IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT DAR ES SALAAM

REVISION NO. 576 OF 2019

BETWEEN

BARTON SAMWELI & 9 OTHERS ..... APPLICANTS

VERSUS

KAMAKA IT SOLUTION CO. LTD. ..... RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

The applicants were aggrieved by the award of the Commission for Mediation and Arbitration ("CMA") in Labor Dispute No. CMA/DSM/ILA/463/17/875 ("the Dispute") delivered on 13/05/2021. They have lodged this revision under the provisions of Section 91(1)(a),(b),(c) and Section 94(1)(b)(i) of the Employment and Labour Relations Act, 2004, as amended ("ELRA"), read together with Rules 24(1), 24(2)(a),(b),(c),(d),(e),(f), 24(3)(a),(b),(c),(d), and Rule 28(1)(c),(d)(e) of the Labour Court Rules GN. 106 of 2007 ("the Rules"). The application is brought on the following grounds:

1. That the arbitrator dismissed the dispute while disregarding that the matter proceeded with no evidence adduced by the respondent upon its closing the company.
2. The arbitrator dismissed the dispute without recording correctly the evidence presented by the parties and which cause serious miscarriage of justice to the applicants.

The applicants moved the court to revise and set aside the whole of the award. They also prayed for any other relief that the court may deem fit and just to grant. The respondent opposed the application on the ground that the termination of the applicants was for a valid reason following operational requirements after poor performance of the company. Hearing of the application proceeded by orally. In this application, the applicants were represented by Mr. Daudi Maziku Maduki, personal representative and the respondent was represented by Mr. Bakari Juma, learned advocate.

Having heard the applicants in this case, I find that the main issue for determination is whether the applicants were fairly terminated bo substantively and procedurally, the respondent pleaded operatior requirement as a reason for terminating the applicants.

Mr. Madiku's submissions were that the respondent didn't follow the proper procedures before terminating the applicants. That on 27/03/2017 the respondent called a meeting with the applicants, however in the said meeting the officer of the applicant just came to read over to them the decision of the Board of Directors dated 23/03/2017. The said decision was to the effect that the Board had resolved to terminate all the 10 respondents. Therefore on 27/03/2017 the respondents just read over to the applicant the names of those people who were terminated.

In reply, Mr. Juma submitted that the reasons for termination were operational requirements as per the provisions of Section 23(1) of the ELRA. He argued that under Section 38 of the same law and the Rule No. 23, 24 and 25 of GN No. 42/2007, the reason which was the poor performance of the applicant's business which forced the applicant to close his business, was valid.

At this point, I gather that the respondent claims that the applicants were terminated due to operational requirements following poor performance of the respondent company. The issue is what the law says about such situation and whether the respondent complied with the requirements of the law. Section 38(1) cited by Mr. Juma provides that:

(1) 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,

(d) Give the notice, make the disclosure and consult, in terms of this subsection, with-

(i) Any trade union recognized in terms of section 67;

(ii) Any registered trade union which members in the workplace not represented by a recognized trade union;

(iii) Any employees not represented by a recognized or registered trade union.

The first and most important aspect of retrenchment according to the law is the notice of intention to retrench (Sect. 38(1)(a)). However, the notice is not just a simple notice, under the provisions of Section 38(1)(b), it should disclose all relevant information on the intended retrenchment for the purpose of proper consultation. The next question here then is whether such a notice was issued to the applicants. I had to revisit the records of the CMA to see whether that was established.

In the evidence adduced, DW1 was the respondent's lawyer who explained that the retrenchment was due to operational requirements. He testified that the notice was placed in the company notice board. But the notice was not tendered at the Commission to see whether it met the requirements of the Section 38(1)(b). He tendered EXD1, minutes of meeting with the applicants whereby the applicants requested to have a representation from Trade Union or Labor Office. But what does the law say about retrenchment? The law requires the employer to have explained the reason for termination in order to facilitate the process through which

the retrenchment may best be executed. In this case, no notice was tendered.

I have again perused the collective EXD1, the alleged minutes dated 27/03/2017 which are signed by the parties present, however the body of the minutes is cumbersome. It just briefly says "Mr. Peter Lyimo (Mwanasheria) alieleza vizuri kuhusu kufunga Kampuni ya Kamaka IT Solution na walilipokea vizuri". The minutes did not say what exactly what was discussed, it just then set a date for the next meeting. As argued by Mr. Madiku, which I am inclined to agree, the employer just made the parties sign the document and made it look like there was actually a meeting. The reason for closing down of the company was not recorded in the meeting, by implication, it is safe to conclude that the reason was not communicated to the applicants during that meeting. There was another document in the collective D1, minutes of the meeting which did not have any body content on it, the employees were just made to sign the document. Thereafter there was Collective EXD2, the letters of retrenchment issued to the applicant and that is it, the applicants were allegedly retrenched.

