IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 836 OF 2018

BETWEEN

HASNU ABDUL MURO & 66 OTHERS.....APPLICANTS

VERSUS

MIC (T) LTD.....RESPONDENT

JUDGEMENT

Date of Last Order: 24/04/2021

Date of Judgement: 11/05/2021

Aboud, J.

The applicants filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration (herein CMA) delivered on 08/12/2016 by Hon. Wilbard, G.M, Arbitrator in labour dispute No. CMA/DSM/KIN/R.512/14/456. The application is made under section 91 (1) (a), 94 (1) (b) (i) and section 91 (2) (c) of the Employment and Labour Relations Act [CAP 366 RE 2019] (herein referred as the Act) Rule 24(1) 24 (2) (a) (b) (c) (d) (e) (f) 24 (3) (a) (b) (c) (d) and Rule 28 (1) (c) of the Labour Court Rules GN. No. 106 of 2007 (herein referred as the Labour Court Rules).

The dispute emanates from the following background; the applicants were the employees of the respondent employed on

different dates and in different positions. The applicants belonged to technical department until when they were retrenched. It is on record that on 21/07/2014 the respondent entered into an agreement with Huawei Technologies Tanzania Co. Ltd to outsource the network operations from that Company. Following such agreement, the respondent retrenched the applicants being the employees who were working on technical department and transferred them to Huawei Technologies Tanzania Co. Ltd. The applicants were unhappy with the respondent's decision to retrench them hence, they referred the matter to the CMA claiming for unfair termination.

The CMA found that the respondent had valid reason to retrench but on the aspect of procedures he omitted to follow some minor procedure of informing the applicant's the purpose of the meeting. On such findings the Arbitrator awarded the applicant's one month's remuneration and transport allowances to the entitled employees. Again, the applicants were dissatisfied by the CMA's award thence they filed the present application urging the court to

determine the following issues: -

i. Whether the reason for termination was fair

ii. Whether the award for compensation of one month salary was sufficient.

The matter was argued orally. Both parties enjoyed the services of Learned Counsels. Mr. Hekima Mwasipu was for the applicants while Mr. Sinare Zaharani appeared for the respondent.

Arguing in support of the application Mr. Hekima Mwasipu prayed to adopt his affidavit to form part of his submission. He submitted on the issues mentioned above.

On the first issue he submitted that, according to DW1 as reflected under page 3 of the impugned award he testified that the reason for termination was due to technological needs. It was submitted that, such reasons is what made the respondent to enter contract with 3rd party company, that is Huawei Company Ltd which was self-sufficient to run the technology which was operated by the respondent. He added that following such reason the respondent decided to terminate the employment of the applicants.

It was further submitted that, section 37 (2) (a) of the Act, provides that the reason for termination must be valid, however in this matter that was not observed due to the following reasons: -

Firstly, that it was not communicated to the applicants as there was no consultation meeting between the employer and employees according to the testimony of DW1 reflected at page 4 of the impugned award. It was also submitted that, according to section 38 (1) of the Act, the employer was supposed to comply with the requirement of notice on the agenda of termination, and that violation of such section makes the termination unfair. It was further submitted that there was no any consultation about the reason for termination on operational requirement as reflected by PW1's testimony at page 6 of the award.

Secondly it was submitted that, for the termination to be fair it must be on legitimate reason as in accordance with Rule 23 (2) (b) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. 42 of 2007 (herein GN 42 of 2007). The Learned Counsel submitted that the employer was supposed to comply to the relevant Rule in terminating the employees. It was submitted that in this matter there is no any witness from the respondent who testified that they shifted the technical department to Huawei Company because they had no sufficient technology to run the business. It was added that, PW1 at page 6 of the award testified that there was no

advancement of the technology at the Huawei as claimed but were the same and only decided to do so by changing the employer.

