IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 372 OF 2020

(ARISING FROM LABOUR DISPUTE NO.CMA/DSM/KIN/235/2020/235)

ANDREW MICHAEL KAHOMBWE.....APPLICANT

Versus

ESTIM CONSTRUCTION CO. LTD.....RESPONDENT

JUDGEMENT

22nd September & 11th November 2021

Rwizile, J

This application is from the decision of the Commission for Mediation and Arbitration dated 30th July, 2020. It is filed by the chamber summons supported by the affidavit of the applicant stating grounds for which the application is founded. Facts paving the way to this application state that, the applicant was employed by the respondent in 2017 as a carpenter. He was terminated on 9th March, 2020, for the reason of operation requirement. Dissatisfied with termination, he referred the dispute to the Commission which was decided in the respondent's favour.

The applicant was not satisfied with the award hence this application. The issues for determination in the view of the applicant are as hereunder;

1. That the honourable Arbitrator erred in law and in fact in not recording properly the testimony by the applicant.
2. That the Honourable arbitrator erred in law and in fact by granting the presence of the consultation meeting while there was no evidence tendered by the respondent.
3. The honourable arbitrator erred in law and in fact in dismissing the applicant's dispute while the respondent failed to adhere to legal procedure for retrenchment.

Mr. Mhando, stood as the personal representative for the applicant and Mr. Mbaga, learned advocate represented the respondent. Hearing of the application proceeded by way of written submissions.

Supporting the application, Mr. Mhando submitted in respect of the first ground that, the decision to terminate the applicant after consultation with the respondent meant, he was an employee who was not in a task force as stated in the termination letter. He asked this court to fetch support in the case of **Director Usafirishaji Afrika vs Hamisi Mwakabala and 25 Others**, Labour Revision No. 291 of 2009 HC (Unreported) at page 4.

It was his submission that there was no evidence proving that the applicant was terminated due to economic hardship faced by the respondent. There were no proved consultative meetings made before termination. Section 111 of the Evidence Act, he submitted, provides that he who alleges must prove.

Arguing the second ground, Mr. Mhando was of the view that the arbitrator misdirected herself in not considering that the respondent had to comply with section 38 of the Employment and Labour Relation Act, [Cap 366 R.E 2019], ELRA. He stated that the arbitrator's decision regarding the procedural aspect of retrenchment exercise, is contrary to the position dealt with by this Court in the case of **Oil Gas & Marine (T) Ltd vs Jovent Mushwaimi & 19 Others.** Revision No. 293 of 2019, HC (unreported) at page 5. He therefore prayed, the application be granted and CMA award to be set aside.

Challenging the application, Mr. Mbaga submitted that the respondent had complied with all requirements of the law under retrenchment exercise as stipulated under Section 38 of the Employment and Labour Relation Act, and Rule 23 and 24 of the Employment and Labour Relations (Code of Good of Practices) G.N No. 42 of 2007. He stated that consultation was

initiated by involving applicant's trade union namely TAMICO and his rights were considered. It was said, he was paid his leave payments, notice and severance pay. All this, it was argued, is a result of consultation meetings. The counsel argued further that if there was any disputed, it should have been challenged at the Commission as per Rule 23 (8) of the Employment and Labour Relations (Code of Good Practice) G.N No. 42 of 2007.

He argued, there was an agreement of reducing employees that resulted from shortage of work. The applicant, he argued as well, did not dispute that there was consultation. The counsel was of the view that consultation was correctly done. To support his stand, he cited the case of **Resolution Insurance Ltd versus Emmanuel Shio & Others, Labour Revision No. 642 of 2019,** High Court of Tanzania, (unreported).

He prayed, this application be dismissed.

My consideration upon going through the submissions and records is to determine; *Whether procedures for retrenchment was adhered to?*

In law, procedure for retrenchment, is provided under section 38(1) of the ELRA, which reads as hereunder: -

In any termination for operational requirements (retrenchment), the employer shall comply with the following principles, that is to say, he 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,

The stipulated procedures under the provisions are mandatory. This means the same must be followed to the letter when an employer contemplates retrenchment. Further, it is also stated under Rules 23 and 24 of the Employment and Labour Relations (Code of Good Practices), GN No. 42 of 2007.

In this application, it is clear that the procedure as to retrenchment was not properly followed. There is no evidence whatsoever that proves retrenchment was discussed. Not even a collective bargaining agreement to justify consultation with the applicant or TAMICO. Since the duty to prove all this is on the employer as stated under section 39 of ELRA. I am of the view that the arbitrator did not properly direct her mind on the retrenchment procedures provided by the law. Therefore, the application is partly allowed.

Regarding the reliefs, this court has found that the respondent had a valid reason to terminate the applicant. However, the procedure for termination was not fair. In the strength of section 40(1) (c) of the ELRA, the applicant ought to be paid atleast 12 months' salary as compensation. But this depends on the circumstances of each case. Since there was sufficient reason to terminate, but the procedure was not followed. I order payment of 6 months' salary as compensation for unfair termination. No order as to costs.

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

A.K Rwizile
JUDGE
11.11.2021