IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 179 OF 2022

(From the decision of the Commission for Mediation and Arbitration of DSM at Morogoro) (Makanyaga: Arbitrator) dated 29th March 2022 in Labour Dispute No. CMA/MOR/67/2020

STEVEN NKOMOLA.....APPLICANT

VERSUS

MUHOJI GENERAL SUPPLIES LTD.....RESPONDENT

JUDGEMENT

K. T. R. MTEULE, J.

11th November 2022 & 28th November 2022

This is a revision application arising from the award issued in **Labour Dispute No. CMA/MOR/67/2020** from the Commission for Mediation and Arbitration of Morogoro, (herein after referred to as CMA). Aggrieved by the award, the applicant has filed this application praying for the orders of this court to call for the CMA record of the aforementioned Labour Dispute, revise the proceedings, quash and set aside the award thereon and for orders to grant any other relief as this Court may deem fit and just to grant.

What I gather from the CMA record, applicant's affidavit, and the Respondent's counter affidavit is briefly explained hereunder. The applicant was employed by the respondent as Electrical Engineer. On

28th March 2020 he was retrenched for what the respondent claimed to be the reason of financial constraints in running her business. Being dissatisfied with the retrenchment, the applicant referred the matter to the CMA. Having found the retrenchment to be fair in terms of procedure and reason, the CMA awarded nothing to the applicant hence this application.

Along with the Chamber summons, in support of the application, the affidavit of the applicant was filed, in which after elucidating the chronological events leading to this application, the applicant claimed that he was unfairly retrenched. The Applicant challenged the arbitrator's findings that the retrenchment exercise was lawfully performed. According to the affidavit, the retrenchment exercise was initiated during his suspension pending investigation of theft which occur at workplace. Two grounds of revision have been raised in items 3.1 and 3.2 of the affidavit to wit:-

> *"3.1 That, the Honorable Arbitrator immensely erred in law and facts for holding that the employer had a valid reason of retrenching the applicant and procedure were followed.*

3.2 That, the Honorable arbitrator erred in law and facts for holding that the applicant was not terminated but he was retrenched."

The application was contested by the respondent vide counter affidavit which denied invalidity of the reason in the retrenchment exercise. The respondent further disputed any existence of procedural irregularities in retrenching the applicant on the reason that the exercise was already initiated before investigation. He stated that the investigation process could not bar respondent's operations relating to her business.

On hearing of this application, the applicant was represented by Mr. Prosper Mrema, Advocate, whereas the respondent was represented by Mr. Richard Mote, Advocate. The hearing proceeded by a way of oral submissions.

With regards to the reason Mr. Mrema submitted that the reason for retrenchment came as an afterthought, on the reason that applicant was terminated while he was on suspension as per Exhibit P-1 (suspension letter). He stated that even though it may be true that the respondent contemplated to have the retrenchment exercise, but it was supposed to be exercised in accordance with **Section 38 of the Employment and Labour Relation Act, Cap 366 R.E 2019** which requires an employer

implementing retrenchment in terms of economic, technological or structural changes, to consult the employees or registered trade union if it exists at the workplace. Mr. Mrema submitted that there was a Trade Union at respondent's workplace which is recognized as an exclusive bargaining agent, but the respondent did not bother to give any notice to that Trade Union namely TUICO.

It was further submission by Mr. Mrema that the record of CMA reveals nothing regarding notice of retrenchment neither to the applicant nor the Trade Union. In absence of notice and minutes of retrenchment, he is of the view that the respondent had no valid reason for retrenchment.

It was further submitted that the arbitrator erred in law by relying on Exhibit M1 &M2 which is the letter requesting for an outstanding balance of the amount with the Tanzania Revenue Authority and letter of closure of Business operation respectively, on the reason that those two exhibits were not disclosed anywhere during the retrenchment exercise, but it come to be disclosed before the CMA.

On procedural irregularities, Mr. Mrema submitted that for any termination by retrenchment to be procedurally fair, the employer must adhere to **Section 38 (1) (a) (b) (c) (d) of Cap 366 R.E 2019**. He added that under **Rule 23(4) of the Employment and Labour**

Relations (Code of Good Practice) Rules G.N No. 42 of 2007, emphasizes on the purposes of consultation as per **Section 38 of Cap 366**. In his view, it is clearly reflected that procedural and substantive aspects must be adhered to for an exercise of retrenchment to be adequate and fair, but the employer failed to comply.