On the second issue it was submitted that, the award was inadequate because the reasons for termination was unfair as the reason was not communicated to the applicants. It was further submitted that, twelve month compensation prayed in CMA Form No. 1 was not honoured and the Arbitrator awarded the applicants only one month which is contrary to section 40 (1) (c) of the Act. To support his submission, he referred the case of **Felician Rutwaza Vs. World Vision Tanzania**, Civil Appeal No. 213 of 2019. He therefore prayed for the Court to revise the award because there was no valid reason for termination of applicants' employment contracts.

Responding to the application Mr. Sinare Zaharani for the respondent submitted that, the evidence which was put before the CMA clearly established that the employer/respondent had valid reasons to terminate the applicants. He said it is clear from the testimony of DW1 that in order for the respondent to improve its operation had to apply advanced technology which they did not have by that time therefore, they engaged the Huawei as clearly submitted by the applicants. It was stated that, the advancement of technology

necessitated the termination of the applicants on the ground of retrenchment. It was argued that the applicants were consulted on a group level as well as individual level and were 128 employees who were affected by the termination exercise, however out of them only 72 employees filed their complaint at the CMA.

It was further submitted that, all those who were terminated were given alternative jobs at the Huawei, so they did not lose their jobs as claimed. It was added that all retrenched 128 were paid their terminal benefits dues according to the law, save to repatriation costs paid to some few of them.

The Learned Counsel strongly submit that, according to the award which is based on the evidence at the CMA, the reason for termination was justified and was valid reason hence fair termination. It was argued that the reason does not become unfair simply because the applicants were not given a notice, and that is why there is a substantive fairness and procedural fairness. It stated that the Arbitrator was correct to reach to a conclusion that the procedures which were omitted by the respondent were minor and the award of one month was proper.

The Learned Counsel submitted that, regarding the Court of Appeal decision referred by the applicant's counsel was contrary to his submission. He stated it is clear from the relevant decision that where the termination is only procedurally unfair the CMA or Court should grant compensation less than twelve months. He therefore prayed for the award to be sustained.

In rejoinder Mr. Hekima Mwasipu reiterated his submission in chief and argued that, the respondent action of finding an alternative employment cannot be used to justify the reason for termination of the applicants' employment contract but that should be considered was just a mitigating factor. He therefore prayed for the application to be allowed.

Having gone through parties submissions, Labour laws, CMA and court records with eyes of caution, I believe the issues for determination are; whether the respondent had valid reason to retrench the applicants, secondly is whether the retrenchment procedures were followed and lastly is to what relief are the parties entitled.

On the first issue as to whether the respondent had valid reason to retrench the applicants; retrenchment is one of the types of

termination recognized in our Labour laws which is based on operational requirement. The term operational requirement is defined under section 4 of the Act which is to the effect that:-

> *'Means requirement based on the economic, technological, structural or similar needs of the employer'.*

The law under Rule 23 of GN 42 of 2007 provides for circumstances that might legitimately form the basis of a termination under operational requirement. The relevant provision is to the effect that: -

> *'Rule 23 (1) A termination for operational requirements (commonly known as retrenchment) means a termination of employment arising from the operational requirements of the business. An operational requirement is defined in the Act as a requirement based on the economic, technological, structural or similar needs of the employer.*
>
> *(2) As a general rule the circumstances that might legitimately form the basis of a termination are:-*
>
> *a) **economic needs** that relate to the financial management of the enterprise;*

b) ***technological needs*** *that refer to the introduction of new technology which affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace;*

c) ***structural needs*** *that arise from restructuring of the business as a result of a number of business related causes such as the merger of businesses, a change in the nature of the business, more effective ways of working, a transfer of the business or part of the business.'*

[Emphasis is mine]

In the instant matter the reason for retrenchment was based on structural needs of the business as evidenced by a Specific Service Agreement between MIC Tanzania Limited and Huawei Technologies Tanzania Company Limited (Exhibit MIC7). In the relevant agreement the respondent agreed to outsource the network operations from Huawei Technologies Co. Ltd. That was also the reason contemplated to the applicants as testified at the CMA. The respondent alleged that after he decided to outsource the network operations from Huawei

Technologies the applicants positions were no longer needed to the respondent.

