IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

DAR ES SALAAM

REVISON NO. 227 OF 2020

BETWEEN

SCOLASTICA WALLACE AND AMINA SALEHE.....APPLICANTS

VESRUS

SAMMY'S JOINT LIMITED..... RESPONDENT

JUDGMENT

Last order 8/7/2021

Judgment 28/7/2021

B.E.K. MGANGA, J

Applicants were employed by the Respondents as waitress. On 5th May, 2017 their employment was terminated. After the said termination, they referred Labour Dispute No. CMA/DSM/TEM/77/2018 to the Commission for Mediation and Arbitration (CMA) at Temeke seeking for reinstatement, in alternative, payment of 24 months salaries for unfair termination, payment of overtime, one month in lieu of notice, balance of severance allowance and leave allowance. It was contended by the Applicants that legal procedure of termination of their employment were not followed and that there were no valid reasons for their termination. On 17th May 2017 CMA issued an award in favour of the Respondent that termination of Applicants was fair, that reasons for their termination was given, and further that applicants were not entitled for overtime, leave payment and 24 months salaries.

Being aggrieved by the decision of CMA, Applicants has filed this revision Application praying the court to find that their termination was unfair and that they are entitled to payment of 24 months salaries as a remedy for the unfair termination, and that they are entitled for payment of overtime as well as payments in lieu of annual accrued. Applicants has raised five legal issues namely

1. *That the Hon. Commission for Mediation and Arbitration erred in law and facts for deciding that the Respondent had valid reason for retrenchment,*
2. *That the Hon. Commission for Mediation and Arbitration erred in law and facts for deciding that the procedure of retrenchment were observed by the Respondent.*
3. *That the Hon. Commission for Mediation and Arbitration erred in law and facts by not awarding the Appellants 24 months salaries for unfair termination/retrenchment;*
4. *That the Hon. Commission for Mediation and Arbitration erred in law and facts for deciding that Applicants are not entitled to payment of overtime; and*
5. *That the Hon. Commission for Mediation and Arbitration erred in law and facts for deciding that the Applicants are not entitled to payment in lieu of annual leave accrued for the years the Applicants worked with the Respondent.*

When the matter was called for hearing, Mr. Benard Shirima advocate appeared on behalf of the Applicants while Mr. Likwilile Mussa Ally appeared as the personal representative of the Respondent in terms of section 56(b) of the Labour Institutions Act [Cap. 300 R.E. 2019].

Counsel for the Applicant arguing the 1st issue i.e., that the Hon. Commission for Mediation and Arbitration erred in law and facts for deciding that the Respondent had valid reason for retrenchment, submitted that evidence of DW1 shows that the Respondent has branches at Masaki, posta, Mlimani city and Quality centre. He went on that; the Masaki Branch was opened after retrenchment of the Applicants. He insisted that the Respondent was therefore supposed to transfer the Applicant to Masaki branch and not to retrench them. Submitting on this issue on behalf of the Respondent, Mr. Ally argued that, there were good grounds/reasons for retrenchment. He submitted that presence of other branches cannot be a reason for transfer of employees because each branch has its management. He went on that, in order to transfer an employee from one branch to another, there must be a need to the branch to which an employee has to be transferred to. He submitted that, all other branches were in economic difficulty. He denied the possibility of transferring the Applicants to Masaki because recruitment was done prior their retrenchment. In rejoinder, Mr. Shirima for the Applicants submitted that, the Respondent's hardship was not the reason for retrenchment as Mr. Ally (for the Respondent) has submitted that, a new branch was opened while the Applicants were on move of retrenchment.