On second ground of revision Mr. Mrema submitted that the Hon. Arbitrator erred in law and facts in holding that the applicant was not terminated but retrenched. According to him, **Rule 9(4)(d) of the Employment and Labour Relations (Code of Good Practice) Rules G.N. No. 42 of 2007** allows operational requirement to be among the reasons under which the employer can terminate an employee. He is of the view that retrenchment is a form of termination, and the arbitrator was wrong in holding that the applicant was not terminated but retrenched as stated at page 9 of the CMA award. They thus prayed for the CMA award to be revised and set aside.

Opposing the application regarding the **first** ground of revision, Mr. Motey referred to the reasons for retrenchment indicated in paragraph 2 of the respondent's counter affidavit as referred to by the arbitrator at page 9 paragraph 2 of his award and submitted that since the retrenchment exercise was initiated before suspension, then it could not

bar the respondent from proceeding with retrenchment exercise. To support his contention, he cited the case of **Mainline Carries Limited vs. Delifrida Filbert, Labour Revision No. 264 of 2019,** High Court of Tanzania, Labour Division, at Dar es salaam, (unreported) which held that the employer could proceed with retrenchment exercise even at the time when the employee was on suspension.

According to Mr. Motey in the retrenchment process, the procedures were followed, as all the staff members including the applicant were called in a meeting to discuss the need for the respondent to conduct the retrenchment and the intended closure of business due to economic reasons. He stated that the meeting was conducted orally, and the applicant admitted that there was such a meeting.

Mr. Motey further submitted that it is true that **Section 38 of the Employment and Labour Relations Act, Cap 366 R.E 2019** sets mandatory requirement to be complied with in retrenchment, but such provision does not require each and everything to be reduced into writing. He stated that various stages are not meant to be applied in a check list form as was held in **Mainline's case (supra)**.

Regarding the **second** ground of revision that the applicant was retrenched and not terminated, Mr. Motey is of the view that, it was a minor error, but the arbitrator held that the applicant was retrenched.

On the relief, Mr. Motey submitted that, paragraph 4 (2) of applicant's affidavit states clearly that the prayer is for award of 12 months. He wondered how the counsel prayed for 24 months remuneration.

Making reference to paragraph 6 of the affidavit, Mr. Motey stated that during mediation, the applicant and the respondent signed an agreement where he was paid **TZS 4,590,936**. He further added that if you go through Form No. 6 in CMA record, it is stated that the nature of dispute is "kuachishwa kazi". According to Mr. Motey, the 1st paragraph indicates that parties agreed to this amount, therefore, the claims by the applicant have no legs to stand as he was already paid. In view of that, he is praying for the Court to dismiss this matter for lack of merit.

Mr. Mrema made a rejoinder, where he emphasized that the applicant was paid terminal benefits only, as reflected at page 11 last paragraph of the CMA award and not the claims regarding the allegation of unfair termination. He stated that the law does not allow retrenchment consultation to be held orally. He added that there must be a document

to keep the record of the reasons and procedures used in the retrenchment exercise.

Mr. Mrema submitted that nowhere has the applicant admitted that he was called in consultation meeting. According to him, the only meeting the applicant held with the respondent was a production meeting and not the retrenchment meeting.

From the submissions made by both parties, the applicant's affidavit, the Respondent counter affidavit and CMA record, I formulate two issues for determination. **Firstly, whether the applicant has provided sufficient ground for this Court to revise and set aside the CMA award** and **secondly, to what reliefs parties are entitled?**

In addressing the above issues, the grounds identified in the affidavit will be considered in a chronological order as presented in the parties' submissions. Starting with termination, it is common that fairness is assessed in two aspects which are reasons and procedures. According to the record, it is apparent that the type of termination in question is based on retrenchment. The 1st ground of revision which will be addressed first, concerns the fairness of the said retrenchment. The epicenter of parties' arguments in this ground is based on whether the retrenchment exercise was substantively and procedurally fair.