In deciding whether termination under the ground of retrenchment was fair, Judges and Arbitrators are cautioned not to interfere with the legitimate business decision of the employer. This is the position in the case of **Hendry vs. Adcock Ingram** (1988) 19 ILJ 85 (LC) at 92 B-C where the Labour Court of South Africa held that:-

> *'When judging and evaluating an employer's decision to retrench an employee, the court must be cautious not to interfere to the legitimate business decision taken by employers who entitled to restructure.'*

Also, in the case of **Moshi University College of Corporative & Business Studies (MUCCOBS) V. Joseph Rueben Sizya**, Lab Div. DSM Rev. No. 11/2012 cited by the Arbitrator it was held that: -

> *'Retrenchments or termination for operational grounds are defined under section 4 of the Employment and Labour Relations Act, 6/2004 (the Act) to include ..... requirements based on the economic, technological, structural or*

similar needs of the employer. In my view the objective of the law in regulating termination disputes arising from retrenchments is not to interfere with the employer's managerial prerogative, regarding the decision to terminate on operational grounds ... Rather, it is my opinion that the functions or objective of the law is twofold.

i. *The first objective is to ensure that such terminations are substantively fair, meaning, operational grounds are not used as a smokescreen to mask termination based on prohibited grounds, otherwise unfair termination. That is why to win in such a dispute the employer must establish that operational requirements were the real reason and not a pretext for terminating the involved employee.*

ii. *In my opinion, the second objective is a policy one, it reflects the need to shield employees from vagaries of job loss by ensuring that the decision to retrench is not rightly resorted to by employers, and* ***that when it must be taken, efforts are made to minimize its impact on affected employees.*** *The concern is*

basically the reason the law mandates procedural fairness in retrenchment.'
[Emphasis supplies]

On the basis of the above discussion, it is my view that in this case the respondent made legitimate decision to outsource the technology from another Company thus, the Court needs not to interfere with such decision. As the decisions referred above states clearly that, the employer is at liberty to restructure his/her business so long as he/she has not used such a reason as a pretext to retrench his employees. In this matter the respondent after evaluation of his business, found the need to restructure its business the decision which I fully agree to be justifiable. As the record reveals, there is no doubt that in the circumstances of this case retrenchment was inevitable because the technology department was no longer needed. Therefore, the Arbitrator as rightly found the respondent had valid reason to retrench the applicants. In other words, the respondent had substantive reason to retrench the applicants.

On the second issue as to procedures for retrenchment, the same are provided for under section 38 of the Act. I quote the relevant section for easy of reference: -

'Section 38 (1) - In any termination for operational requirements (retrenchment), the employer shall comply with the following principles, that is to say, he shall:-

a) ***give notice of any intention to retrench*** *as soon as it is contemplated;*

b) ***disclose all relevant information*** *on the intended retrenchment for the purpose of proper consultation;*

c) ***consult prior to retrenchment*** *or redundancy on: -*

(i) the ***reasons for the intended retrenchment****;*

(ii) Any ***measures to avoid or minimize the intended retrenchment****;*

(iii) the ***method of selection of the employees*** *to be retrenched;*

(iv) the ***timing of the retrenchments****; and*

(v) ***severance pay*** *in respect of the retrenchments'*

[Emphasis is mine]

The above stipulated procedures and principles are mandatory requirements and must be followed by any employer who decides to

terminate his employees by retrenchment. The section is in pari materia with Rules 23 and 24 of GN 42 of 2007.

Having considered the records of this matter, it is crystal clear that the relevant stipulated procedures were properly followed. It is revealed that on 12/08/2014 the applicants were informed to attend a meeting at Townhall (exhibit MIC6). In the relevant notice it is true that the applicants were not informed of the retrenchment process as rightly found by the Arbitrator. However, in the relevant meeting the applicants were informed of the respondent's intention to outsource its technology from Huawei Company as reflected in exhibit MIC7.

It is also true that the notice of retrenchment issued to the applicants did not disclose what will transpire to that meeting. Now the question to be determined by the Court is whether such an anomaly vitiates the whole retrenchment procedures adhered by the respondent? In my view the answer to that question is no. Though the applicants were not informed of the purpose of the relevant meeting but they attended and the reason for retrenchment was communicated to them which is of paramount importance in termination under retrenchment. Apart from the meeting held on

12/08/2014, the record also shows the applicants had one by one meeting with the respondent and all of their issues were addressed.

