THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVSION APPLICATION NO. 197 OF 2020

BETWEEN

RASHID BENJAMIN BOWA & 6 OTHERS ..... APPLICANT

AND

TRANSCARGO TANZANIA LIMITED..... RESPONDENT

JUDGMENT

Last order 16/11/2021
Date of ruling 6/12/2021

B.E.K. Mganga, J

Applicants were employees of the respondent. Their employment was terminated on 20th August 2009 by retrenchment. After termination of their employment, they referred the dispute to CMA that they were unlawfully terminated. On 2nd December 2010 the award was issued in favour of the respondent that termination of the applicants was fair as a result, they filed revision application No. 59 of 2011 before this court. On 6th July 2012, S.A. N. Wambura, J (as then she was), issued a ruling that:-

> *"It is in record that the applicants have been paid their terminal benefits and some have actually left. If there is a difference in the payments, then it is an issue to be mediated upon at CMA rather than have a retrial of the matter. Retrial will take place if mediation fails.*

After the said ruling, applicants filed the dispute at CMA. There were arguments as whether the arbitrator has to determine among other issues as to whether there were valid reasons for retrenchment or not, whether applicants were notified or not and what relief(s) the parties were entitled to. The arbitrator found that these issues has to be determined by calling evidence and that is what it was ordered by this court. The arbitrator therefore proceeded to call evidence.

The respondent did not enter appearance on the date of hearing as a result, the dispute was heard exparte. Only two witnesses namely, Benjamin Bowa (PW1) and John Msigwa (PW2) to testify and closed evidence of the applicants. On 16th February 2015, Johnson Faraja, L, Arbitrator issued an award in favour of the applicants that there were no valid reasons for retrenchment and further that procedures of retrenchment were not adhered to. Based on that reasoning, the arbitrator ordered the respondent to pay 24 months' salary to each applicant instead of reinstatement. The arbitrator therefore ordered the respondent to pay the applicant a total of TZS 41,880,000/= to the applicants.

Applicants filed execution application No.205 of 2018 to enforce the aforementioned award. But before an order of attachment

was issued, the respondent filed Miscellaneous application No. 147 of 2015 as a result execution was stayed pending determination of the said Miscellaneous Application. On 16th October 2017, respondent withdrew the afore mentioned Miscellaneous application. After the said withdrawal, respondent filed at CMA an application to set aside the aforementioned exparte award. At CMA, applicants raised a preliminary objection that the application is incompetent for offending mandatory provisions of the law and that there was improper citation of the law and non-citation. On 27th March 2019 Kokusiima, L, Arbitrator delivered a ruling dismissing the preliminary objection and ordered parties to appear on 2nd April 2019 for hearing of the application to set aside an exparte award. On 2nd April 2019 hearing of the application did not proceed as Mr. Ngowo, the personal representative of the applicant did not enter appearance as a result it was adjourned to 3rd April 2019. On 3rd April 2019, Mr. Ngowo, applicants' personal representative did not also entered appearance, but the applicants appeared and prayed Hon. Kokusiima, arbitrator to rescue. The arbitrator refused to rescue but ordered hearing of the application on 9th April 2019. On 9th April 2019, neither Jamal Ngowo nor Mwanakombo, personal representatives of the applicants entered appearance but Ally Sinzi one of the applicants was present. The arbitrator adjourned hearing of the application to 02:00 PM

as last adjournment. On the same date, respondent submitted that she was not served with summons to appear before CMA granting the applicant a prayer to prove the application axparte. On 16th April 2019, Kokusiima. L, Arbitrator, set aside the exparte award and ordered the dispute be heard inter parte. Applicants did not enter appearance as a result on 22nd October 2019, Kokusiima. L, Arbitartor, dismissed the dispute filed by the applicants for want of prosecution. After dismissal of the said dispute, applicants filed an application to set aside dismissal order. On 8th April 2020, Kokusiima arbitrator, delivered a ruling dismissing the application by the applicants that was seeking to set aside the dismissal of their application for want of prosecutions as she found that applicants failed to adduce good grounds for non-appearance.

