IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 112 OF 2022

SIMBANET TANZANIA LIMITED ..... APPLICANT

VERSUS

AGNESS MWAMBO ..... RESPONDENT

(From the decision of the Commission for Mediation and Arbitration of DSM at Kinondoni)

(Nyagaya: Arbitrator)

Dated 14th March, 2022

in

REF: CMA/DSM/KIN/R.723/19

EXPARTE JUDGEMENT

22nd September & 4th November 2022

Rwizile, J

The applicant filed this application asking this Court to call for records, revise and set aside the award made by the Commission for Mediation and Arbitration (CMA) in the labour dispute No. CMA/DSM/KIN/R.723/19.

The rise of this application is based on the following facts; that the respondent was employed by the applicant on 04th May, 2017, in a fixed term contract of two years. Due to financial difficulties faced by the applicant in July, 2018, it was decided to integrate its various entities.

The action made some positions to become redundant. The applicant issued a notice of redundancy on 06th August, 2018. On 28th September, 2018 the respondent signed the termination letter which served as retrenchment agreement. The respondent was paid her terminal benefits to wit, a notice, September salary, Severance and Gratuity to the tune of TZS. 9,608,104.00 as net pay from the amount of TZS. 13,809,558.00. Thereafter the respondent filed a labour dispute at CMA alleging breach of contract.

The award was in favour of the respondent. The applicant was ordered to pay the respondent TZS. 16,288,432.00 as salaries for the remaining period of the contract. The applicant was aggrieved hence this application.

The application is supported by the applicant's affidavit sworn by Albert Chamriho, a Human Resource Manager. Grounds for revision are as follows: -

i. *The honourable arbitrator erred in law and fact when she misdirected herself in determining the validity of retrenchment as opposed to breach of contract which is the cause of action that had been pleaded by the respondent.*

ii. *That the honourable arbitrator erred in law and fact by failing to analyse the evidence brought before the commission and hence*

reached to an illogical and irrational award that there was no valid reason for retrenchment and that the procedure was not followed.

iii. *That the honourable arbitrator erred in law and fact by ordering payments of the respondent of salaries for the remaining period of the contract to the tune of Tshs. 16,255,432.00 without considering previous payments done to the tune of TZS. 13,809,558.00 hence double payments.*

The respondent did not enter appearance in Court. The order for substituted service was made on 03rd August, 2022 in two daily circulating newspapers. Both publications were done on 13th August, 2020 in Nipashe newspaper at page 3 and Daily News at page 6. But still the respondent did not enter appearance. The application was therefore heard exparte on 06th September, 2022.

The hearing proceeded was by way of written submission. The applicant was enjoying services of Mr. Philip Lincoln Irungu, leaned Advocate who on the first issue submitted that the respondent filed CMAF1 for breach of contract. He stated that the arbitrator's findings questioned the validity of retrenchment which was never pleaded in the CMAF1. Therefore, he added, the cause of action was breach of contract and not retrenchment.

To support his point, he cited the case of **Faidha Shabani Ally v Brac Tanzania Finance**, Labour Revision No. 12 of 2021, High Court at Morogoro. He continued to argue that since the respondent agreed to receive a retrenchment package, it means she agreed to the retrenchment terms. To cement this, he cited the case of **Mpoki Mwangalaba v Achelis Tanganyika Limited**, Labour Revision No. 39 of 2021, High Court at Dar es Salaam.

He stated that the issue of validity of retrenchment was never framed by CMA and parties were not afforded with the right to be heard.

On the second issue, he submitted that the applicant had valid reasons for termination as provided under rule 23(1) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007. He said, the reason is structural changes due to financial difficulties. It was insisted that the situation prompted to reduce running costs of the company and that employees were informed. He stated further that retrenchment was not an issue to be proved because, it was not in dispute as it was in the case of **Resolution Insurance Ltd v Emmanuel Shio & 8 Others**, Labour Revision No. 642 of 2019 (unreported), High Court at Dar es Salaam.

