IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT MOROGORO

REVISION NO. 04 OF 2021

RUMISHAEL P. KAWA & 33 OTHERS.....APPLICANTS

versus

GRB MINING SERVICES LIMITED OMBENI.....RESPONDENT

JUDGMENT

30th August & 3rd September 2021

Rwizile J.

RUMISHAEL P. KAWA & 33 OTHERS filed the present application to challenge the decision of the Commission for Mediation and Arbitration (CMA) in labour dispute No. CMA/MOR/46 & 51/2019. They are praying for the orders of the Court in the following terms: -

1. That this Honorable Court be pleased to call for and examine the record of the proceedings of the Consolidated Labour Dispute No. CMA/MOR/46 & 51/2019 to satisfy itself to the illegality, correctness and propriety of the proceedings and the award made thereon.
2. The Honourable Court be pleased to quash the award of the Commission for Mediation and Arbitration dated on 30th day of December 2019, by Hon. Wambali V.

3. Costs of the application be provided for by the respondent.

The application is supported by the applicants' affidavit stating at Paragraph 4 three issues for determination by this court as follows; -

i. Whether the arbitrator properly determined the issues agreed.

ii. Whether termination of the employment of the applicants was in accordance to the valid and fair procedure as required by labour laws.

iii. Whether there was valid and fair reason (s) for terminating the employment of the applicants.

It can be factually briefed that the respondent is a registered company under the law of Tanzania working in the mining sector. It was involved in the mining activities where the applicants were employed on various positions. At a certain point in time, following government ban on the mining activities due to failure of the same to comply with mining requirements. The applicants were terminated on 4th April 2019 for the reason of loss employment resulting from project closure. Aggrieved by the respondent's decision, the applicants unsuccessfully, referred the matter to the CMA, hence the present application.

Before this court, the applicants were represented by Mr. Ambakisye, a Personal Representative, whereas the respondent was represented by Ms. Mbosa, learned Advocate.

Mr. Ambakiyse submitted that the CMA award did not analyse evidence given by the applicants. The reasons for termination were not apparent. He stated that the stop order given, was not to warrant termination as the same was issued to MMC Limited and not the respondent. Therefore, it did not involve the respondent, Ambakisye opined. On the basis, there was no sufficient reason to terminate the applicants. It was further submitted that the respondent (GRB) and MMC relationship are not supported by any evidence to acquire status of being the same.

Ambakisye was of the view that the applicants' termination was contrary to Rule 23 and 24, of the Employment and Labour Relations (Code of Good Practice) G.N 42 of 2007 and Section 38 of the Employment and Labour Relations Act, [Cap 366 R.E 2019].The applicants therefore prayed for the CMA award to be revised.

Ms. Mbosa submitted when opposing the application that exhibit DD-2 (subcontract agreement) which was admitted at CMA without objection established a relationship between respondent's Company and MMC

Limited, on that partnership the stop order (exhibit DD-1) affected the respondent as well.

The Counsel submitted that the provision stated or cited by the applicants are dealing with retrenchment, since the same suits a case where there is change in business, in economic crises or change of technology but the same is not relevant in this application. It was further stated that five witnesses testified and proved so. One of them, it was stated, was Human Resource Officer (HR) who testified that the applicants were consulted before termination. She argued further that the applicants were terminated because there was no any job to do. Therefore, their termination was under section 41 of (1) (ii)(b) of the Employment and Labour Relation Act, [Cap 366 R.E 2019] which demand for the same to be within 28 days. Their contracts were terminated on no notice but they were paid salaries in lieu of it. The learned advocate held the view that CMA award was fair.

In a rejoinder, Mr. Ambakisye submitted that termination did not have consultation because there were no minutes of the meeting as evidence to support the alleged consultation. He added that, on termination the letter is entitled "Kupunguzwa kazini" which is retrenchment.

Therefore, in exercising retrenchment process the respondent had to comply with section 38 of the Employment and Labour Relation Act and Rule 23 and 24 of the Employment and Labour Relations (Code of Good Practice) G.N No. 42 of 2007. It was further submitted that the law requires employers to follow the law not simply terminate employment. Notice cannot be used to legalizing unfair termination, CMA did not receive such evidence of fair termination. On payment, it was argued, they were paid their dues or terminal benefits, which is the salary only. She therefore prayed the CMA award to be revised.

From the submissions, there are two points for determination as follows: -

i) Whether the respondent had contractual relationship with MMC Limited?

ii) whether applicant's termination was fair?