I have carefully examined evidence that was adduced by the parties at CMA as to the reasons for termination of employment of the applicant. Mr. Moses Medard Humbi (DW1) testified that the Respondent was in economic difficulties as a result, she terminated the Applicants. He sates;

> *"Biashara ilizorota na hiyo kupelekea tuweke kikao baina ya viongozi na wafanyakazi. Kwenye kikao hicho mada kuu ilikuwa ni mwenendo wa biashara. Tulizungumzia juu ya kutatua matatizo ya kiuchumi".*

In his evidence, DW1 testified that they have closed some branches. He also testified that there is only one branch in Masaki and that he cannot recall as to when it was opened. I have examined the evidence of Scolastica Wallace (PW1) and Amina Salehe (PW2), the herein Applicants, and find that none of them testified that Masaki branch was opened after their retrenchment as argued by their counsel in this application. As there is no such evidence, this court, cannot take submission from the bar as evidence that Masaki branch was opened after termination of employment of the Applicants. Applicants if were aware of that evidence, they were supposed to bring it before CMA so that they can be cross examined by the Respondent. It is unfair to bring that evidence at this stage while denying the other party right to cross examine. I therefore, dismiss that argument as it is not supported by evidence. I have also found that PW1 and PW 2 stated in their evidence

that termination of their employment was due to economic conditions the respondent was experiencing. For the foregoing, this issue is resolved in favour of the respondent that there were valid reasons for termination.

On the 2nd legal issue i.e., that the Hon. Commission for Mediation and Arbitration erred in law and facts for deciding that the procedure of retrenchment was observed by the Respondent; counsel for the Applicants argued that procedures were not adhered to. He submitted that section 38 of the Employment and Labour Relations Act, [Cap. 366 R.E. 2019] was not complied with. He submitted that; no notice was issued to the Applicants. Counsel submitted that, Exhibit D1 does not amount to notice as it did not state that the Respondent intended to retrench the Applicants. He went on that, there was no prior consultation to the intended persons to be retrenched. He pointed out that section 38 of Cap. 366 (supra) requires the employer to disclose important information prior to retrenchment but it was not done by the Respondent. Mr. Shirima cited the case of ***Clare Haule vs. Water Aid Tanzania, Revision No. 13/2019*** to stress his point that failure to consult, led this court, to order payment of salary in favour of the applicant. He also cited the case of ***Security Group (t) Ltd vs. Florian Modest Shumbusho, Revision No. 302/2014*** and Jasson ***Peter***

Lwiza and others vs. Christian Council of Tanzania, Revision No. 18 of 2013 to cement on his argument that failure to adhere to procedures amounts to unfair termination.

Submitting on this issue on behalf of the Respondent, Mr. Ally conceded that exhibit D1 is an information relating to the meeting. He was however quick to submit that, to him, that amounts to notice. He submitted that in the said meeting, he informed all employees economic difficult situation the company was going through. That, the same is reflected in the minutes of the said meeting. He concluded that, there was compliance of the provisions of section 38 of Cap. 366, supra and that the procedure for termination was adhered to. He was of the view that Exhibits D1, D2 and D3 shows the procedure that was followed before termination of employment of the Applicants. He argued that, Applicants didn't lodge a complaint to the management within five days as required by the law and that acceptance of their terminal benefits is an indication that they were satisfied.

In rejoinder, counsel for the Applicants maintained that, they were not given notice as exhibits D1 and D2 are not amounting to notices. He submitted that the law requires Applicants to lodge a complaint at CMA within 30 days and that is what they did.

I have examined rival arguments between the parties i.e., whether termination of the Respondents adhered to the procedures provided for under the law or not. While Mr. Shirima Advocate has submitted on behalf of the Applicants that the procedure was not adhered to, Mr. Ally on behalf of the Respondent is of the different view. I am of the settled view that the procedure of termination was not adhered to. My reasons for this stance is not far. It is born out of (i) evidence of Moses Medard Humbi (DW1) the only witness who testified on behalf of the Respondent and (ii) the law. In his evidence, DW1 is recorded to have stated in cross examination that prior to termination of employment, Applicants were neither consulted nor informed that they will be terminated and that, they became aware after being served with termination letters. In fact, this confirmed also what was stated by PW1 and Pw2 (the Applicants) in their evidence. This was in violation of the law. Section 38(1) of Cap. 366 supra is clear as to what procedure has to be followed prior termination of an employee. The said section provides;-

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,

(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 recognised trade union;

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

Rule 8(1) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007, GN. 42 of 2007 hereinafter referred to as the Code of Good Practice, provides what has to be done by the employer who intends to terminate employment of an employee. Rule 8(1)(c) and (d) of the said GN provides:-

8(1) An employer may terminate the employment of an employee if –

(a)....