Section 37 of the Employment and Labour Relations Act, 2004 provides that it is unlawful for the employer to terminate the employment of an employee unfairly. As well, **Section 39** of the same Act imposes on the employer a duty to prove that the reason for any termination was fair to the employee. Section 37 (1) and (2) reads as follows:-

> ***"37 (1) It shall be unlawful for an employer to terminate the employment of an employee unfairly.***
>
> ***(2) A termination of employment by an employer is unfair if the employer fails to prove:-***
>
> ***(a) That the reason for 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 above provision makes unfair termination to be unlawful unless the employer (applicant) proves the validity and fairness in both reason and procedure. **Was the retrenchment fair in this matter?**

It is apparent that the nature of the termination in this matter is based on **Rule 37 (2) (b)** (ii) which is (ii) which is the operational requirements of the employer.

In the CMA, the arbitrator found that the retrenchment exercise was substantively and procedurally fair. Mr. Mrema is challenging the CMA findings. According to him, the retrenchment came as an afterthought, because the applicant was terminated while he was on suspension, and no proper consultation was made, hence no valid reason for termination.

On the other hand, Mr. Motey for the respondent maintained that since the retrenchment exercise was initiated before suspension, it could not bar the respondent from proceeding with retrenchment exercise. He contended that all the procedures were duly followed during the retrenchment.

The reasons advanced by the respondent for the retrenchment exercise was the financial constraint which necessitated the closure of the business. The respondent justified this reason by Exhibit M-2 (respondent's outstanding tax liability) which was issued on 16th January 2019 and Exhibit M-3 (respondent's closure of the business operation). Further Exhibit P-1 (applicant's suspension letter) shows that suspension of the applicant was done on 17th February 2020 which means the

respondent started to experience financial constraints before the applicant's suspension. In such circumstances, the retrenchment cannot be said to be an afterthought because the reasons for retrenchment existed before the suspension.

As to whether financial constraints in business operation constitute a good reason for termination, I will rely on the decisions in **Bakari Athumani Mtandika V. Superdoll trailer Ltd, Labour Revision No. 171 of 2013 (Unreported)**; and **Security Group (T) Ltd. Vs. Samson Yakobo and 10 Others,** Civil Appeal No. 76 of 2016 **(Unreported)**. In **Bakari versus Superdoll,** it was stated that the basic duty of a decision maker in unfair termination dispute where operational reasons are advanced as causes for terminating an employee, include to inquire whether operational grounds were genuine reason justifying termination or a pretext.

In the instant matter it is undisputed that there was a financial constraint in the respondent's business which necessitated the closure of the business as per Exhibit M-3 (respondent's information to TRA regarding closure of the business). What constitute operational requirement is defined by **Section 4 of CAP 366 RE 2019 as**:-

"Operational requirements" means requirements based on the economic, technological, structural, or similar needs of the employer".

From the above definition, operational requirement can be based on economic needs. In my view financial constraints as the case in this matter, amounts to such economic needs. Basing on the above legal interpretation, I am of the view that financial constraints being economic need, attracts operational requirement which may warrants retrenchment exercise to be implemented at workplace. In this regard I will find that there was a valid and fair reason for the retrenchment exercise. I therefore agree with the arbitrator's findings regarding fairness of reason for retrenchment.

Having found that the termination was exercised by way of retrenchment and that the reason was both valid and fair, the next question on the first ground of revision is whether the procedure for retrenchment was adhered to by the employer. Arguing in this aspect of termination Mr. Mrema rejoined that the record reveals nothing about notice of intention to retrench and the minutes of consultation meeting. He is of the view that there was no proper consultation in implementing the retrenchment exercise.

Disputing procedural irregularities Mr. Motey stated that the, procedures were followed, as all the staff members were called in a meeting including the applicant to discuss the need of the respondent to conduct retrenchment and the intended closure of business due to economic reasons. He stated that the meeting was conducted orally, and the applicant admitted that there was such a meeting.

In resolving this debate, the relevant provision to be invoked is **Section 38 of Employment and Labour Relation Act, Cap 366 R.E 2019** which reads as follows:-

> ***"38.-(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."

From the above provision, the employer is mandatorily required to comply with the principles enumerated therein during retrenchment process. These principles include notice of intention to retrench, disclosure of all relevant information on the intended retrenchment, consultation prior to retrenchment and issuance of notice for retrenchment.

