IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR DISPUTE NO. 09 OF 2018

YUSUPH BARONGO.....1ST COMPLAINANT

YUSUPH SEIF.....2ND COMPLAINANT

THADEO MUSHI .....3RD COMPLAINANT

HIJA ABASI.....4TH COMPLAINANT

ALLY MOHAMED.....5TH COMPLAINANT

ALLY SHOWARI.....6TH COMPLAINANT

PETER KALING'ASI.....7TH COMPLAINANT

YUSUPH S. PAZI.....8TH COMPLAINANT

BAKARI YUSUP.....9TH COMPLAINANT

IDDI HAMIS.....10TH COMPLAINANT

MOHAMED B. NANDON .....11TH COMPLAINANT

ALMASI KIGUGA.....12TH COMPLAINANT

STANSLAUS MUSHI.....13TH COMPLAINANT

JOMO K. ATHUMANI.....14TH COMPLAINANT

ALLY HUSSEIN.....15TH COMPLAINANT

ALLY SIMBA.....16TH COMPLAINANT

MSINDU MOHAMED.....17TH COMPLAINANT

SHABANI MKUMBA.....18TH COMPLAINANT

HAMIDI ALLY.....19TH COMPLAINANT

JUMA KYELA.....20TH COMPLAINANT

MAHAMOUD SELEMANI.....21ST COMPLAINANT

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ABDALLAH HAMISI.....22ND COMPLAINANT

ATHUMANI MATIMBWA.....23RD COMPLAINANT

HAMISI SAID.....24TH COMPLAINANT

RAMIA MFAUME.....25TH COMPLAINANT

SELESTINE MIHOJA.....26TH COMPLAINANT

EVOLDS KALOKOLA.....27TH COMPLAINANT

ABDALLAH MATIMBWA..... 28TH COMPLAINANT

JUSTINE KAPALA.....29TH COMPLAINANT

SALIM HUSSEIN.....30TH COMPLAINANT

SALEHE O. KIPOZI.....31ST COMPLAINANT

MOHAMED MATAYO.....32TH COMPLAINANT

RASHID MOHAMED.....33RD COMPLAINANT

DANIEL MDINGI.....34TH COMPLAINANT

NGONDIMBO CHIKAWE.....35TH COMPLAINANT

HARUNA H. NDUNDU.....36TH COMPLAINANT

JOSEPH MAZANDA.....37TH COMPLAINANT

JUMANNE M.NGWILIKA.....38TH COMPLAINANT

SHARIFU ABDALLAH.....39TH COMPLAINANT

KASSIM A. MBEGU.....40TH COMPLAINANT

HASSANI RAMADHANI.....41TH COMPLAINANT

ANTIDIUS RWEYEMAMU.....42TH COMPLAINANT

MWANGA A.KINYOGOLI .....43TH COMPLAINANT

SALIM MADUGIO.....44TH COMPLAINANT

JUMA CHAMBUSO.....45TH COMPLAINANT

SAIDI MWINYINGWISA.....46TH COMPLAINANT

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SHABANI KAMBI.....47TH COMPLAINANT

SEIFU CHAMBUSO.....48TH COMPLAINANT

TWAHIRU OMARY.....49TH COMPLAINANT

ABASS MASOOD.....50TH COMPLAINANT

ABDALLAH ATHUMANI.....51TH COMPLAINANT

YAHAYA BASHESHE.....52TH COMPLAINANT

JUMANNE K. MKENGE.....53TH COMPLAINANT

ERNEST MISANA.....54TH COMPLAINANT

JACKOB ODAJO..... 55TH COMPLAINANT

ABDALLAH S.MWEMBE.....56TH COMPLAINANT

RASHID HAMAD.....57TH COMPLAINANT

ATHUMANI BILALI.....58TH COMPLAINANT

OMARY MKUMBA.....59TH COMPLAINANT

MOHAMED A. TOLYA.....60TH COMPLAINANT

MOHAMED K. MKUMBA.....61TH COMPLAINANT

EDWARD A. FANDE.....62TH COMPLAINANT

MASHAKA UEED.....63TH COMPLAINANT

JUMA MAKOTA.....64TH COMPLAINANT

VERSUS

MOHAMED ENTERPRISES (T) LIMITED.....RESPONDENT

JUDGEMENT

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6th & 24th December 2021

Rwizile, J

In this complaint, this court is coaxed by the parties to determine the following issues, to wit;

i. *Whether Mohamed Enterprises as an employer of the applicants, her business falls under transportation sector for the purposes of payment of wages according to Government order GN No. 223 of 2007*

ii. *Whether, the respondent terminated the applicants after they claimed salary arears at the CMA*

iii. *Whether termination was substantively and procedurally fair?*

iv. *Whether, other claims such as NSSF, salary arears and leave payment were raised within time provided by law (additional issue raised on 10th December 2020)*

v. *To what reliefs are the parties entitled to?*

In essence, the complainants were turnboys all employed by the respondent. Whereas the 1st to 7th complainants were employed on contracts of unspecified time and received a monthly salary of 80,000/=, the 8th to 64th were paid weekly wages of 18,600/=. Seemingly, the conflict between the