Aggrieved by that decision, applicants have filed this application seeking the court to revise the said ruling. Applicants filed a joint affidavit in support of the notice of application. In the said joint affidavit, applicants raised legal issues that:-

1. *1. That, arbitrator erred in law and facts for failing properly evaluate evidence adduced by the parties.*
2. *2. That the arbitrator erred in law and facts by reaching to a ruling which is not supported by the evidence adduced during arbitration.*

3. *3. That, the arbitrator erred in law and facts by reaching on a conclusion which has no legal basis or justification.*
4. *4. That arbitrator erred in law and facts for failing to consider evidence adduced by the applicants.*

The respondent filed both a notice of opposition and a counter affidavit sworn by Ndiege Kelvin Bwana, her principal officer opposing the application. In the counter affidavit, the deponent deponed that the arbitrator considered all relevant provisions of the law and material circumstances of the applicant's case.

The application was disposed by way of written submissions. In the due course of composing the judgment and after reading submissions of both sides, I noted that parties did not sufficiently address the legality of all proceedings at CMA. I therefore resummoned parties to submit whether they complied with the ruling that was issued by S.A.N. Wambura, J (as she then was), on 6th July 2012 in Revision No. 59 of 2011.

Mr. Michael Mgombozi, from TUPSE, a trade union on behalf of the applicants responding to the issue raised by the court, submitted that, the High Court found that there were irregularities in Revision No. 59 of 2011, as a results proceedings and award were quashed and ordered trial *de novo* before another arbitrator. He submitted that, after the said

High Court decision, applicants referred the dispute to CMA and that on 16th March,2015 Johnson Faraja L, arbitrator, issued an exparte award.

On her side, Hilda Rugakingira, advocate for the respondent submitted that, in revision No. 59 of 2011, the High court, (Wambura, J as she then was), noted that applicants were already paid terminal benefits but that there were some differences between the applicants and the respondent. Counsel went on that the court ordered parties to go back to CMA to clear difference in payment rather than ordering retrial. Counsel for the respondent submitted further that, instead of complying with court's order, applicants filed a dispute that was heard exparte and later on set aside. She submitted that when the dispute was called for hearing, applicant did not enter appearance as a result it was dismissed for want of prosecution. She concluded by submitting that it was not proper for the applicants to file another dispute contrary to what this court (Wambura, J) directed.

In rejoinder, Michael Mgombozi, for applicants submitted that, applicants interpreted the High Court ruling (Wambura, J, as she then was) as an order for retrial that is why, the matter was to be heard *de novo*.

I have read the ruling of this court (S.A.N. Wambura, J, as she then was) dated 6th July 2012 and find that the issue of unfairness of termination of employment of the applicants was determined as she found that termination was unfair procedurally as the employees and TUICO branch leaders were not consulted. The court then went on:-

> *" For that reason, I would have found that the arbitrator's award was irregularly found, thus CMA's proceedings including the award and other orders be accordingly quashed, order the matter to be returned to CMA and be heard by another arbitrator.*
>
> *However, it is in record that the applicants have been paid their terminal benefits and some have actually left. If there is a difference in the payments then it is an issue to be mediated upon at CMA rather than have a retrial of the matter. Retrial will take place if mediation fails. I so order."*

From the above quoted paragraph, this court ordered parties to go back and agree on amount payable to the applicants only and that if no agreement is reached, parties can resort to mediation and arbitration. The court did not order retrial as applicants thought. It was therefore an error for the arbitrator to hear the parties *de novo* and issue an exparte award. In my view, all proceedings relating to exparte award and those conducted thereafter was contrary to what this court ordered. I therefore nullify all proceedings that were conducted at CMA contrary to the ruling of this court dated 6th July 2012 and set aside the award arising therefrom. I hereby order that parties should comply with the

ruling of this court. If anyone was aggrieved by that ruling, was supposed to appeal to the Court of Appeal instead of ignoring it.

B.E.K. Mganga
JUDGE
6/12/2021