IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 845 OF 2019

BETWEEN

AGP CONSULTANTS LIMITED.....APPLICANT

VERSUS

IDDI SHIRIMA & 7 OTHERS.....RESPONDENT

JUDGEMENT

Date of Last Order: 02/07/2021

Date of Judgement: 08/7/2021

A.Msafiri, J.

The Applicant filed the present application seeking revision of the award of the Commission for Mediation and Arbitration (herein CMA) which was delivered on 27thSeptember 2019 in Labour Dispute No. CMA/DSM/ILA/ 756/18/449 by Hon.Chacha. B, Arbitrator. The application was made under the provisions of Sections 91(1)(a) and 91(2)(b) of the Employment and Labour Relations Act No.6 of 2004; Rules 24(1),(2)(a)(b)(c)(d)(e)(f), 24(3)(a)(b)(c)(d), and 28(1)(c)(d)(e) of the Labour Court Rules, GN No. 106 of 2007.

The application was supported by the affidavit of Augustino Sizya, the applicant's Site Manager/ Human Resources manager, and the respondents filed their counter affidavit challenging the application.

Following is the brief background facts to the application. The respondents were employed by the applicant on different occasions to work on a project called Kinyerezi II as scaffold men to work on specific project of Kinyerezi II 240 MW CCPP. Abdalla Mohamed was employed on 23/03/2017, Ibrahim Hassan and Mrisho Bakari was employed on 24/10/2017, the contract of these three came to an end on 24/10/2018 but they were employed again by the applicant on February 2018. Iddi Shirima, Abdalla Ramadhani and Bahati Joseph were employed on 19/02/2018, Mselemu Hamisi on 26/2/2018 and Imani Saidi on 24/4/2018.

Respondents were paid salary per hours worked and their contract was oral contract. At sometime, the respondents were served with the letters of termination of their employment contracts which were titled "TAARIFA YA UKOMO WA AJIRA" dated 02/05/2018. The letters were notice of termination which informed the respondents that their employment will officially come to an end on 31/5/2018. The applicant paid the respondents their benefits through their bank accounts. Being aggrieved with the termination, on

10/7/2018, the respondents filed complaints before the Commission for Mediation and Arbitration (herein as CMA) claiming for unfair termination. After failure of mediation, matter was referred to the arbitrator whereby the hearing was conducted and on 27/09/2019, an arbitrator entered an award in the favour of the respondents and he ordered that the respondents be compensated six months salaries and compensation of TZS 3,120,000/= for failure to follow procedures for termination.

The applicant was aggrieved and filed the present application praying for this court to revise the proceedings, orders and quash and set aside the award in the said labour dispute before the CMA. When this application came for hearing, Ms. Christine Katala, advocate appeared for the applicant. The respondent was represented by Mr. Respicious Mukandala, Advocate.

Submitting in support of the application, Ms. Christine Katala prayed to adopt the Notice of Applications, chamber summons and the contents of the affidavit of one Augustino Sizya, and pray that they be part of the applicant's submissions. She prayed to address the court on legal issues on the applicant's affidavit at paragraph 4, (4.1-4-3). On the first issue, she stated that the Hon. Arbitrator erred in law and fact by holding that the

procedures for termination were not followed while the respondents were given notice of termination of employment contract.

The respondents were given notice informing them that the employment contract was coming to an end due to the project for which they were working for, was nearly coming to an end. And the Notice of termination was tendered as exhibit D2 as stipulated in the page 6 of the award. Also, there was a list of the number of employees which were supposed to go out in the project and the list was accepted as exhibit D1.

The counsel stated that, the Arbitrator erred by his finding that the procedures were not followed where two of the respondents had Notice of Termination of the employment contract and the respondents chose not to collect the Notice for their terminations. Therefore, the respondents cannot say that the procedures were not followed, while they were given 28 days Notice from 2nd May 2018 to 31st May 2018 as stipulated in the Notice of their termination.

