IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 540 OF 2019

BETWEEN

SIJAONA MOSHI & 28 OTHERS ..... APPLICANTS

VERSUS

DOUBLE TREE BY HILTON & GOLDEN SANDS SERVICE APARTMENT LIMITED ..... RESPONDENT

JUDGMENT

Date of Last Order: 23/06/2021

Date of Judgment: 16/07/2021

L.J. Itemba, J.

The applicants Sijaona Moshi & 28 Others, filed the present Labour Revision against Double Tree by Hilton & Golden Sands Service Apartment Ltd, the Respondent herein. The applicants seek revision of Commission for Mediation and Arbitration (CMA) decision with reference No. CMA/DSM/KIN/254/2011 dated 7th of June 2013 by Hon. Alfred Massay, Arbitrator.

The application is made under Section 91(1)(a), 91(2)(b), 91(2)(c) and 94(1)(b)(i) of the Employment and Labour Relations Act No. 6 of 2004, (ELRA) as amended and Rule 24(1), (2)(a)(b)(c)(d)(e)(f) and

3(a)(b)(c)(d) and 28(1)(a)(c)(d) and (e) of the Labour Court Rules GN 106/2007.

The applicants were employed by the respondent on diverse dates between 2009 and 2010 and in different capacities. The respondent terminated the applicants between 7th and 8th March 2011 for reasons of having low business and overstaffing. The applicants complained before the CMA and their application was dismissed for want of merit save for 2 employees Stella Jackson and Bahati Memba; hence this application.

In their affidavit the applicants raised 3 grounds as follows:

i. *That procedure for termination based on operation requirement was not complied with.*

ii. *That the Hon. Arbitrator erred in assessment of evidence submitted before the CMA.*

iii. *That the award issued by CMA contains material errors which occasioned injustice to the applicants.*

At the hearing, the applicants were represented by Mr. Elisaria Mosha while the respondent was represented by Mr. Praygod Uiso, both learned advocates.

Mr. Mosha submitted that, in the CMA Form No. 1 the cause of action was that termination of employment on the basis of operation

requirements was procedurally and substantively unfair. He argued that the applicants did not complain about expiration of contract before the CMA.

He also stated that proceedings before CMA shows that DW1 and DW2 testified separately but their testimony was consolidated by the arbitrator. He faulted that the arbitrator stating that the evidence of DW1 and DW2 was contradictory because DW1 could not prove if the notice was issued to the applicants while DW2 stated that the notice was issued.

The counsel for the applicants also stated that the applicants were not issued with contracts when their employment commenced. There was no evidence to support that some of the applicants had worked for less than 6 months because all the 5 annexures to the affidavit of DW1, including the contracts of the applicants, were not tendered before the Court. Therefore, evidence against the applicants was hearsay.

The counsel for respondent also argued that the CMA award mentions '9 other' applicants without disclosing them and that the respondent could not prove if he was actually facing low business and overstaffing.

The counsel for the applicant further argued that, Evelyn Riwa was not appointed by the applicants to represent them in workers' meeting and that one Kuluthum Masoud was not present in the said workers' meeting of therefore, there was no representation of employee which is contrary to section 38(1) of ELRA.

In rebuttal, Mr. Uiso submitted that, termination procedures were adhered by the respondent and that on 4th of March 2011 the respondent had a meeting with the applicants regarding termination. The minutes of that meeting were tendered as exhibits. He explained that the said minutes shows that Kuluthum Masoud and Evelyn Riwa attended the meeting. He added that the respondent issued to the applicants through a workers' union, CHODAWU, a notice of plans for retrenchment dated 3/3/2011 which was marked "G".

With regards to types of contracts entered by the applicants, he stated that they were fixed annual contracts which expired in 2009 and they were renewed for 2010. That at the time of retrenchment the applicants had served for under 6 months and therefore, they could not file a dispute based on unfair termination because unfair termination does not apply for specific tasks and fixed term contracts. In support of his argument, he referred to the case of **Samira Khamis Kimbwi V.**

Double Tree by Hilton, Revision No. 582/2017, DSM and **Serenity on the Lake Ltd V. Dorcus Martin Nyanda**, Civil Appeal No. 33/2018, Mwanza.

In his rejoinder Mr. Mosha reiterated his submission that there was no evidence to prove that the applicants' contracts were fixed and that claims for unfair termination applies even in fixed term contracts.

Having heard both parties the issues to be determined are:

i. *Who are the proper applicants referred to in this application?*
ii. *Whether there was valid reason for retrenchment.*
iii. *Whether the procedure for retrenchment were adhered.*
iv. *Whether section 35 is applicable to employees with six months employment contract.*
v. *Reliefs entitled to the parties.*

Before responding to these issues, with regard the cause of action, CMA records shows that, following consolidation of 3 disputes, there was an order that CMA Form No. 1 to be amended to include breach of contract as a cause of action.

