IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 13 OF 2022

Arising from the decision of the Commission for Mediation and Arbitration of Dar Es Salaam in Labour Dispute No. CMA/DSM/ILA/I245/2016 by (Hon. Abdallah, Arbitrator dated 15th January 2021)

BETWEEN

ELIZABETH OWEN CHIGALA .....APPLICANT

VERSUS

THINAMY ENTERTAINMENT LIMITED..... .....RESPONDENT

JUDGMENT

K.T.R. Mteule, J

07th December 2022 & 13th December 2022

This is an application for revision seeking for this court to call for the record of Labour Dispute **No. CMA/DSM/ILA/I245/2016** from the Commission for Mediation and Arbitration of Dar Es Salaam (CMA).

The applicant is a former employee of the respondent who had a one-year fixed term contract which was running from 1st October 2014 to 31st August 2015 (**See Exhibit D-1**). On 8th December 2016 the respondent issued a notice of non-renewal of contract due to operational requirements. Being dissatisfied with the termination, the Applicant lodged a complaint before the CMA vide the impugned **Labour Dispute No. CMA/DSM/ILA/1245/2016** claiming to have been

unfairly terminated. The CMA found that the respondent had a valid and fair reasons for termination and that she followed all the required procedures and decided the matter against the applicant.

Aggrieved by the decision of the CMA, the applicant preferred this application for revision advancing in her affidavit the following grounds:-

1. That the Arbitrator erred in law and fact by deciding in favor of the respondent although the respondent failed to produce relevant written documents to support its arguments;
2. That the Arbitrator acted and occasioned material irregularity after failing to determine their fair reasons leading to the termination of the applicant herein;
3. That the Arbitrator occasioned material irregularities when she acted on mere assertion of the respondent's witnesses;
4. That the Arbitrator occasioned material irregularities when she failed properly to discuss the cause of action, material things and issues framed before him;
5. That the Arbitrator occasioned material irregularities when she failed to properly address herself with the rules/Law of evidence in proving cases.

According to the affidavit, while on leave, the Applicant received termination letter with alleged economic reasons. She blamed the arbitrator of having exercised his jurisdiction with material irregularities with errors material to the merit occasioning injustice.

The Application is contested by the applicant through a counter affidavit sworn by the Respondent's Principal Officer one Alex Massawe. Through the counter affidavit, the applicant disputed all the material facts of the case.

The Application was heard by a way of written submissions. The applicant is represented by Ms. Blanca Ligema, Advocate while the Respondent by Mr. Tesiel Kikoti, Advocate. Both parties filed their submissions.

Beginning by exploring on the legal position guiding termination of employment, Ms. Ligema referred to **Section 38 (1) of The Employment and Labour Relations Act, Act No. 6 of 2004, (Cap 366 of 2019 R.E.)** and **Rule 23(4) of Employment and Labour Relations (Code of Good Practices) Rules, (G.N. No. 42 of 2007)** both providing for the procedures to be adhered to in any termination for operational requirements (retrenchment). According to her the provisions places on the employer the obligations to ensure compliance

in both procedure and substance particularly embracing the purpose of consultation required by **Section 38 of Cap 366 cited supra** in a manner which permits the parties' discussion, in a form of joint problem-solving exercise, to reach agreement.

Ms. Ligema alerted the court on its duties under the provision to ensure that operational reasons are not used by employer as a cover up to terminate employees unfairly. To support this position, she cited the case of **Bakari Athuman Mtandika v. Superdoll Trailer Ltd Revision No. 171 of 2013 High Court of Tanzania Labour Division. at Dar Es Salaam**, cited in the case of **Ringo R. Moses v. Lucky Spin Ltd (Premier Casiono) Revision No. 541 of 2019,** in the High Court of Tanzania Labour Division at Dares Salaam (Unreported) at Page 3, where it was held that operational reasons should not be used by the employer as pretext to terminate an employee unfairly at the employer's will.

Ms. Ligema, submitted that according to the evidence on record the Respondent contravened the mandatory requirement by not holding a consultation meeting prior to retrenchment. According to her, the evidence shows that the Respondent just issued a notice to consultation meeting, but the said meeting was never conducted. Referring to CMA

record, she stated that only two managerial officials of the Respondent appeared and testified that the meeting was conducted but none of them produced signed minutes of the meeting showing the deliberations therein and the agreement reached. She submitted that the Respondent failed to call any other employee to testify on that rather than the two Human Resource Officials who are managerial carder.