The counsel asserted that, the applicant followed all the procedures for termination as required under section 41(1)(b)(ii) of the Employment and Labour Relations Act, No. 6 of 2004. However, the applicant could not follow the procedures for retrenchment as expected by the arbitrator since the

applicant's company was not undergoing any economic crises or introduction to new technology or restructuring the company or any other look like crisis which was beyond the control of the applicant. In that regard, procedures for termination were followed.

On the second issue, the counsel for the applicant stated that the arbitrator erred in law and fact by not taking into consideration the fact that the project for which the respondents were employed on, had come to an end and the nature of their contract was the contract to perform specific task on a project and contract for a specific work. On this, the nature of employees' contract was to perform specific task in the project known as KINYEREZI II MW CCPP.

She submitted that, a person who is employed to perform a specific task in the project, his employment automatically comes immediately after completion of the work which he was employed for. To support this argument, the counsel for the applicant referred the case of **Hussein Ngaluma vs. Carmelite Fathers Roman Catholic,** High Court Labour Digest of 2011-2012, Dar es Salaam, Revision No. 238 of 2011, in which Moshi, J, held that;

"upon completion of the task, that task being duly paid for in accordance with the terms of the contract, nothing binds the part".

Therefore, in the present matter, the respondents' contract came to an end upon the completion of their task and they were duly paid after completion of the task for which they were paid for. And the exhibits of their payments can be found at page 6 of the award which was marked as exhibit D4.

On third issue, the counsel for the applicant submitted, that the Hon. Arbitrator erred in law and fact by not evaluating properly the evidence tendered by the applicant's witnesses during the hearing. The witness of the applicant at CMA testified that, the main reason for termination of employment contract of the respondent was because the project was nearly coming to an end as stipulated in the exhibit D2. However, the arbitrator went ahead to hold that the respondents termination was based on operation requirement (page 9 of the award).

The counsel argued that Rule 23(1) of Employment & Labour Relations Act, (Code of Good Practice Rules) G.N. 42 of 2007, defines retrenchment as," termination of employment arriving from operational requirement of the

business. Operational requirement is requirement based on economic, technological, structural or similar need of the employer".

Basing on this definition, the arbitrator had no evidence showing that the applicants company was facing economic, technological or financial crisis warranting him to retrench some of his employees. Therefore the arbitrator erred in law and facts when she failed to evaluate the evidence tendered before her, hence arriving at a wrong conclusion that the employees were retrenched.

Replying, counsel for the respondents prayed to adopt the counter affidavit sworn jointly by the respondents as part of his submissions. Starting with the first issue raised by the applicant, he deny vehemently and stated that, the arbitrator was correct to hold that the procedures were not followed for terminating the respondents since in oral contract between the respondent and their employer, there was no any clause or agreement that this is a contract for specific project and when it comes to an end, there will be no further employment.

The counsel agreed that the respondents were employed during Kinyerezi Projects but there was no any statement that once the project comes to an end, there will be no further employment. This is due to the

fact that, in Projects which have time limit, the time limit is known to the giver and the contractor. So it was the duty of the employer, to be specific to the employees during the time of agreement that the project will start on 2017 and end on 2018.He argued that, failure to tell the employees the end of project and later telling that the end was 31st May 2018, it was an afterthought after being served with the application by the CMA at Ilala.

The counsel argued further that, there is the issue of assessment of the project that is after assessment, it is known that the project has reached a certain percentage of construction. Once it comes to the knowledge that the project has a short time to be completed, most employer's gives notice to their employees and other labourers. Therefore, the respondents do not agree with the applicant that the arbitrator erred in law on that stated issue. Therefore, the Arbitrator was correct under section 38(1) of the Employment and Labour Relations Act as well as Rule 32 of G.N. 42 of 2007 to find that the procedures were not followed.