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parties arose in 2009, when the complainants realized there was a wage order, The Labour Institutions (Regulation of wages and terms of employment) order 2007, GN No. 223 of 2007, which since January 2008 had weekly payment of wages on Inland Transport to the tune of 46,153.85. In 2009, the respondent initiated, the retrenchment process of all turnboys working in the transport department after her efforts to transfer them to other departments to avoid the loss faced failed. They were later terminated by retrenchment from 27th October 2007. They were however given terminal benefits which included the weekly pay, notice of 4 days, severance pay, and leave. Having pocketed the same, then, they filed a disputed with the commission claiming for terminal benefits. The same was dismissed for want of pecuniary jurisdiction. Thereafter, this disputed failed, alleging they were unfairly terminated and under paid.

Therefore, they filed this complaint under sections 37(1) (2) (a to c), 40(1) (a) (3), 41(1) (b) (3), 42(1) (2)(a) 44(1)(a) b) (2) and section 94 of the Employment and Labour Relations Act, 2004. As well as Section 61 (a) to (f) of the Labour Institution Act, 2004 read together with rule 8, (a) to (d) and 9(1), of Employment and Labour Relations (Code of Good Practice) rules,

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2007, GN No. 42 of 2007. They are praying for the following reliefs against the respondent;

(i) *An order for Gross Payment of the sum of Tanzanian Shillings 1,400,323,542/= being arrears of terminal benefits for unfair termination in respect of 64 employees as per schedule attached and signed by complainants.*

(ii) *An order for Gross payments of the sum of Tanzanian Shillings 156,685,848/= being salary arrears and various allowances which were not paid before termination of employment contracts in respect of 62 employees as per schedule attached and signed by complainants.*

(iii) *Costs of the suits and,*

(iv) *Any other relief this Honourable Court may deem just to grant.*

For the complainants, Mrs. William learned advocate appeared, while the respondent was represented by Mr. Adam Mwambene being assisted by MS Saudia Kabora learned advocates. On agreement of the parties, the complainants testified by way of affidavits. Apart from their affidavits, 15 of the complainants appeared before this court to tender different documents

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and for cross-examination at the interest of the respondent. Yusuf Barongo (PW1), Peter Kalingw'ana (PW2), Yusuf Seif (PW3), Yusufu Simba (PW4), Ally Mohamed (PW5), Bakari Yusuph (PW6), Ramia Mfaume (PW7), Salehe Omary (PW8), Antidius Rweyemamu (PW9), Jumanne Mkenge (PW10), Shaban Kambi (PW11), Stanslaus Mushi (PW12), Evodi Kalokola (PW13), Joseph Mazanda (PW14), Ally Simba (PW15). From PW1 to PW15 each of them tendered letters of termination of their employment, Hija Abasi (PW16) on his party, tendered the termination letters of the remaining 42 complainants.

The defence on its party, tendered four witnesses namely. Nassir Sood Seleman (DW1) who tendered business licenses for the respondent, (D1), Multazar Fazal Dewji (DW2) tendered 19 letters which were admitted as D2. Hassan Gullam Abasi Dewji (DW3), tendered the minutes of the consultation meeting D4, and the last witness for respondent was one Willy Kibona from TUICO.

After a full hearing, parties were afforded a chance to make closing submission. Mrs. William, learned advocate submitted for the complainant that the complainant were employees of the respondent on open ended contracts. Based on the GN No.223 of 2008, which was tendered as exh. P2.

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She argued that they were paid less than what the order stipulated. According to the learned counsel, the weekly pay was supposed to be 46,153/= but the complainants received 18600/=. She argued that among the complainants 1-7 were to be paid 200,000/= instead of 80,000/= paid monthly. In her view, since the complainants were turnboys they were in the transportation sector and deserved according to the terms of the wage order. Dealing with the first and second issues, which were argued together, she said claiming of the difference of their salaries arears at the commission as per the stated GN, the complainants were terminated by the respondent. She said, termination on that fact did not comply with section 37(3) (a) (iii) of the Employment and Labour Relations Act. Concluding, her argument in this point, she said that termination did not base on operation requirements as stated by the defense witnesses. To support her argument, the learned counsel referred to the case of **Simon Mwita Mlagani and Another vs Kiribo Ltd** (Labour Revision No. 11 of 2020) TZHC 3942 at Musoma, where the court insisted on application of section 37 when terminating the employees.

