IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 192 OF 2020

BETWEEN

AIRTEL (T) PLC.....APPLICANT

VERSUS

RICHARD NYARUGENDA AND 15OTHERS.....RESPONDENT

JUDGMENT

Date of Last Order: 02/07/2021
Date of Judgment: 06/07/2021

D, P. NGUNYALE, J.

This is revision application against the Award of Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/KIN/R. 961/17 which was delivered on 30/12/2019 by Hon. Kokusuma, L. Arbitrator. **RICHARD BYGONZA NYARUGENDA & 15 OTHERS** the applicant herein, is applying to this Court for an order in the following terms: -

1. This honorable Court be pleased to revise and set aside the whole award of Hon. Belinda; Arbitrator dated 28/12/2018 in Ref No. CMA/KIN/R. 961/17.
2. Any other relief the Court deem fit to grant thereof.

The historical background of the dispute is that the respondents were employed on different dates and position, they were terminated for the reason of retrenchment on 31/07/2017 on such decision the respondents filed the matter at CMA, CMA decided the matter on his favors. Dissatisfied with the CMA's award the applicant filed the present application.

The application is accompanied with Chamber Summons and is supported by Affidavit sworn by Gladys Fimbari, Applicant's legal Officer. The Applicant's Affidavit contains five advanced legal issues for determination. The legal issues are as follows;

i. Whether the arbitrator was right to determine the fairness of respondent's termination where retrenchment agreement is reached by the parties as required by law.

ii. If issue one is answered in affirmative, whether the arbitrator considered the applicant's evidence on record on substantive and procedural fairness of the respondent's termination properly.

iii. Whether there were evidence on record to discredit the retrenchment agreement.

iv. Whether the arbitrator dealt with the parties' evidence on record fairly and equally without applying double standard.

v. Whether there was evidence of special circumstance to justify excessive compensation of 24 months.

At the hearing of the application, the applicant was represented by Mr. Samah Salaha, Advocate, while the Respondent was represented by Mr. Sosten Mbedule, Advocate. Hearing of the application proceeded by way of written submission. Even though applicants' grounds were submitted partly and other grounds were jointly argued, this Court finds wise to number those ground for the purpose of avoiding confusion on the same.

In supporting the application, the applicant's Counsel submitted of ground (d), (e), (f) and (g) jointly and ground (d) and (e), (a) (b) (c), (f) and (g).

On whether the arbitrator was right to discredit the retrenchment agreement, the Counsel submitted the arbitrator erred in law by discrediting the retrenchment agreement on reason of seal without citing any law for such requirement. He stated that respondent owe duty to prove regarding their allegation of the officer who signed the agreement as per section 110(1) of the Law of Evidence Act, Cap 345

R.E. 2019 and this is contrary to what was testified by the DW1. On such basis he of the view that the arbitrator failed to consider applicant's evidence and the reason for decision was not adhered.

On second issue, the Counsel submitted that since retrenchment exercise was implemented in accordance to section 37(2)(b)(ii) of the Employment and Labour Relation Act, Cap 366 of 2019 read together with Rule 23(1)(2) of the Employment and Labour Relations (Code of Good Practice) GN. No. 42 of 2007. The stated that in case parties failed to agree on retrenchment agreement then the matter should be referred to CMA for mediation, things not happened in this matter, this means parties agreed on the same as per section 10 of the Evidence Act, Cap 345 R.E. 2019.

It was further argued that since the reason for retrenchment was communicated to the respondents, and all procedures were followed, the applicant's claim that they were forced to sign without any proof lacks legal stance.

On third issue, regarding the fairness of the reason, the applicant's Counsel submitted that on his findings at page 35 of the CMA's award the arbitrator seems to be aware regarding the reason for the intended retrenchment as evidenced by Exhibit D1, (minutes of

midsession), D4(Group consultation meeting) and D-7 in such circumstance the applicant discharged his duty of proving that there was a fair reason for termination. To back up his argument he cited the case **of Emmanuel Urassa and 10 others. Shaned Networks Tanzania Limited,** Labour Revision No. 467 of 2019, High Court of Tanzania, at Dar es salam (unreported).