(b)...

(c) ***follows a fair procedure before terminating the contract;*** *and*

(d) ***has a fair reason to do so as defined in section 37(2) of the Act.***

Appended to the Code of Good Practice is guideline procedure on retrenchment which provides *inter-alia* how consultation and disclosure of information should be done. Clause 2 of the said retrenchment procedure provides; -

2(1) ***where an employer contemplates to retrench the employees*** *for operational requirements,* ***the management shall notify in writing the employees likely to be affected*** *and to consultant with the trade union which include-*

(a) any affected union recognized as exclusive bargaining agent if retrenchment is contemplated within the bargaining unit;

(b) any other union having members who will be affected, if they do not fall within a bargaining unit for which a union is recognized as the exclusive bargaining agent; and

(c) any affected employees who are not represented under (a) and (b) above.

(2) subject to sub-clause (1), ***management's written notice shall state the employer's view on the following*** *–*

(a) ***the reason for the intended retrenchment;***

(b) any measures to avoid or minimize the intended retrenchment;

(c) the selection for the employee to be retrenched;

(d) the timing of the retrenchment

(e).....

(f)...

(3) The management should consult the parties referred to in sub-clause 1 as soon as possible after the employer contemplates retrenchment to explore possible alternatives and the issues to be consulted about shall include issues as specified in sub-clause 2.

(4) ***The management shall allow the consulting parties referred to in clause 2.1, an opportunity to prepare and to make representations on matters being consulted on.***

(5) the management shall consider and respond to any representations made and, if management disagree with them state reasons for disagreeing and the management shall have to respond in writing to any representations made in writing.

It was submitted on behalf of the Respondent that Exhibits D1, D2 and D3 are notices and that Applicants were consulted. I have examined these exhibits and find that D1 is a notice to all employees to attend the meeting scheduled 25/10/2016 and exhibit D2 is a minute of the said meeting. I have noted that the date on Exhibit D2 has been altered to read 28/10/2016 or 26/10/2016 while initially it was not. The same is not signed. Whatever the case, nothing was mentioned therein as to consultation and retrenchment of the Applicants though it is shown that waiters and waitress were supposed to be retrenched. Nowhere in Exhibits D1, D2 and D3 applicants were notified that they were likely to be retrenched. No reasons can be found in these exhibits as to why Applicants were selected for termination of their employment. As they were not consulted, they were also not given an opportunity to make representation. In any case, exhibits D1, D2 and D3 does not qualify to be notices mentioned in Section 38(1) (a) of Cap 366 Supra. Therefore, I hold that no notice was issued to the applicants prior their retrenchment. I am also of the firm opinion that applicants were not consulted. In fact, DW1 testified while on cross examination, that no consultation was made to the Applicants prior termination of their

employment. With this evidence, I am of the settled mind that the Respondent violated section 38 of Cap. 366 R.E. 2019 and the Code of Good practice.

Now the issue is whether, the Respondent had fair reasons to terminate employment of the Applicants or not. Rule 8(1)(d) of the Code of Good Practice (supra) is clear that in termination of employment of an employee, employer should have fair reasons for termination as defined by section 37(2) of Cap. 366 R.E. 2019. The said section 37(2)(c) of Cap. 366 R.E. 2019 provides -

> ***37(2) A termination of employment by an employer is unfair if the employer fails to prove-***
>
> *(a)....*
>
> *(b)....*
>
> ***(c) that the employment was terminated in accordance with a fair procedure.***

As pointed out herein above, the respondent violated fair procedures of termination of employment of the applicants as they were neither consulted nor served with a notice prior to their retrenchment. This non- compliance of the law and fair procedure of termination amounted to unfair termination. The court of Appeal had occasion to discuss a similar issue in the case of ***SECURITY GROUP T. LTD VS SAMSON YAKOBO & OTHERS CIVIL APPEAL NO.76 OF 2016***. In the

Security Group case, like the Application at hand, a meeting was held between the employer and employees to determine the amount of severance payable. The Court of Appeal held that the same did not amount to consultation envisaged under s. 38(1)(d)(iii) of Cap. 366 R.E. 2019. For the foregoing, I hold that the Commission for Mediation and Arbitration erred in law and fact in holding that procedures for termination of employment of the Applicants were adhered to.