Now answering the 1st ground, as stated by the counsel for the applicants, the applicants in this matter are those referred to in **Misc.**

Labour Application No. 228 of 2016 before Hon, Mipawa J. In the said application SIJAONA MOSHI was granted leave to file a representative suit to represent her fellow employees in the intended revision application against the CMA.

In the second issue, Section 37 (10 (2) of ELRA CAP 366 RE 2019. The law requires termination of an employment contract to be on valid and fair reason. Retrenchment being one of the ways of termination is supposed to be conducted in compliance with the law.

Having gone through the records, the grounds for termination advanced by the respondent are financial problems and overstaffing. Unfortunately, the records are silence as to the proof of the said grounds. There is no evidence of how the company has undergone economic difficulties and to what extent.

Likewise, the respondent have failed to substantiate the issue of overstaffing and how did the same came into existence. The respondent had a duty to prove that they had valid and fair reasons to conduct retrenchment exercise as per section 39 of CAP 366 RE 2019. The respondent as the employer has a duty to prove that, the said reason exists and not just a shield for retrenchment. I thus find the respondent had no valid reason for retrenchment of the applicants.

Concerning the 3rd issue, the procedure for retrenchment have been stated under section 38 of CAP 366 RE 2019 read together with Rule 23 (4). In the matter at hand, the applicants alleged that the was no proper notice of retrenchment, they were not consulted and for the employees who were not members of the trade union were not represented in the consultation meeting. On the other hand the respondent maintained that the applicants were duly consulted and represented by Evelyn Riwa. Evelyn Riwa stated in her affidavit that she was not a representative of the applicants but one Ms. Sheila asked her to represent the rest of the employees in the workers meeting.

As regard to notice of retrenchment, the law under section 38 (1) (a) of CAP 366 RE 2019, thrusts a duty to the employer to give notice to retrench as soon as it is contemplated.

On records, there's no proof of a notice issued to the applicants on the intended retrenchment. Even DW1 who was the General Manager at the time of retrenchment in his testimony before CMA stated that, he is not sure if notice of retrenchment was issued. I thus find that, the applicants were neither notified on the intended retrenchment nor properly represented in the said retrenchment process.

Further, I find that there was no proper consultation as required by the law under section 38 ELRA. The respondent had a duty to disclose all relevant information on the intended retrenchment, including the details for reasons of retrenchment, method of selection and ways used to minimize retrenchment.

Having gone through the minutes for consultation meeting (exhibit D1), the said minutes do not reveal that the respondent disclosed the details of the reasons for retrenchment and other requirements as per the law.

On the circumstance I find that the procedures for retrenchment were not followed, I thus fault the arbitrators finding that, the respondent adhered to the procedure for retrenchment.

On the 4th issue, the law under section 35 of CAP 366 RE 2019 provides:

> *'The provision of this sub-part shall not apply to an employee with less than six (6) months with the same employer, whether under one or more contracts'.*

Sub-part E is all about principles of unfair termination. The arbitrator partly dismissed the complains to the part who worked with the respondent in less than six months.

I am of a different view with arbitrator on the basis that, the duration referred in that provision is of length of the contract and not the time that the employee has worked with the employer. In the matter at hand, some of the employees had a contract of six months but worked with the respondent in less than six months. On that regard their claim of unfair termination was proper as their contract is not less than six months. I thus find the arbitrator misdirected himself to that effect. I therefore, fault the arbitrator's decision of dismissing the complaint on part of Sijaona Moshi and 17 others.

As regards to parties' reliefs, it has been an established principle and practice of this Court that where a contract of employment is unfairly terminated before expiry of the agreed period, the employee is entitled to salaries of the remaining period of the contract. This position is traced the case of **Good Samaritan V. Joseph Savari Munthu,** Rev. No. 165 of 2011 (unreported) and also found in the cases of **Jonas Oswady V. Cost Data Consultation Limited,** Labour Revision No. 3 of 2020, Mwanza and the case of **Tanganyika Farmers Association Limited V. Njake Oil Company Limited**, Civil Appl. No. 40 of 2005.

Since I found that retrenchment was unfair both substantively and procedurally and taking into consideration that the applicants were

under a fixed term contract, the relief entitled to them is the salaries for the remaining period of a contract.

In the final result the CMA award is hereby revised to the extent that, the applicants be paid the salaries of the remaining period of their respective contracts, save for those whom it is duly proved that their contracts came to an end on the date of retrenchment.

It is so ordered.

L.J. Itemba

JUDGE

16/07/2021