On fourth issue, in respect of procedure the Counsel submitted that the applicant conduct retrenchment by adhering Section 38(1) of the ELRA. He adduced that the intended retrenchment involved fair practice which were conducted from 19 to 29 July, 2017 and retrenchment agreement was executed as per Exhibit D1, (minutes of midsession), D4(Group consultation meeting) , D6(invitational to consultation meeting) and D7 to support his submission he cited different cases including the case **Nelson v. Attorney General and Another;** (1999) and EALR 160. Therefore, the retrenchment procedures were adhered.

Lastly, the Counsel I submitted that on issue of excessive award of 24 months as stated at page 47 a CMA award contrary to Section 40(1)(c) of the Employment and Labour Relation Act. Cap 366 of 2019 which demand compensation for unfair termination is 12 months

salaries to support his position he referred this Court in different cases including the case of **Vedastus so Ntulangedka & 6 others Vs Mohamed Trans Ltd,** Revision No. 4 of 2014, H.C. of Tanzania at Shinyanga (Unreported).

Thus, they prayed for the application to be granted, CMA's award to be revised and set aside.

Opposing the application respondents' Counsel submitted that since the contract was not signed by authorizing Officer and lacks a Seal which affect the validity of the contract. He stated that the retrenchment agreements have many weaknesses especially its clauses including that of Michael Mnyabebe under clause 2.2 provides that the complainant was notified, consulted and counseled but the reality is that the respondent was in suspension as per Exhibit AP5 and 6. To cement his position he cited the case of **Tanzania Fish Processors Limited v. Christopher Luhanyula,** Civil Appeal No. 21 of 2010, CAT, (unreported).

It was further submitted that there was no meeting of mind in retrenchment agreement as the same was signed by the person who had no mandate to do so, therefore in such circumstance he was of the view that the agreement lacks binding nature.

On second issue regarding fairness of respondent termination, the Counsel argued that the applicant failed to observe Section 39 and 38 of the Employment and Labour Relation Act, Cap 366 RE 2019 read together with Rule 23 of the Employment and Labour Relations (Code of Good Practices) G.N No. 42 of 2007 which demand the employer to observe procedure in exercising retrenchment and to prove reason on the same.

The Counsel submitted that there was no consultation at all it was just a mere information and the record show contrary as per Exhibit D-5 which is email dated 24 July 2017 shows that, respondents were terminated since 19 July 2017 as indicated at page of the CMA's proceedings.

Regarding the reason for termination the counsel submitted that the applicant failed to establish economic need and the case cited is distinguishable as there is no evidence justify the need of new structure and there was a double standard as it was justified in page 49 of the typed proceedings.

On fourth issue the Counsel submitted that Exhibit D-6 show that there was no consultation, even enough time to discuss the same was not afforded it is just an information and the decision was made and

not aimed to minimize retrenchment. He stated that the intended retrenchment failed to produce old as well as new organization structure to prove reasons for termination.

Lastly regarding compensation, the Counsel submitted that the case cited by the applicant regarding this aspect is distinguishable as since in this application the applicant failed to establish whether the termination was both procedurally and substantively fail. Therefore, the arbitrator acted in accordance with Section 40 (1)(c) of the Employment and Labour Relation Act, Cap 366 of 2019 in such circumstance it was just and fair compensate.

They thus prayed for the application to be dismissed.

Having gone through party's submission this Court finds that the respondent raised the issue of description, names and address of the parties. It is true that in labour laws that the formality of affidavit should complied as per Rule 24(3)(a) of the Labour Court Rules, G.N No. 106 of 2007 things which were not honoured by the applicant for not introducing address of the parties.

However, the question before this Court is whether the failure mention the address of the parties on the affidavit does it render the whole application fatal for the same to be stuck out. This Court has

been insisted in numerous decisions to do away with formalities or technicalities by applying overriding principle in the case of **John Madata v. Republic, Criminal Appeal No. 453 of2017** (unreported). the Court stated that:

> *"...those grounds are new. As often stated, where such is the case, unless the new ground is based on a point of law, the Court will not determine such ground for lack of jurisdiction".*

In such circumstance where the respondent decided to raise the objection at submission stage while he was afforded a time of challenging the same before submission, since this is not jurisdiction matter which can be raised at any stage, I am of view that the same lacks merit. Having finding the issue raised lacks merit this Court find worth to determine the disputed issues; -

i) Whether the reason for termination was valid and fail?

ii) Whether procedures for retrenchment was adhered?

iii) What are the remedies to the parties?

