IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 972 OF 2019

NYEREMBE NYAMPIGA ..... APPLICANT

AND

ACCESS BANK TANZANIA CO. LTD ..... RESPONDENT

JUDGMENT

Last order 04/10/2021
Date of Judgment 12/10/2021

B.E.K Mganga, J

Applicant entered in unspecified period employment contract with the respondent on 1st August 2018. Place of recruitment was Dar es salaam while place of work was Mbeya. Early December 2018 respondent opted to retrench Credit Department, as a result applicant was retrenched with effect from 22nd December 2018. Aggrieved by retrenchment, on 11th January 2019 applicant filed Labour dispute CMA/DSM/MBEY/10/1029/80 at Mbeya praying to be reinstated without loss of his salaries on ground that there were no valid reasons for termination and that legal procedure were not followed. Later on, applicant prayed the dispute to be transferred from Mbeya to Dar es salaam. On 28th November 2019, having heard

evidence of both sides, Mpapasingo, B, Arbitrator issue an award in favor of the respondent that there were valid reasons for retrenchment and that the procedure was followed. Further aggrieved by that decision, applicant filed a notice of application supported by his affidavit seeking to revise the said award. In the said affidavit, applicant raised six grounds of revision namely:-

1. 1. *That, the Honorable Arbitrator erred in law and fact by failing to realize that the respondent failed to prove that there were sufficient reasons for retrenchment.*
2. 2. *That, the Honorable Arbitrator failed to realize that there were no sufficient reason and no proof of calculation used to select the applicant for retrenchment.*
3. 3. *That, the Honorable Arbitrator erred in law and fact by accepting and relying on the terms of the retrenchment agreement which was contrary to the Labour laws.*
4. 4. *That, the Honorable Arbitrator erred in law and fact by disregarding applicant's evidence EXHIBIT C2 (salary slip) which prove his membership in the trade union called TUICO.*
5. 5. *That, the Honorable Arbitrator erred in law and fact by failing to observe the requirements under section38(1) of Employment and Labour relations Act No.6 of 2004 as amended by section 14 of the Written Laws (Miscellaneous Amendment) Act No. 3 of 2010 in awarding the respondent.*

6. 6. That, the Honorable Arbitrator erred in law and fact by failing to observe the requirements under Rule 23(1), (2), (3), (4), (5), (6) and (7) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007 GN. 42 of 2007.

On 4th October 2021 when this application was called for hearing, Abel Reuben counsel for the applicant prayed to proceed ex-parte as the respondent was served with the application but failed to file a counter affidavit. Mr. Humphrey Mwasamboma, Advocate for the respondent did not resist, correctly in my view, because on 14th July 2020, when the application was called for mention before Hon. Z.G. Muruke, J, Mr. Mwasamboma, counsel for the respondent prayed leave of the court to file counter affidavit out of time as a result the court granted him leave to file counter affidavit within 14 days from that date. In short, the counter affidavit was supposed to be filed on or before 28th July 2020, but no counter affidavit was filed. I therefore allowed counsel for applicant to proceed ex-parte.

In his submission, Mr. Reuben, counsel for the applicant argued ground number 1 and three together that arbitrator erred in law and facts as respondent failed to prove that there were sufficient grounds of termination. He submitted that; arbitrator relied on exhibit C1 instead of

evidence adduced by the parties. He went on that Applicant and respondent did not agree on retrenchment. He submitted further that respondent retrenched applicant based on alleged operational difficulties as per exhibit C3. Counsel submitted further that applicant (PW1) testified that there was no proper explanation as to how respondent was incurring loss although Joseph Nyamonge (DW1) Finance personnel, testified that he did audit and find that respondent was incurring loss.