Arguing the 3rd issue, Mrs. William was of the view that the respondent did not fairly terminate the complainants. She said, their terminal benefits were

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not what was required to turnboys. She argued that since they worked in the transport sector, GN 223 applied to their salaries. The respondent, she further argued, did not comply with Rule 8(1) (a) to (d) of Employment and labour Relations (Code of Good Practice GN. 42 of 2007 and section 37 of ELRA. She therefore, asked this court to grant the prayers made by the complainants.

On party of the defence, Mr. Mwambene submitted that the respondent's business does not fall in the transport in inland transport sector. In his view therefore GN No. 223 of 2007 does not apply to her business. To support his argument, the learned counsel referred to the evidence of DW1, the General Manager. According to him, the evidence of DW1 was clear that the business according to exhibit D1, business license No. 00940087, and 00940088, the respondent trade is in food stuff and export of crops respectively. He said, the complainants worked in the department of transport and the respondent has never driven her income from transport activities. The learned advocate was of the view that based on the evidence of DW2 who is the respondent's director of operations, they are not allowed to do business not licensed.

The learned counsel cited the case of **Director Ptotrans Ltd vs Daud Mohamed & another**, Lab. Div. DSM, Revision No. 173 of 2010, 2011-2012

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LCCD 5, where the sectoral wage, held binds the whole sector unless the wage order differentiates the same. In the case at hand, he argued the complainants had to prove their allegations as under section 110 and 112 of the Evidence Act and the case of **Lamshore Limited and J.S Kinyanjui vs Bizanje K.V.D.K** [1999] TLR 330.

On whether termination was fair, he submitted that the respondent retrenched the complainants as discussed in exhibit D3 and termination letters exhibit D5. He submitted that there was a need for the respondent to re organize the transport department due to operation requirement and so the law was followed as DW2 and DW3 testified before this court. The reasons were discussed according to him in the consultative meeting and termination followed but not due to claiming of arears of salaries as per GN No. 223.

In his view, the transport department made loss and so according to DW2 and DW3 in September 2009, the complainants were offered chances to be transferred to other departments, upon rejecting the offer termination by retrenchment was the only choice. Transfer letters according to him are exh. D2. In this point, the court was asked to refer to the cases of Resolution

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Insurance Ltd vs Emmanuel Shio and 8 others, Labour Revision No 642 of 2019.

In his view, since 22nd October 2009, as per evidence of DW2, DW3 and DW4, a notice of intension was issued to the complainants and the regional Secretary to TUICO-Temeke Region.

On 24th and 26th October, exh. D3 and D4, consultation meetings were made and an agreement reached that lead to payment of terminal benefits as per agreement from 27th to 31st October 2009 as per exh. D5 and D6, which prove the complainants were paid and as per the agreement. In his view therefore, termination was valid both in substance and procedure. He asked this court to dismiss this case.

I have shown before, this court is required to determine if the respondent's business falls in the Inland transport sector for the purpose of wages for the transportation sector in accordance to GN No. 223 of 2007. In my consideration, the wages orders are made by the Minister responsible for Labour matters (section 34 (b), under part V of the Labour Institutions Act [Cap 300 R. E 20019]. It is unfortunate, Part V, sections 34 to 42, does not define term transportation sector. But according to section 41(1) of the Act,

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wage order has a binding character on all employers and employees described in the notice.

It follows therefore that the sector wage order is to be categorized according to the employers' business and it has therefore to cover all employees in the given sector, save where it separates them based on their tasks within the same sector. Further, the terms of GN 223, does not as well define what constitutes the transport sector, it only defines agriculture, Commercial enterprises etc. The order was revoked by the Labour Institutions (Regulation of Wages and terms of Employment) order GN 172 of 2010, which also was revoked in 2013 by GN No 196 of 2013, which I think is currently in force. The two succeeding orders have maintained similar terms and definitions as in GN 223.

It can therefore be held, in the absence of a legal definition, basically transport sector may mean, the movement of people and goods from one place to another. In my considered view therefore, to know who is engaged in this sector one has to look at the business license and perhaps the memorandum and articles of association of the company in question.

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Going by evidence, it was testified by the respondent that the core business of the respondent is import and selling food stuff such as rice, oil, sugar etc. as per evidence of DW1 and DW2. The business license was tendered as exhibit D1. The same was for the year 2004. It was testified that the same business has being carried as it is now. For the respondent's witnesses, there was no dispute that the complainants are turnboys assisted drivers to ferry goods to the customers.