Section 38 (1) (d) (i) to (iii), it is very clear that consultation needs to be done to a registered and recognized trade union or the employees

who are not the members of such kind of a Trade union. The arbitrator took note of the evidence given by both parties where DW1 claimed that the respondent notified the applicant on the status of the economic performance of the respondent and the possibility of retrenchment shall the company proceeds with such poor performance. At the same time, the applicant is denying having been involved in any meeting to discuss retrenchment. Whether the evidence of DW1 sufficiently disclosed existence of consultation meeting is a question which struck my mind. What I note from DW1, there is a claim that the respondent notified the parties about the possibility of retrenching some employees if the economic situation won't improve, and after these meetings, not a long period passed before the respondent started to retrench some employees. It is not known if the actual decision of retrenchment was really discussed in the meeting apart from the notification of its possibility shall the situation continues with that economic hardship. Whether the situation improved or not so as to decide to retrench or not, this information was not brought back to the employees.

In my view, since the existence of the consultation meeting was a debated issue, the minutes of the meeting was important to prove what transpired. The respondent claimed that the consultation was done orally. It is the duty of the employer to keep record of the employment.

(See Section 15 (5) of Cap 366 of 2019 R.E). As well, an employer has a duty to prove the fairness of termination pursuant to **Section 37 & 39 of Cap 366 of 2019 R.E**. The missing evidence ought to have been given by the employer who is the custodian of employment record and who is liable to bear the burden of proof in fairness of termination.

In this respect, I am inclined to differ with the arbitrator's findings that there was fair procedure in retrenchment exercise on the reason that no sufficient evidence to prove that there was consultation meetings prior to retrenchment.

From the above legal reasoning it is my holding that in terminating the applicant's employment retrenchment exercise was not fair in terms of procedure for the omission to consult the employees or the Trade Union.

On **second** ground of revision as to whether the Honorable arbitrator erred in law and facts in holding that the applicant was not terminated but he was retrenched, the law is very clear under **Rule 9(4)(d) of the Employment and Labour Relations (Code of Good Practice) Rules G.N. No. 42 of 2007** that operation requirement is one of grounds for the employer to terminate an employee. That means retrenchment is one of the mode of termination. Under such circumstances I agree with the applicant's Counsel that retrenchment is

the form of termination. On such basis I am of the view that the arbitrator erred in law in holding that the applicant was not terminated but retrenched as stated at page 9 of the CMA award on the reason that retrenchment is a form of termination.

The above two findings confirm a need to revise the CMA award, and therefore the first issue as to whether the applicant has adduced sufficient reasons to revise the CMA award is answered affirmatively.

Now comes the issue as to what are the reliefs entitled to parties. Unlike the arbitrator in the CMA, I have found that the respondent had fair reason to terminate the applicant, but she did not comply with fair procedure. This means the termination was unfair in terms of procedure. Therefore, the applicant is entitled to compensation for such unfairness.

The applicant claimed to be compensated 12 months remuneration. When unfairness is based only on procedural irregularity with fair reasons, the compensation cannot be as equal as when the fairness is on reason or on both reasons and procedure. In the case of **Felician Rutwaza v. World Vision Tanzania,** Civil Appeal No. 213 of 2019, CAT at Bukoba (unreported). It was held; -

> *".....Under the circumstances, since the learned Judge found the reasons for the appellant's termination were valid and fair, she*

was right in exercising her discretion ordering lesser compensation than that awarded by the CMA....."

Guided by the above authority, the minimum amount of compensation provided under **Section 40 of Employment and Labour Relation Act, Cap 366 R.E 2019** seems to be disproportionate to the procedural unfairness in this matter. I find it excessive to award the applicant 12 months remuneration as compensation for a matter where unfairness is based on only one among several procedures. In my view, 6 months remuneration is sufficient to compensate the unfairness in the procedure.

The application is therefore allowed. The CMA award is hereby revised and set aside. The applicant is awarded compensation of 6 months for unfairness in the procedure of retrenchment. I give no order as to the costs.

Dated at Dar es Salaam this 28th day of November 2022.

KATARINA REVOCATI MTEULE
JUDGE
28/11/2022