IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 258 OF 2020

BETWEEN

BOC TANZANIA LTD ..... APPLICANT

VERSUS

FRANK HYERA ..... RESPONDENT

JUDGEMENT

S. M. MAGHIMBI, J

The applicant has lodged this revision moving the court to revise and set aside the award of the Commission for Mediation and Arbitration for Ilala (CMA) in Labour Dispute **No. CMA/DSM/ILALA/675/19** ("the Dispute") issued by Hon. Alfred Massay, Arbitrator on 12/06/2020. The application is made by both notice of application and Chamber Summons pursuant to Section 91(1)(a), 91(2)(b) and 94 (1) (b)(i) of the Employment and Labour Relations Act (Cap 366 R.E. 2019), Rule 24(1), 24(2)(a)(b)(c)(d)(e) & (f), 24(3)(a)(b)(c)(d) and 28(1)(c) of the Labour Court Rules GN. No. 106 of 2007. The application was supported by an affidavit of Mr. Boniphace Sariro, learned advocate representing the applicant. On his part, the respondent opposed the application by filing his counter affidavit and notice of opposition.

The background of the dispute may be summarized as follows; the respondent was employed by the applicant on 06/05/2014 as a Regional Manager in the applicant's Dar es Salaam offices. On 31/07/2019 the respondent was terminated from employment on the ground of operational requirement (retrenchment). Aggrieved by the termination, the respondent referred the dispute to the CMA claiming of unfair termination. The CMA found the respondent to have been unfairly terminated both substantively and procedurally hence he was awarded 12 months' salaries as compensation for the termination. Being resentful by the CMA's award, the applicant filed the present application. In his affidavit in support of the application, the applicant had six grounds of revision. However, while filing his written submissions to support the application, he abandoned the 3rd to 6th grounds and remained with the first and second grounds which are as follows: -

i. Whether the Arbitrator considered and analysed the evidence adduced by both parties.

ii. Whether the Arbitrator properly interpreted and applied the labour laws while making his decision.

The application was argued by way of written submissions. (BOTH PARTIES DID NOT FILE NOTICE OF REPRESENTATION. THE

APPLICANT'S NOTICE OF REPRESENTATION INDICATES THAT HE WAS REPRESENTED BY BONIPHACE SARIRO HOWEVER THE SUBMISSIONS ARE PREPARED BY CAROLINE ASSENGA.)

In this court, the applicant's submissions were drawn and filed by Ms. Christine Asenga while the respondent's submissions were drawn and filed by Mr. Abraham Mkenda, personal representative.

In her submissions to support the application, Ms. Assenga started by a prayer to adopt the applicant's affidavit to form part of her submissions. She then submitted that the Arbitrator failed to discharge his duties of making proper analysis of the evidence adduced by the parties. That he considered the evidence adduced by the respondent only and disregarded that of the applicant. She pointed out that the Arbitrator did not consider the fact that the respondent was paid a total amount of Tshs. 6,323,989/= being terminal benefit agreed by the parties. To support her submission, she referred the court to the cases of **Hussein Iddi and another v. Republic, [1986] TLR 16**6 and **Goodluck Kyando v. Republic, [2006] TLR 367.**

As to the second ground it Ms. Assenga submitted that the Arbitrator failed to apply and interpret the labour laws properly by concluding that the applicant did not issue notice while the applicant

testified that notice was issued. Ms. Assenga argued that Section 38 (1) (a) of ELRA, does not provide the time limit for issuance of notice of intention to retrench. She prayed that the application be allowed by citing the decision of this court in the case of March L. Lumanija & Another Vs. Tanganyika Bus Service Co. LTD, Revision No. 223/2008 where it was determined that failure of the Arbitrator to exercise his/her jurisdiction properly in analysing the evidence, led to the quashing of the impugned award. She hence prayed that the court to grant the application.

Replying on the first issue, Mr. Mkenda submitted that the Arbitrator properly considered and analysed the evidence adduced by the parties. That the respondent was engaged in a meeting via teleconference and the discussion was to close the applicant's office at Mwanza region while the respondent was stationed at Dar es Salaam. He referred the court to the evidenced of the hearing minutes (exhibit D2). He alluded that the respondent was not properly consulted on retrenchment as reflected in hearing minutes. He contended that the case of **Hussein Iddi** (supra) cited by the applicant's counsel is distinguishable to the case at hand. As to the case of **Goodluck Kyando** (supra), he alluded that the same favours the respondent as in

termination of employment disputes, the burden of proof lies to the employer. Mr. Mkenda submitted further that though the respondent was paid her terminal benefits, no retrenchment agreement was reached between the parties.