On ground two, counsel for applicant submitted that arbitrator erred as he failed to analyze that there was no sufficient reason and no proof of criteria for selecting the applicant to be retrenched. He went on that Mujuni Batao (DW3) testified that applicant scored below minimum. It was further submitted by Mr. Reuben that there was contradiction in evidence of DW3. Arguing ground number four, counsel for applicant submitted that arbitrator erred by disregarding applicant's evidence in exhibit C2 i.e.; salary slip that proved that applicant is a member of TUICO. He went on that, there was no Trade Union consulted while applicant was a member hence the procedure was not followed. On ground number five, counsel for applicant submitted that arbitrator erred for failure to comply with Section 38(1) of the Employment and Labour Relations Act [Cap. 366 R.E.2019] as

amended by Section 14 of Written Laws (Miscellaneous Amendments) No.3 of 2010 when held that employer is not bound to follow all requirements under Section 38 Cap. 366, supra. He submitted that, DW3 conceded that Trade Union was not consulted. He submitted further that in terms of Rule 23(6) of GN. No. 42 of 2007 consultation was supposed to be done by engaging the Trade Union, but it was not done. On the last ground number 6 that is all similar to ground number 5, counsel for the applicant submitted that arbitrator failed to observe Rule 23 of GN 42 of 2007. Counsel concluded by praying the application be allowed by setting aside the CMA award and deliver a judgment in his favour by ordering reinstatement without loss of his salaries.

I have carefully scrutinized the evidence of the parties at CMA and submissions of counsel for the applicant in this application and find that the central issue is whether there were valid reasons for termination and whether procedure for retrenchment was followed and reliefs parties were entitled to.

One need to carefully examine evidence adduced by the parties in order to conclude whether there were valid reasons for retrenchment or not. I have examined evidence of Joseph Nyamonge (DW1) who in his testimony,

stated that in September 2017 the bank registered a profit of TZS 873 but from October to December 2017 it recorded a loss of TZS 758. The evidence of this witness is to the effect that, in January to September 2018 the bank recorded a loss of TZS 3.219 billion that forced the bank to reduce cost by closure of some branches and retrenchment of some employees, applicant inclusive. The same evidence was adduced by **Mugini Batao (DW3).** In his evidence, DW3 is recorded saying:-

1. *"Banki ilijiendesha kwa hasara licha ya kuongeza mtaji na kusitisha kuajiri na kutoongeza mikataba ya ajira".*

On the other hand, **Nyerembe Nyampiga (PW1)** in his evidence both in chief and cross examination, testified that employees including himself were informed that respondent opted to retrench some of her employee as she was incurring loss. I should point out evidence of both Joseph Nyamonge (DW1) and Mugini Batao (DW3) were not shaken during cross examination. In my view, there is no ground for disbelieving these witnesses. With that evidence from both the applicant and respondent, it is unjustifiable to criticize the arbitrator that he failed to realize that respondent did not prove that, there were valid reasons for retrenchment. It is my considered view that, reasons advanced by the respondent, is in

conformity with the provisions of Rule 23(2) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 that provide as a general rule, circumstances that can be a base of termination for operational requirement also known as operational retrenchment. To be specific in the application at hand, where witnesses for the respondent testified, and their evidence was not contravened, that the respondent was registering loss, in my view, was clearly covered by Rule 23(2)(a) of the said GN. Reason for retrenchment of the applicant was indicated as due to economic needs that relates to the financial management of the enterprise. In the circumstances where the respondent was incurring loss, despite the fact that she tried to inject capital to rescue the situation, but the same did not help, it cannot be expected to continue keeping employees who at the end will be paid their salaries but suffocating the respondent. The law, especially Labour laws, in my view, is there not to suffocate employers rather, to facilitate business. To force employers to continue keeping employees in circumstances that will kill the business, in my view, is selfish of the highest that is to say; let me get whatever I can to enable my survival, even if the giver(employer) dies and thereafter find another giver or employer who will keep my life safe. This is what I understand the

applicant was pressing unto me in this application. In his evidence, applicant (PW1) testified that a financial expert was not brought to employees specifically to him (applicant) to explain, by evidence, how the respondent was incurring loss. This, in my view, is to stretch the net wide. It will not end up there, as employees will also require to each and every detail of doing that business and profits generated therefrom. In short, this is a demand of unveiling business secrets of the employer with the risk of those secrets being leaked to the business competitors, who at any time can re-employ the said employee. That invitation, in my view, and from where I am standing, cannot be accepted. But this reasoning should also not be used by employers to deny information to employees. Both employer and employees should work at mutual trust keeping in mind that they depend on each other. If one suffocates, the other also stand to suffer. I therefore uphold the decision of the arbitrator that there were valid reasons for retrenchment and hereby dismiss ground one of revision.