In addition to that, the respondent transferred all of the retrenched employees to Huawei Company. In my view such an action was high degree of adherence of the retrenchment procedures because the employer found alternative jobs to them. The respondent entered into agreement with Huawei Co. to transfer his employees thereto for the purpose of securing the jobs. Such an effort cannot be ignored by this Court. Therefore, in the circumstances of this case it is my view that, the respondent adhered to all the retrenchment procedures as they are provided under section 38 (1) of the Act discussed above. Thus, the Arbitrator's findings that the respondent did not follow some of the procedures has no legal basis and it is hereby quashed.

On the last issue as to parties' relief, at the CMA Form 1 the applicants prayed for 12 months salaries compensation for unfair termination, severance allowance, repatriation allowances and subsistence allowances. The record shows that after termination the applicants were paid their terminal benefits as reflected in the applicants pay slip and terminal benefits calculations (exhibit MIC 4)

including salaries for the month of September, severance pay and handshake bonus.

As to the payment of compensation, it is a trite law that it is one of the remedies for unfair termination provided under section 40 of the Act. In this case, having held that the reason for retrenchment was valid and the procedures were followed I find the applicants are not entitled to the compensation claimed.

Regarding the payment of severance pay it is evidenced by exhibit MIC 4 that the applicants were all paid the same thus, they cannot claim for such allowance again.

Turning to the payment of transport allowance and subsistence allowances, the position of the law as set under section 43 (1) of the Act; it requires the employer to pay the employee transport allowance and subsistence allowance upon termination of the contract. The relevant provision is of the effect that: -

> *"43 - (1) Where an employee's contract of employment is terminated at a place other than where the employee was recruited, the employer shall either: -*

(a) Transport of the employee and his personal effects to the place of recruitment.

(b) Pay for the transportation of the employee to the place of recruitment, or

(c) Pay the employee an allowance for transportation to the place of recruitment in accordance with subsection (2) and daily subsistence expenses during the period, if any, between the date of termination of the contract and the date of transporting the employee and his family to the place of recruitment.

(2) An allowance prescribed under subsection (1) (c) shall be equal to at least a bus fare to the bus station nearest to the place of recruitment.

(3) For the purposes of this section, "recruit" means the solicitation of any employee for employment by the employer or the employer's agent'.

The above position is also reflected in section 44 (1) (f) of the Act which provide that: -

'On termination of employment, an employer shall pay an employee any transport allowance that may be due under section 43'.

Also, this Court had decided on the issue in the case of Coca Cola Kwanza Ltd. Vs. Kareji Misyangi, Lab. Div. DSM, Rev. No. 238 of 2008 where it was held that:-

> *'the transport and subsistence is to be paid where the employee is necessitated to quit job on employer's accord or at the end of the contract.'*

From the position of the law above it is crystal clear that transport allowance is paid to an employee who is necessitated to quit his/her job. In the application at hand though the applicants ended the employment contracts with their original employer (the respondent herein) but they did not loose their jobs as their employment contracts were shifted to Huawei Co. Under such circumstance it is my view that the applicants would have been entitled to transport allowance if they had to go back to their place of recruitment. However, that is the position in this case as they remained to their places and transferred to another employer. Thus, they are not entitled to transport allowance as wrongly awarded by the Arbitrator.

Turning to the award of subsistence allowances, it is a trite law that subsistence allowance is paid to an employee waiting for transport allowance. In this application as it is stated above that the applicants are not entitled to transport allowance it is my view that they are also not entitled to subsistence allowance.

In the result I find the respondent had valid reason to retrench the applicants and the procedures thereto were followed, I hereby quash and set aside the award of transport allowance and the payment of one month salary to the applicants as compensation for procedural unfairness. Thus, the application has no merit and is dismissed accordingly.

It is so ordered.

I.D. Aboud
JUDGE
11/05/2021