On the 4th legal issue i.e., that the Hon. Commission for Mediation and Arbitration erred in law and facts for deciding that Applicants are not entitled to payment of overtime, Mr. Shirima submitted that, Applicants testified that they were working for 13 hours daily amounting to 78 hours per week instead of 45 hours and that this was in contravention of section 19 of Cap. 366 Supra. He submitted further that, this evidence was not contravened by the Respondent. He stressed that non-payment of overtime was in violation of the contract the respondent entered with Applicants as per Exhibit A1 and A3. He however, conceded that no evidence was adduced to show that parties agreed on overtime as it is stipulated under paragraph 6.2 of their contract. He submitted further that Applicants worked on public holidays contrary to their agreement. On his side, Mr. Ally on behalf of the respondent submitted that, there was no agreement for overtime and

that no proof that Applicants worked beyond the allowed time for them to be paid overtime. He submitted also that, for Applicants to be paid overtime, there has to be agreement in terms of paragraph 6.2 of the contract. He insisted that nothing was brought to CMA to prove that there was overtime.

The rival issue of payment of overtime can be answered by referring to evidence of PW1 and Pw2 adduced at CMA. In their evidence, Applicants did not establish the amount they were supposed to be paid by the Respondent as overtime pay. That being the case, I cannot guess it. For that reason, this ground fails.

On the 5th legal issue, i.e., that the Hon. Commission for Mediation and Arbitration erred in law and facts for deciding that Applicants were not entitled to payment in lieu of annual leave accrued for the years they worked with the Respondent, Mr. Shirima submitted that, Applicants worked from 2012 up to May 2017 without being given annual leave. That both Applicants stated in their evidence that they were not given annual leave. He submitted that this was contrary to section 31 of Cap. 366 supra. On the other hand, it was submitted by Ally on behalf of the Respondent that Applicants were paid salary in lieu of annual leave for the five years they worked with the Respondent and that, it was so indicated in their retrenchment letters. In rejoinder,

counsel for the applicants submitted that they were paid annual leave for one year and not the rest.

This issue cannot detain me. I have gone through evidence of the Pw1 and Pw2 and find that they testified that each one is claiming Two Hundred Thousand Tanzanian Shillings (TZS 200,000/=) only as leave payment that they were not paid. The respondent is therefore ordered to pay a total of Four Hundred Thousand Tanzanian Shillings (TZS 400,000/=) only as leave payment to both applicants as leave payment.

On the 3rd legal issue i.e., that the Hon. Commission for Mediation and Arbitration erred in law and facts by not awarding the Appellants 24 months salaries for unfair termination/retrenchment, counsel for Applicants submitted that in terms of section 40(1)(c) of Cap. 366, supra, they were entitled. The respondent resisted this claim on ground that, Applicants were terminated due to employer's operational requirement i.e., economic requirement as there were no many customers. Much as I agree that there were operational grounds, termination of the Applicants was unfair as held hereinabove. The remedy available for this unfair termination is under section 40(1) of Cap. 366 R.E. 2019. Having found that there were operational issues, I decline the prayer of the Applicants to be paid 24 months salaries. Instead, I grant them the minimum payment of 12 months salaries

provided for under section 40(1)(c) of Cap. 366 R.E.2019. In their evidence, Applicants stated that they were receiving Two Hundred Thousand Tanzanian Shillings (TZS 200,000/=) only each as monthly salary. Therefore, each applicant shall be paid Two Million Four Hundred Thousand Tanzanian Shillings (TZS 2,400,000/=) only as compensation for the said twelve months.

For the foregoing and for avoidance of doubt, the respondent will pay each applicant Two Hundred Thousand Tanzanian Shillings (TZS 200,000/=) only as annual leave pay and Two Million Four Hundred Thousands Shillings (TZS. 2,400,000/=) only, being twelve (12) months salaries compensation. In total the respondent will pay Five Million Two Hundred Tanzania Shillings (TZS 5,200,000/=) for both applicants.

It is so ordered.

B.E.K. Mganga
JUDGE
28/07/2021