On the second issue, counsel for the respondents also submitted that the arbitrator was right by not taking into consideration the fact that the project which the respondents were employed to work on, had come to an end and

the nature of their contract was the contract to perform specific task on a project and a contract for a specific work.

The counsel based his argument on employment of one Imani Said who is one of the respondents. He was employed on 24th April 2018. While AGP1 (demobilization chart) shows that it was released on 1st March 2018. The applicant knew well that there was no work at all, but still one month and days later after demobilization chart, it employs one Imani Said and furthermore, 8 days later, the letter for ending the employment was released to the respondents which was received as exhibit D2, whereby Imani Said was the one given the said letter.

Basing on that facts, the respondents do not agree that the employment of the respondents was specific only for Kinyerezi Project but it was permanent employment and not for specific Project on specific contract. To add on that point, as stated earlier, on any Project, there is assessment of the Project, basing on that fact, the employers knows the end of Project, therefore there was no need for them to renew the contract of some of the respondents on January and February without informing them the remaining time limit of the Project.

Responding on third issue, the counsel submitted that the Hon. arbitrator evaluated properly the evidence tendered by the applicant's witness due to the fact that, the witness stated that the employees were given notification letter on 2nd May 2018 informing them the purpose of the letter and the end of their contract will be on 31st May 2018.

But very unfortunately, the respondents continued to be regarded as the employees of employer until on 2nd July 2018 when their salary payment for the month of June was released to them. This facts shows that it is true as claimed by the respondents that the announcement for ending of their employment came on 30th June 2018 by their supervisor. Therefore, the counsel denied the claim of the applicant that he followed all the procedures for termination. To cement on his submissions, the counsel restated the Rules cited by the counsel for the applicant, which is Rule 23(1)of G.N 42 of 2007, which is similar with section 38(1) of the Employment and Labour Relations Act where they provides that;

> *'.....An operational requirement is defined in the Act as a requirement based on the economic, technological, structural, or similar needs of the employer'.*

The counsel argued that the situation in this matter falls on the last statement which is the alternative provided in the said Rules which states

"similar needs of the employer". That, the applicant employed the respondents without notifying them the time limit of the project. After the end of the project, and after the fact that the applicant has no further work to continue with the respondents, that is when unfortunately, the applicant unknowingly, applied the alternative provided by the provision.

In conclusion, the counsel for the respondents prayed for this Court to declare that the respondents were not fairly terminated from their employment contract by their employer since their contract was permanent one, which allows them to proceed with other projects even after Kinyerezi II Project. He prayed further that, the CMA award be upheld but since the respondents were terminated unfairly, he prayed to add to what they were given in the award from 6 months to 12 months.

In rejoinder the applicant counsel addressed the issue of demobilization chart given on 1st March and the Notice of Termination given on 2nd May 2018. She countered the argument by the counsel for respondent that the applicant decided to give notice of termination on 2nd May 2018 after CMA case has been filed. She stated that, at page 5, the CMAF1 shows that the case was filed on 10th July 2018. In that regard, the counsel for

respondent cannot say that the applicant gave notice on 2nd May 2018 after seeing the CMA case. Hence, the procedures for termination were followed.

On the issue of payment made on 2nd July 2018 which was also raised by the respondents counsel, she stated that, this payment was made because of the negligence of the respondents themselves since the notice clearly showed that they were supposed to return clearance form on 1st June 2018 but they chose to remain with them in their houses and the applicant had no mandate to force the respondents to return the forms on the date stipulated in the Notice of termination, so clearance forms were returned on 31st June 2018. When a person returns clearance Form, he returns with all belongings/ equipments which he were using in his work during the time of employment. And that made it necessary to wait for clearance forms to be returned in order to pay the respondents their benefits.

Therefore, the respondents cannot blame the applicant for paying them late in July and that does not mean they were still the employees of the applicant. She concluded by reiterating her prayers.