Up to this point, there is no evidence that the respondent properly followed the procedure under Section 38 of the Act. The notice was not substantive and the consultations were not proper. The applicants were denied their rights of representation despite the fact that they requested for that right. Hence all in all, the procedures followed for retrenchment were unfair, leaving the applicants with no choice but to sign the letters.

Having found that the procedure was unfair, we now look at the substance, I have done this exchangeable because the two aspects are overlapping in this case. As I have indicated in the beginning, there is no valid reason with evidentiary value that was tendered to prove that the respondent was qualified to terminate the applicants. Explaining the provisions of Section 38 in its wider context, the retrenchment process requires the employer to comply with several procedures because in the labor regime, retrenchment is always said to be the last resort the employer should take in a company's financial crisis situation. That is why the law has been very strict in compliance with the procedure for retrenchment because otherwise, the employers would have been vigorously hiring and firing under the umbrella of retrenchment.

As cited above, Section 38(1) of the ELRA both generally and strictly outlines the requirements employer have to comply with before she decided to retrench. The law requires a retrenchment plan to be made and communicated to the employees. The plan should outline a brief description of the problems the employer is facing, there has to be outlined an analysis of alternatives to retrenchment that have been considered and why retrenchment is the only remaining option to the employer. A description of the retrenchment plan is another crucial element to explain why a certain group of people will be retrenched and those who will remain.

There should also be a consultation process which is a key to comply with the employees fundamental right to be heard before their right to work enshrined under the Constitution of the United Republic of Tanzania (as amended from time to time) is taken away from them. There must also be a transparency in the selection criteria of those to be retrenched. The consultations will facilitate to settle the severance packages and also outline the remedial measures that the employer will take to assist workers during the transition and parties must agree to the procedures to be followed and the implementation schedule of the plan. When all these

procedures are followed, then the substance of the retrenchment may be said to be valid.

In the case at hand, there is a general plea that the company had to close down "kitengo cha uzalishaji" and that is why the applicants were retrenched. It has not been said or proved how the need to retrench was investable. In the absence of what I have outlined above, I agree with the applicants that there was no a valid substance for their termination.

I have further noted that there is another employer Boniface who wrote a letter to the CMA of his intention to withdraw the complaint on the ground that there is hope of re-hiring from the employer. This implies that there were other employees who were re-employed by the same which implies that first the company was not going into liquidation and/or two, under Section 36(v) a failure to re-employ an employee if the employer has terminated the employment of a number of employees for the same or similar reasons and has offered to reemploy one or more of them results into an unfair termination.

That said therefore, the termination at issue falls squarely under Section 37(2)(b)(ii) of the ELRA because the respondent failed to prove the

operational requirement for retrenchment and whether it was communicated to the applicant.

Having made the above findings, I find the termination of the applicants was unfair both substantively and procedurally. The next question is the reliefs that they are entitled to. The CMA award is hereby revised and set aside. Having found that the applicant's termination was unfair both substantively and procedurally, the award of the CMA dismissing the dispute is revised and set aside. The next issue is the reliefs that the parties are entitled to.

Looking at what the applicants claimed at the CMA, their claims are based under Section 40(1)(c) of the Act, compensation of not less than twelve months remuneration. Most of the applicants have worked with the respondent for not more than two years hence they are entitled to a compensation of twelve months remuneration as follows:

1	Barton Samwel	6,346,800.00
2	Mahsudi Ally	4,440,000.00
3	Peter Charles	4,800,000.00
4	Edson Allen	5,040,000.00
5	Doto Kasanga	4,800,000.00
6	Rashid Haruna	4,440,000.00

7	Issa Suleiman	4,056,000.00
8	Abubakar Suleiman	5,040,000.00
9	Ladrof Paulo	4,800,000.00
10	Alanus Timothy	3,600,000.00

The employer is therefore required to pay a total amount of **Tshs. 47,362,800.00** as broken down above. It is so ordered.

Dated at Dar-es-salaam this 15th day of October, 2021

.....

S.M. MAGHIMBI
JUDGE