Commencing with determination of the first issue regarding the aspect of substantively fairness, the Employment and Labour Relations Act, 2004 in Section 37 provides that it is unlawful for the employer to terminate the employment of an employee unfairly and put the duty to

prove the reason for that termination was fair to the employee. Section 37 (1) and (2) reads as follows:-

"37 (1) It shall be unlawful for an employee to terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove-

(a) That the reasons for termination is valid;

(b) That the reason is a fair reason-

(i) Related to the employee's conduct, capacity or compatibility; or

(ii) Based on the operational requirements of the employer, and

(c) That the employment was terminated in accordance with a fair procedure."

From the above cited provision make unfair termination to be unlawful and it put to the employer (applicant) a duty to prove the validity and fairness of the reason for termination. The letter of termination in this case shows that the reason for termination was to restructure the organization (Company) as evidenced by exhibit D6(invitational to consultation meeting) and retrenchment agreement

as named as AIRTEL 6 in such circumstance of this case as the applicant intended to restructure the company on its performance the result or changes could not be witnessed before the implementation of retrenchment exercise therefore applicant allegation that there was no changes for the same and no loss lacks merit. This position was also emphasized in the case of **Bakari Athumani Mtandika V. Superdoll trailer Ltd. Labour Revision No.171 of 2013(Unreported)** it was explained that;-

> *"The basic duty of decision maker in unfair termination dispute, operational reasons are raised as a cause for terminating an employee job among issues to be framed should be whether or not operational grounds were genuine reason justifying termination or a pretext."*

In this dispute the reason for retrenchment was given by Stella Luchembe Kibacha - DW1 who testified before the Commission that the reason for retrenchment was to improve working performance of the Company as evidenced at page 3 paragraph 2 of the arbitrator award. It is my opinion that the applicant had a better position to improve her working performance by restructuring the company. Thus I find that the reason adduced by DW1 is a valid reason for retrenchment.

Since I have found out that the termination was by way of retrenchment and that the reason was valid, the next question is if the procedure for retrenchment was adhered by the employer.

The ELRA in section 38 provides for mandatory procedures to be followed during termination based on retrenchment. The section 38(1) reads as follows:

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

From the above provision, the employer is required to comply with 5 principles during retrenchment process. The principles include

notice of any intention to retrench, disclosure of all relevant information on the intended retrenchment, consultation prior to retrenchment and to give the notice for retrenchment.

DW1 who was the only witness of the respondent before the CMA testified that on the June 2017 the retrenchment exercise started its undisputed that the respondents were notified on the same and consultations meeting was conducted as per Exhibit D6 (invitation to consultation meeting) and Exhibit D-4 (minutes of group consultation meeting) and they signed on the same and the meeting was conducted on 21/07/ 2017, during the meeting retrenchment was a main agenda and respondents were present and its undisputed that they were paid terminal benefits as per Exhibit d7 (terminal benefit package). In the meeting the reason for retrenchment was stated. On 31/07/2017 the respondents were terminated. In such circumstance where by respondents received payment after retrenchment exercise and sign on the same. I am of the view that the retrenchment agreement was valid and allegation that the contract was drafted before lacks merit as they agree by signing the same.

Since the respondent observe the required principles as provided by the law as was discussed in the case of **Bernard Gindo and 27**

others v. TOL Gases Ltd, Revision No. 18 of 2012, High Court, Labour Division at Dar Es Salaam, this Court held that various stages are not meant to be applied in a check list fashion, rather are meant to provide guidelines to ensure the consultation is fair and adequate.

It's my finding that the procedure for retrenchment was adhered by the respondent to retrench the applicants. Therefore, termination was both substantively and procedurally fair. Since the termination was fair, I award nothing as the same was already awarded on retrenchment exercise.

In the circumstances, I fault the Arbitrator's award as discussed herein. The application is allowed. I give no order as to the cost of the suit.

D. P. NGUNYALE

JUDGE

06/07/2021