On the second issue, Mr. Mkenda submitted that the Arbitrator properly interpreted and applied the labour laws while making his decision. That even if the respondent was part of the meeting which was conducted through teleconference, the meeting was to close Mwanza offices of the applicant. He also distinguished the cases cited by Ms. Assenga on that aspect to the circumstance at hand. In the upshot, Mr. Mkenda concluded that the application has no merits and it should be dismissed with costs.

I have considered the submissions by both parties and have taken time to go through the records of this application. I will address the two issues argued jointly as they are both revolving around the fairness of the termination in relation to the alleged retrenchment. In essence, the applicant is strongly alleging that he proved the reason for termination and he followed the required procedures. As stated above the respondent was terminated from employment on the ground of retrenchment/operational requirement which is defined under section 4

of the ELRA. The same is also defined in the case of **Moshi University College of Corporative & Business Studies (MUCCOBS) V. Joseph Rueben Sizya**, , Revision No. 11/2012, (Labor Division, Dar-es-salaam) where 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 two fold.*
>
> *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]

In the instant application, the applicant alleges that the retrenchment process was associated with economic crisis of his business. I have critically examined the record, as rightly found by the Arbitrator, no evidence was tendered to prove that the applicant was undergoing the alleged financial crisis. Procedures for retrenchment are provided for under Section 38(1) of the ELRA which provides that:

(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,

(d) Give the notice, make the disclosure and consult, in terms of this subsection, with-

(i) Any trade union recognized in terms of section 67;

(ii) Any registered trade union which members in the workplace not represented by a recognized trade union;

(iii) Any employees not represented by a recognized or registered trade union.

From the cited provisions, it is clear that in the retrenchment process, the employer is required to comply with several procedures laid in order to ensure, as what was termed in the cited case of **Moshi University College of Corporative & Business Studies (MUCCOBS) (Supra) 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."

To cement the importance, labor laws categorize retrenchment as the last resort the employer should take in a company's financial crisis situation, hence the strict requirement in compliance with the procedure for retrenchment. As the court in the case MUCCOBS (suora) also held:

"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."

Coming to the case at hand, there is no exceptional but to see whether the applicant established grounds to retrench the applicant. It is undisputed fact that the applicant was engaged in a teleconference meeting which mainly focused on closure of the applicant's branch at

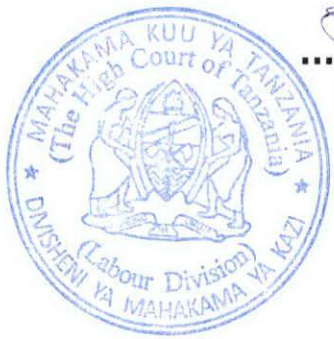
Mwanza offices. Apart from that, there is no evidence tendered to explain how the applicant's Dar es salaam branch, where the respondent was working, was affected by the alleged economic constrains. Moreover, in the Dar es salaam branch, it was only the respondent was retrenched while the cited Section 38 requires a description of the retrenchment plan in order to explain why a certain group of people will be retrenched and those who will remain. Under such circumstances, it is crystal clear that in the instant case, the respondent being the only employee retrenched in Dar, while the plan of retrenchment explained to him was to affect Mwanza branch only, then it is conclusive that he was unfairly terminated on the alleged ground of retrenchment. In other words, as rightly found by the Arbitrator, the employer used the ground of retrenchment as a pretext to terminate the respondent.

On the procedural aspect of termination, any employer terminating an employee on the ground of retrenchment is required to adhere to the termination procedures provided under section 38 of the ELRA reads together with Rule 23, 24 and 25 of the Employment and Labour Relations (Code of Good Practice) G.N. 42 of 2007 (G.N. 42/2007) as correctly submitted by the parties. In the case at hand the procedures provided in the relevant provisions were not followed by the applicant.

No notice of intention to retrench was served to him, he was not consulted and even the selections criteria are unknown to him. The termination was also unfair procedurally.

In the result, I see no reason to fault the findings and award of the CMA. Termination of the respondent was unfair both procedurally and substantively. Consequently, this application lacks merit and it is hereby dismissed.

Dated at Dar es Salaam this 03rd December, 2021.



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S.M. MAGHIMBI
JUDGE