On procedural fairness, it was submitted that the applicant followed proper procedure for retrenchment as provided for under section 38 of Employment and Labour Relations Act [CAP. 366 R.E. 2019] read together with rule 23(4), (5) and (6) and rule 24 of G.N. No. 42 of 2007. For him a notice of redundancy, emails which are exhibit D1 was for consultation meeting and payment of terminal benefits, all meant a procedure for retrenchment was followed.

He further submitted that the employment contract, exhibit A1, under clause 5.1, provided that each party may terminate the contract of employment by giving one month termination notice. The applicant issued the notice in compliance of clause 5.1 of the contract of employment. This, he argued, is in line with section 38(1) of Employment and Labour Relations Act [Cap R.E. 2019] and rule 8(2)(d)(i) of G.N. No. 42 of 2007.

It was the learned counsel's argument that failure to submit the structural changes cannot vitiate the whole retrenchment process as facts of economic crisis and merger of companies were objected hence a single document cannot destroy the whole essence of retrenchment. To support his point, he cited the case of **The Registered Trustees of Rulenge Ngara Catholic Diocese v Theresia William**, Labour Revision Application No. 07 of 2019, High Court at Bukoba.

He stated further that the respondent was not in any trade Union and that the procedure provided under section 38 of ELRA cannot be applied simultaneously. In support was the case of **Airtel (T) Plc v Richard Nyarugenda and 15 Others**, Revision No. 192 of 2020, High Court at Dar es Salaam. He then finalized by stating that the applicant followed both substantive and procedural law on retrenchment of the respondent.

On the third issue the advocate for the applicant submitted that the arbitrator wrongly awarded the respondent as she already received her retrenchment package as per section 38(1)(v). For him the award makes the payment to be double. He lastly prayed for the award to be revised and quashed.

Having heard the submissions, I have to start determining the first point as it was raised, which states thus; *whether the honourable arbitrator erred in law and fact when she misdirected herself in determining the validity of retrenchment as opposed to breach of contract which is the cause of action that had been pleaded by the respondent.*

Going through CMA records, it is clear that the dispute in CMAF1 was breach of contract. Breach of contract is one among ways of terminating employment. The law on termination under section 37(2) of the ELRA provides that: -

"A termination of employment by an employer is unfair if the employer fails to prove-

a) that the reason for the 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."

The onus of proving whether termination was fair is to the employer under section 39 of the Act. In terms of rule 9(1) of G.N. No. 42 of 2007 an employer shall follow a fair procedure before terminating an employee's employment which may depend to some extent on the kind of reasons given for such termination.

In this case, it was the applicant who was supposed to prove whether there was reason for termination and if the procedure was followed. By looking at CMA records especially on exhibit A2 (termination letter) it

stated that; termination of the respondent's employment was by way of redundancy. For easy reference it is stated as hereunder: -

> *"RE: TERMINATION OF YOUR EMPLOYMENT THROUGH REDUNDANCY*
>
> *We refer to the notice of intended redundancy issued to you on 6th August 2018 and the staff memo to all employees on 3rd August 2018.*
>
> *As you are aware, Wananchi Group made a decision to integrate the various Business units, Cable, DTH, Simbanet, Wananchi Telecom and Isat so as to leverage on the synergies and available resources across the Group. As a result of this integration and alignment of the new reporting structures, the purpose of this letter is to confirm the outcome of a recent review by the Company of its operational requirements and what this means for you.*
>
> *As a result of integration and consolidation of the entities operations, your position of Team Leader Project is now redundant. Regrettably, this means your employment with the company will terminate on account of redundancy as of 30th September 2018."*

As shown above the nature of termination of contract is by retrenchment, hence one cannot avoid to discuss compliance of the law on retrenchment. I find no reason to fault the arbitrator on this point. This point for revision has no merit.

The second ground is *whether the honourable arbitrator erred in law and fact by failing to analyse the evidence brought before the commission and*

hence reached to an illogical and irrational award that there was no valid reason for retrenchment and that the procedure was not followed.