Arbitrator is faulted by the applicant in ground number 3 to 6 in essence that retrenchment procedures were not adhered to. In his evidence, Mgini Bitao (DW3) testified that on 4th November 2018, a Notice of retrenchment was issued to employees with measures already taken to avoid

retrenchment and that consultation meeting was held on 7th December 2018. On her part, Grace Metta (DW2) testified that she recorded minutes of consultation meeting (exh. A2) and read over to employees including applicant who, all of them, signed the said minute. She also tendered attendance sheet (exh. A1) that was also signed by employees including the applicant. It is worth to point out here that the said exh. A2 was tendered without objection.

On the other hand, applicant (PW1) in his evidence stated that consultation meeting was held and tendered retrenchment agreement (**exh. C3)**. In his own words, applicant (Pw1) is recorded saying:-

2. "*...Baada ya kuachishwa nilipewa mshahara 1 wa likizo ambayo sijaenda, mshahara wa siku 7 kwa kila complete year ambayo nimefanya kazi, repatriation costs, bonus, mishahara 2 kamili. Repatriation cost nilipewa TZs 1,160,000/=. Sitahili iliyokosekana ilikuwa siku niliyofanyia kazi baada ya tarehe 7/12/2018 ambayo ndiyo ajira yangu ilikoma yaani tarehe 8 mpaka 22 Disemba 2018 ndio siku 15 tulizoambiwa mwisho wa kuwepo kazini ni 709,500/=. Repatriation cost TZS 1,160,000/= tulishindwa kujua kikokotoo gani walitumia kwani haziwezi kunisafirisha na familia na mizigo. Wote tuliotoka Mbeya kuja DSM tulipewa kiasi hicho.* ***Nina mke na Watoto 2 hivyo walitkaiwa kuangalia kuwa nitakaa hotelini kwa muda.***

3. *2014 nilihama kutoka Kahama kwenda Mwanza kM 255 walinilipa TZs 2,940,000/= sasa hivi kutoka Mbeya to DSM KM 780 wana nilipa TZS 1,160,000/=.*

4. ***Kikao cha tarehe 7/12/2018 ilikuwa ni retrenchment, mlalamikiwa alisema amefikia hatua ya kufanya retrenchment kwa sababu ya operational requirement**. Huku akisema kuwa amekuwa akipata hasara...tulitegemea kwenye kikao kile mlalamikiwa amlete mtaalam wa fedha atuambie ni jinsi gani benki inatengeza hasara. Walitutajia tu criteria na uzito wake lakini hakuna mtu aliyesimama na kutuonyesha utofauti wa "team Leader mmoja na mwingine ni hizi na hizi. Utaratibu wa retrenchment haukuwa sahihi n hapakiuwa na sababu za retrenchment. Naomba nilipwe mishahara ya miaka 2 (miezi 24), mshahara wa siku 15 wakati namalizia handing over na anilipe fidia kwa maana ya damage ya vitu vyangu kusafiri kutoka Mbeya mpaka DSM ambayo jumla yake ni malipo ya TZS milioni 37..."*

On cross examination, applicant (PW1) is recorded saying:-

5. *"...**Kwa mujibu wa mkataba nimeanza kazi Access Bank 1/8/2018 na sina Ushahidi kuwa nilianza kazi 28/12/2010**. Nilitaarifiwa kuwa kutakuwa na upunguzaji wafanyakazi...kwenye kikao cha majadiliano sikuuliza swali... **Sina kitambulisho cha TUICO na sina hakika kama kulikuwa na wawakilishi benki.** Sijaleta Ushahidi kuonesha jinsi nilivyohamishwa toka kahama kwenda Mwanza. Kwenye kikao tuliambiwa benki ilikuwa inapata hasara".*