I have considered in length the submissions by the parties, the record of the CMA and the labour laws. I am of the view that, the major issues to be considered are;

1. *Whether or not the respondent's employment contract was for specific task;*
2. *Whether the respondent's termination based on operational requirements;*
3. *If the answer to the 2nd issue will be in affirmative, then whether or not the procedures for retrenchment was adhered;*
4. *To which reliefs should this Court deem to grant.*

From records, it is undisputed that, the respondents were employed by the applicant. What is disputed in this case is the type of contract they engaged in. In her submission, Ms. Christine Katala, counsel for the applicant, stated that the respondents were employed by the applicant on different occasions to work on Kinyerezi II Project. They were employed as scaffold men and their contract was oral contract.

They were paid salary per hours worked and the nature of their contract was the contract to perform specific task. She stated further that the contracts of the respondents was to perform specific task in the project known as Kinyerezi II MW CCPP. She maintained that the respondents' contract came to an end upon the completion of their task and they were

duly paid. She stated that the proof of the respondents' payment was tendered as exhibit D4 during the CMA hearings.

The counsel for the respondent vehemently submitted that, it is not disputed that the respondent were employed during Kinyerezi Projects but there was no any statement or agreement in the oral contract that the contract was for specific task and that it will come to an end when the project comes to an end. That it was the duty of the employer to tell the employees specifically that the end of the project will be the end of their employment.He avers that the contracts of respondents were permanent one which allows them to proceed with other projects even after Kinyerezi II Project.

There are three types of employment contract which are recognized in terms of section 14 of the Employment and Labour Relations Act, cap 366 namely; a contract for unspecified period of time, a contract for a specified period of time for professionals and managerial cadre and a contract for a specific task.

In the case of **Bakari Jabir Nyambuka vs. QCD Supplies & Logistics**, Revision Application No. 962 of 2018 (High Court Labour Division, Dar es Salaam), Muruke, J, held that; in contract law, employment contract may be written or oral. Mostly, written contract is more preferable than oral

contract as it can be used for evidential purpose. The employer is obliged to keep written records of the particulars regarding their employment, in terms of section 15 of the Employment and Labour Relation Act (ELRA).

In the present matter, it is in the record that the respondents had oral contract, and there is no evidence of any written particulars of the employees which the employer was supposed to keep as per section 15 of ELRA. It is a principle of law in labour matters that when there is any dispute regarding the terms of employment in a contract, burden of proof lies on the employer. Section 15(6) of the ELRA provides that;

> 15(6*); "if in any legal proceedings, an employer fails to produce a written contract or the written particulars prescribed in subsection (1), the burden of proving or disproving an alleged term of employment stipulated in subsection (1) shall be on the employer".*

In the case at hand, the respondents are claiming that, the applicant employed them without notifying them that their employment will end when the project ends. Going through the records, beside the submissions of the counsel for the applicant and the contents of the applicant's affidavits, the other evidence which shows the particulars of the respondents is exhibit D4 which is Bank Statement showing payment of salaries for the applicant's staff

for June 2018. However, this does not show whether the respondents were on specific term contract.

The other documents does not show clearly what kind of engagement was there between the applicant and the respondents. It is also on the record that some of the respondents were employed in 2017 and when their contract came to an end, they were re-employed. These are Abdallah Mohamed, Ibrahim Hassan and Mrisho Bakari. It is also not clear what were the terms of contracts for these three who were re-employed. It is also not proved whether the applicant informed the respondent that they were on specific task contract.

Therefore, since the employer/applicant could not prove clearly on the terms of contract, the benefit of doubt is in favor of the respondents who claimed that they were employed on oral permanent contract/agreement. I therefore answer the first issue negatively, that is the respondents was not employed for specific task instead they were employed on unspecified term contract.

The second issues is on whether the respondents termination based on operational requirements. In his findings, the arbitrator after analysis of the evidence adduced before him, he was of the view that the respondents were terminated in fair reason based on operational requirements

(retrenchment) which falls under section 38 of ELRA. It was on evidence by the applicant's witness's testimony that the applicant was a subcontractor who was receiving instructions from the main contractor.