Rule 23(1) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007 provides for retrenchment to be grounded on reasons. It states as hereunder;

> *"A termination for operational requirements (commonly known Operational as retrenchment) means a termination of employment arising from the requirements operational requirements of the business. An operational requirement is defined in the Act as a requirement based on the economic, technological, structural or similar needs of the employer."*

In the records, there is no evidence stating reason for retrenchment to be for economic difficulties, the applicant faced. There are only mere words of the applicant's witnesses. I agree with the arbitrator that there are no proved reasons for retrenchment.

On an issue of procedure for retrenchment; section 38 of the ELRA provides that procedure has to be followed. To include giving the notice of retrenchment when it is contemplated, disclose retrenchment information for consultation and do consultations among many others.

The CMA records, a notice of redundancy- exhibit D2, it is evident that there were no further measures or actions taken by the applicant to mitigate the problem as shown hereunder;

> *"RE: NOTICE OF INTENDED REDUNDANCY*
>
> *Reference is made to the staff communique of 31st July 2018 that outlined the business decision to integrate Zuku Cable, Zuku DTH, Simbanet entities, Wananchi Telecom and Isat entities. This decision is informed by the need to leverage and consolidate our investment through the integration of various Group companies. As a result of this integration and alignment of the new reporting structures, we regret to inform you that a number of positions in the organization will be affected...*
>
> *This notice is given in accordance with the requirements of the Employment and Labour Relations Act, 2004 section 38. Upon the lapse of the notification period, affected the employees will receive a formal notice of termination on account of redundancy and will be paid in accordance with the law and their terms of employment."*

It can be deducted from the notice above that it was given on '6th August, 2018 and termination letter is dated 28th September, 2018. As the advocate for the applicant stated, consultation with the respondent was through emails (attached as exhibit D1 collectively. Both do not show anything that was discussed concerning retrenchment. They are

notification calling the employees. There is no evidence therefore to prove whether the meeting was held or who attended the said meeting. Exhibit D2 stated, the employees will be provided with the formal notice of termination. In the case of **Antony M. Masanga v Penina (mama Mgesi) and Lucia (mama Anna)**, Civil Appeal No. 118 of 2014 (unreported) as was cited in the case of **Mustafa Ebrahim Kassam T/A Rustam and Brothers v Maro Mwita Maro**, Civil Appeal No. 76 of 2019 Court of Appeal of Tanzania at Dar es Salaam at page held 18 that, generally in civil cases, the burden of proof lies on the party who alleges anything in his favour.

It has been abundantly clear that even the procedure for terminating employment of the respondent was not followed. In the circumstances the arbitrator had valid reasons to find as he did. This ground also lacks merit.

On the third issue; *whether the honourable arbitrator erred in law and fact by ordering payments to the respondent of salaries for the remaining period of the contract to the tune of Tshs. 16,255,432.00 without considering previous payments done to the tune of TZS. 13,809,558/= hence double payments.*

It has been held that the applicant retrenched the respondent without reason and did not follow the procedure.

It is also proved that the respondent was paid her terminal benefits. Exhibits D3 and D4 show there were transfers from the applicant's bank account to the respondent's, the sum of TZS. 4,608,104.00 (NBC) and TZS. 5,000,000.00 (CRDB) on 31st October, 2018. The respondent agreed that the CRDB account was credited the money by transfer. For that matter the respondent was paid a total sum of TZS. 9,608,104.00

As the employment contract stated; the respondent's monthly salary was TZS. 2,036,054.00, as per exhibit A1 an employment contract. It shows the respondent was employed on 04th May, 2017 in a two years term. He was terminated on 03rd September, 2018. This means the remaining period of the employment contract was 8 months. In the circumstances the respondent was supposed to be paid TZS. 16,288,432.00 as was ordered by CMA.

The CMA had to consider that the respondent was already paid as terminal benefits the sum of TZS. 9,608,104.00, it ought to be deducted. Therefore, the applicant to pay the respondent the remaining amount after the deduction of the already paid amount which is TZS. 6,680,328/=.

Having so held, this ground has merit. The application therefore is partly allowed to the extent explained, no order as to costs.

X

Signed by: A.K.RWIZILE

A. K. Rwizile

JUDGE

04.11.2022