I have carefully examined exhibit A1 namely, Management /Employee Meeting Attendance Form and find that it shows that consultation meeting was held at Access Bank Board Room on 7th December 2018 and that

employee consultation-credit risk name and signature of the applicant is number 22 out of 52 attendants on the list. I have also found that exhibit **A2,** i.e., Minute of the said consultation meeting was signed by attendants including applicant. In the said minute, it is recorded that:

> " *...the employee agree on the retrenchment and consultation process which has taken place today and in principle, employees agrees with management on the matters related to grounds on retrenchment, measures adopted to minimize retrenchment selection criteria, timing of retrenchment and terminal benefit will be paid."*

For the foregoing, in my view, the complaint of non-compliance with procedure of retrenchment anchored on section 38(1)(a), (b), (c), and (d) of the Employment and Labour Relations Act [Cap. 366 R.E 2019] has no merit. This section requires an employer to give notice of intention to retrench, disclose all relevant information on the intended retrenchment, consult prior to retrenchment or redundancy and give notice or consultant with any trade union recognized or registered or an employee not represented by a recognized or registered trade union. In my view, evidence of both DW2 and Dw3 and exhibits A1 and A2 sufficiently proved that the procedure of retrenchment was adhered to. Not only that but also, applicant signed exhibit **A3** credit risk department consent to retrenchment. His name is number 30 in the list.

In his evidence, applicant (Pw1) testified that he was not afforded right to be heard at the consultation meeting and that there was no trade union representative. It is clear that applicant attended consultation meeting and signed the minutes arising from the said meeting acknowledging to have agreed on what was discussed and conclusion reached. He cannot be heard now complaining that he was not afforded right to be heard. He had an opportunity of raising questions and seeking clarification on issues discussed. If he lost that chance or he came up with a different idea later on, that cannot be said that he was not afforded right to be heard. In fact, issues he has raised may amount to an afterthought. The applicant has not disputed to have not signed the said Exhibit A1, A2 and A3. Whatever the case, applicant cannot know say that at the time of signing the said exhibits, his hand did not go together with his brain. If he signed negligently without reading and think critically the effect thereof, that chance has gone hence he cannot complain now. In my view and with that strong evidence, the argument by applicant that he was not afforded right to be heard is feeble and bound to fail.

Applicant faulted criteria for selection of employees to be retrenched for being not clear. This should not detain me. Witnesses for the respondent

testified that criteria for selecting the employee for termination was such as last-in-first-out (LIFO), subject to the need to retain key jobs, experience or special skills, affirmative action and qualifications. Using the Last in, first out (LIFO) criteria, I have found that applicant was well covered. In his evidence under cross examination, he testified that his contract started on 1st August 2018 and that he did not have evidence to prove that his employment commenced on 28th December 2010. It can be recalled that retrenchment was in December 2018. Therefor, applicant had worked only for four months under the contract with the respondent. Applicant might have worked for the respondent for some years before the last contract, but he was among the last in person based on the contract he entered with the respondent. That complaint fails.

Applicant has complained against the money he was paid as repatriation costs on ground it was small. He argued that he had a wife and two children as such respondent was supposed to take into consideration that he (applicant) will stay in a hotel for sometimes in Dar es Salaam. As pointed earlier, place of recruitment of applicant is Dar es Salaam which is why he was repatriated from Mbeya to Dar es salaam. The argument that respondent was supposed to consider the fact that applicant was expected

to stay in a hotel for sometimes while in Dar es Salaam, in my view, lacks legs to stand. Because that is not a requirement of the law. Once repatriated to the place of recruitment it is over. The logic behind, in my opinion, is sound as it is assumed that prior recruitment, an applicant was staying in a house. On repatriation, therefore, an employee is sent back to stay in the house he/she was staying prior recruitment regardless whether he/she had a house or not. To demand an employer to incur cost for hotel bills is to stretch the net too wide. An employee is supposed to create environment as where to stay after termination. I therefore find that the complaint also lacks merit.

For the foregoing, I hereby uphold CMA award and dismiss the application for want of merits.

It is so ordered.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) (Labour Division) DIVISHENI YA MAHAKAMA YA KAZI

B.E.K. Mganga
JUDGE
12/10/2021