That the main contractor instructed them that the project was coming to an end so they should reduce some of the employees. The Labour Redundancy Chart was tendered as exhibit D1. In her submission, the counsel for the applicant argued that, the main reason for termination of the respondents' contract was that the project was nearly coming to an end as stated in exhibit D2. She pointed that the arbitrator erred in his findings that the termination was based on operational requirements, she stated that, basing on the definition of retrenchment stipulated in Rule 23(1) of G.N 42 of 2007, there was no evidence that the applicant's Company was facing economic, technological or financial crisis warranting the retrenchment of some of the employees.

The respondents counsel counter and argued that, the situation in this matter falls under the operational retrenchment as correctly reasoned by the arbitrator. And that by the definition under Rule 23(1) of G.N 42 of 2007 which is similar to section 38(1) of ELRA, the circumstance of this matter falls under the words " or similar needs of the employer".

It is the testimonies from DW1 and DW2, the applicant's witnesses that, the applicant was sub contracted and he received instructions from main contractor that the work on project was coming to an end hence some employees were redundant. The sub-contractor, applicant was given a redundancy chart showing the number of employees who are to be reduced. In such circumstances I am inclined to agree with the arbitrator's findings that this situation falls under the category of operational retrenchment.

This is clear at page 5 of the award thus;

> *"shahidi alieleza zaidi kuwa main contractor alitoa taarifa kuwa kazi imeisha na kutoa redundancy chat ambayo inaonyesha namba ya wafanyakazi waliopaswa kupunguzwa kila mwezi...."*

Having considered this circumstances, I am of the view that the applicant had to terminate the respondents contracts not because that their contracts has come to an end but because the project was coming to an end. This, in my view falls within categories of the "economic" and or "similar needs" because the employer could not afford to have workers who have become redundant because there was no more work as the project was coming to an end.The second issue is also answered in affirmative that,

basing on circumstances as analysed above, the termination was based on operational basis.

This takes me to the third ground on whether the procedures for retrenchment was adhered. It is on evidence that the respondents were given notice of termination, 28 days before the termination of their employment. In the case of **Emmanuel Urassa and 10 Others vs. Shared Networks Tanzania Limited,** Labour Revision No. 467 of 2019, the mandatory procedures for retrenchment as provided under section 38 of ELRA were restated.

The said provisions were quoted as follows;

S.38 (1) - *In any termination for operational requirements (retrenchment), the employer shall comply with the following principles, that is to say;*

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 close 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.*

Having considered the evidence on records, I am of the view that the mandatory requirements were not adhered. It is on record that the respondents were given notice of termination of their employment, although it was the notices of Imani Saidi and Abdalah Ramadhan which were tendered at the CMA as exhibit D2 collectively. Also there was Labour Redundancy Chart which was claimed by the applicant that it was put on a notice board (at page 4 of the award), and that the employees were paid, and this is evidenced by Bank Statement- payments for a month of June 2018. By the above evidence, I agree with the arbitrator that the procedures for retrenchment were not adhered as per requirements of section 38(1) of ELRA.

Having answered the third issue in negative, the fourth and last issue is to which relief Court should deem to grant.

Having find that the procedures for fair termination on operational requirements were not adhered to, the arbitrator, considering section 40 of the ELRA and Rule 32 of the G.N 67 of 2007, he awarded each of the respondents to be paid 6 months salaries as compensation for unfair termination, taking into consideration the fact that the applicant had valid reasons for terminating the respondents. Considering the circumstance of the case, I find no reason to fault the decision and award by the arbitrator.

Having said that, I hereby uphold the findings and award, and dismiss this application for want of merit. Right of appeal explained.

It is so ordered.

A.Msafiri
JUDGE
08/07/2021