It was submitted by the complainants along with their evidence that since they worked as turn boys, they are therefore working in the transport sector. In my considered opinion, the wage orders did not categorically define the applicable sector especially due to lack of definition of the inland or transport sector. The question would be if the person is not licensed to do transportation of people and goods as the core function, but in order to carry out his duties swiftly hires drivers and turn boys does it means he is squarely working in the transport sector.

Even without evidence, the logic defeats this point. It is true that the complainants worked in the transport department. It seems, transporting of goods to the godowns and whenever needed to customers does not change the nature of the business of the respondent. I have no doubt therefore that

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the complainant although were employed as turn boys but the nature and core business of the respondent does not fall in the sector within the meaning of the GN No 223. Therefore, the first issue fails.

The second issue deals with fairness of termination. It was testified by the complainants and as well, submitted by Mrs. William learned counsel that, the complainants were terminated unfairly because, they claimed their salary arears before the commission. It should not be taken, in her view as retrenchment. The respondent admitted there were claims before the commission before these proceedings were initiated. But it is not known as to what were such claims. What is annexed by their pleadings, is the ruling which dismissed their claims want of jurisdiction. Then they came to file the same before this court. It can therefore be said, that there is no proof that their termination was due to claims of salaries arears. After all, their evidence does not exactly show if there were so targeted by the employer. In their affidavit evidence mostly para 10 and 11, show the complainants have explicitly stated that they discovered they were less paid after termination. This means, GN No 223 came to their knowledge after termination and it was therefore the driving force for instituting the claims based on it.

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To know if termination was fair one needs to visit the law. The conduct of the parties before termination dictates that the nature of termination although, it is disputed that the termination was not by way of retrenchment, there is evidence to prove that. The procedure for termination on the ground of retrenchment are provided under section 38 of the ELRA. The same are further provided under Rule 23 (4) (5) (6), 24 and Rule 25 of GN 42/2007.

Under section 38(1) and (2) of the Act, retrenchment is preceded by the notice to retrench, disclose relevant information, followed by consultation. All this is concluded by an agreement. If an agreement is reached, then termination follows. However, under rule 23 (4), consultation stated under section 38 is aimed at forming a joint problem-solving exercise in order to come to an agreement. Therefore, reasons for retrenchment, possibilities of minimizing effects of retrenchment such as transfer, timing of it, and possibilities of paying severance pay must be adhered to by the employer when contemplating this process.

The complainants as shown by the evidence, were terminated. The evidence as shown above was geared to prove that they were paid 18600/= instead of 46, 153/=. The respondent submitted and testified that there was a notice and consultation. It was stated that upon discovering that the transport

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sector department was making losses. They efforted to transfer the complaints as in exhibit D2 collectively. This happened according to their evidence on 1th September 2009. The same did not accept the offer. On 24th and 26th, October, 2009, all employees were called and their union representative. On the first date which is on 24th October, all parties agreed for retrenchment. But the issue of severance pay was disputed and that is why, another meeting was conducted on 26th. The management according to evidence resolved to pay the same even to none eligible employees. This is shown in exhibits D3 and D4. The minutes of the consultation meetings held on 24th and 26th October 2009. The complainants did not throughout their evidence and submissions denying the contents of the same. Above all, they were tendered and admitted without objection.

According to section 38(2) of the Act, if there is no agreement reached after consultation, the next steps is to file a dispute with the commission. The complainant's evidence is clear on this. I have shown before, in paras 10 and 11 of their affidavits they do not deny the agreement. Because if there was a dispute in that, they could have referred a matter for mediation. But what is apparent in their evidence is that they discovered upon termination that they were paid little amount than the GN required. The defence has tendered

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termination letters. The complainants have also tendered them, the same shows, what was agreed in exhibits D3 and D4 is what they were paid. Exhibit D6, payment vouchers show they were paid the same on 31st October 2009 as it was stated in exhibits D3 and D4. In my considered view, there was retrenchment and it was done according to the procedure laid down by the law.

The next issue is simple to determine, it is about claim of arears and NSSF payment. It is on notice that the same was raised sometimes after the other issues were raised. It was therefore an additional issue which the parties did not discuss in their submissions. I think, in one party I have determined the same when dealing with the first issue because arears was based on discovery of GN No. 223. I do not think it needs determination anymore. As to NSSF, it is clear that is the claim is not subject to the labour laws. It has its own scheme of claiming. Therefore, I hold that the same has no merit.

Lastly, I have to admit that since all reliefs were based on the terms of the GN No. 223, which upon determination, I have said, it did not apply to the complainants. I, in total dismiss the whole matter. The complainants have not proved their case to the required standard. Each party to bear its own costs.

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A.K. Rwizile

Judge

24.12. 2021

Right of appeal is fully explained.

A.K. Rwizile

Judge

24.12. 2021

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