In determination of the first point, the applicant alleged that there was no contractual relationship between respondent and MMC Limited, while the respondent on the other side maintained that there was a relationship between two Companies as evidenced by exhibit DD-2. It is important to note that the disputed issue was not raised at CMA so as to afford an explanation to the other side. In the circumstances, I am of the view that the respondent right to be heard was denied as was held in the case of

Kumbwandumi Ndenfoo v. Mtei Bus Services Ltd, Civil Appeal No. 257 of 2018, Court of Appeal of Tanzania, at Arusha(unreported). But still, I find it prudent to direct my mind on the evidence tendered at CMA. In addressing the same, it was evidenced by exhibit PD-6 which justify the respondent's reasons for termination in connection with MMC limited. likewise exhibit PD6, a notice of termination, which shows the same were terminated due to project closure for there was no work for the applicants. Based on this evidence one could not claim that there was no contractual relationship between the two companies.

In addressing the second point, whether the termination was fair. This Court finds important to refer to the case of **Tanzania Revenue Authority v Andrew Mapunda,** Labour Rev. No. 104 of 2014, where this court held that: -

> *"(i) It is the established principle that for the termination of employment to be considered fair it should be based on valid reasons and fair procedure. In other words, there must be substantive fairness and procedural fairness of termination of employment, Section 37(2) of the Act.*

(ii) I have no doubt that the intention of the legislature is to require employers to terminate employees only basing on valid reasons and not their will or whims."

Starting with the reason for termination, it is undisputed that respondent's project was closed due to non-compliance of the Government directives by (MMC limited) on mining activities. The records reveal that there was loss of jobs which resulted from project closure as evidenced by the notice of termination, exhibit PD6 issued on 4th April 2019. There is no evidence to show when the company regained its mining activities after the project closure. I am of the view that there was a valid reason for termination that resulted from closure of the company activities.

On second aspect of termination, regarding the procedure, the applicant contend that the respondent failed to exercise the retrenchment process as per section 38 of the Employment and Labour Relations Act, read together with Rule 23 of the Employment and Labour Relations (Code of Good Practice) G.N No. 42 of 2007. On the other hand, the respondent was of the opinion that basing on the circumstance of this case, Rule 23(2) of the Employment and Labour Relations (Code of Good Practice) G.N No. 42 of 2007 as well as section 38 of the Employment and Labour Relation Act, are not applicable.

On my party, the CMA record including the notice of termination, exhibit PD-6, states that the reason for applicants' termination resulted from closure of respondent's activities. The factor triggering termination does not fall under Rule 23(2) of the Employment and Labour Relations (Code of Good Practice) G.N No. 42 of 2007 as well as section 38 of the Employment and Labour Relation Act, for the same to be applied.

Further, the parties' contract which is exhibit PD5, states under Article 10.1.1 that, the contract may be terminated by either party upon issuing a one month's notice. In the case of **Simoni Kichele Chacha dhidi ya Avelina M. Kilawe, Civil Appeal No. 160 ya 2018,** Court of Appeal, held that parties are bound by their own agreed terms, also in the case of **Hotel Sultan Palace Zanzibar vs. Daniel Laizer & Another**, Civil. Appl. No. 104 of 2004, it was held as well that: -

> *"It is elementary that the employer and employee have to be guided by agreed term governing employment. Otherwise, it would be a chaotic state of affairs if employees or employers were left to freely do as they like regarding the employment in issue."*

Basing on the above, it is fair to conclude that the parties had their own contract and the same provided procedure to be followed in case of

termination. I share the respondent's view, that the relevant provision is Section 41 (1) (ii)(b) of the Employment and Labour Relation Act, which demand for the notice to be issued within 28 days. There were indeed, no duties to be done, since the core function was the mining project which was closed due to the government directive. Conversely, it is undisputed that the stop order was issued on 11th December 2018 and notice for termination was issued on 4th April 2019, this means, the same was issued after 3 months.

For the foregoing reasons, I am of the firm view that the procedure for termination were adhered to by the respondent. Regarding reliefs, as the termination was both substantively and procedurally fair, I find nothing to award to the applicants as the same was already offered by the respondent during termination. In the end, I find no reason to fault the Arbitrator's finding that the respondent fairly and procedurally terminated applicants' employment. Therefore, this application is devoid of merit and is hereby dismissed. No order as to costs.

AK. Rwizile
Judge
03.09. 2021