Ms. Ligema submitted further that the Respondent was duty bound to ensure that all requisite procedures have been followed including maintaining all documents such as general notice to all employees, invitation to consultation to the affected employees, retrenchment agreement, signed minutes of the meeting including signed attendances and termination letter. Ms. Ligema faulted the Hon. Arbitrator asserting failure to consider insufficiency and irrelevance of the evidence submitted by the respondent to prove consultation meeting and matters agreed including selection criteria for the employees to be retrenched. In her view, this is contrary to **Section 39 of the Employment and Labour Relations Act, 2004** and **Rule 23(4) of Employment and Labour Relations (Code of Good Practices) Rules, G.N. No. 42 of 2007**.

According to Ms. Ligema, although there was a notice dated 22nd August 2016 which informed the employees about the intended meeting on 27 August 2016, there was no evidence to prove that the said meeting took place.

She alleged the Respondent of applying discriminating criteria to retrench the Applicant who was on maternity leave by relying on the wrong evidence that she was sick for a long time and with several warnings.

To support her argument that in absence of proof of Consultation Meeting, the Applicant Termination becomes procedurally unfair, she cited the cases of **Freight in Time (T) Limited & Another v. Rahabu Nieri Wangai Revision Application No. 92 of 2018, High Court of Tanzania [Labour Division] at Arusha (Unreported) at page 7;** and **Walk Water Technologies v. Recho Charles, Labour Revision No. 318 of 2016** and **Panafrican Energy Tanzania Limited v. Jackline Kawishe Revision No. 08 of 2020 High Court of Tanzania [Labour Division at Dares Salaam (Unreported) (a copy appended).** According to Ms. Ligema, in these cases retrenchment was held to be unfair due to lack of prior consultation.

Assuming there to exist a consultation meeting between the employees and the Respondent, Ms. Ligema submitted that there was no agreement between the two hence it was wrong to proceed with retrenchment while there was no agreement. She supported the position by the case of **Panafrican Energy Tanzania Limited v. Jackline Kawishe Revision (Supra) at page 13-14** where in a similar situation, the court upheld the arbitrator's decision that the termination was unfair.

According to Ms. Ligema, when there is no agreement for retrenchment, the respondent ought to have referred the dispute to the CMA in compliance with **section 38 (2) of the Employment and Labour Relations Act** which reads: -

> *"Section 38 (2) Where in the consultations held in terms of subsection (1) no agreement is reached between the parties, the matter shall be referred to mediation under Part VIII of this Act".*

She submitted that contrary to the above cited section, the Respondent proceeded to terminate the Applicant contrary to the Law without affording her enough time to refer the matter to mediation which amounts to unfair termination.

Ms. Ligema faulted the Arbitrator asserting him to have relied on the Respondent's false evidence of the employment contract indicating to have started on **1st January, 2016** and ended on **31st December, 2016** which was signed by one side of the employer alone. According to her this framed evidence cannot be relied upon to reach a decision that when the Applicant was laid off on 3/12/2016 he had less than one month left to finish his contract which would have ended on 31/12/2016. She argued that if this evidence was true, there would be no need of retrenching the Applicant while her contract was coming to an end. In her view, the easiest option was for the Respondent to have informed the Applicant that there will be no renewal of contract after expiration of the existing one. She maintained that the Respondent false evidence was intended to contradict the evidence of the Applicant that the contract was supposed to come to an end in 2017 because the previous contract signed in 2014 was automatically renewed by the conduct of the parties because no new contract was signed but the parties maintained their work relationship.

It is Ms Ligema's submission that the procedures of retrenching the Applicant were covered by serious violations of law and thus amounted to unfair termination and the Hon. Arbitrator misconceived herself in fact

and law by deciding in favour of the Respondent despite the clear facts and evidence in support of the Applicant's position.

In response to Ms. Ligema's submissions, Mr. Tesiel Kikoti, having adopted the respondent's affidavit opposing the revision application, submitted that the contractual relationship between the Applicant and the Respondent came to an end after the expiration of the contract of the 2014 to 2015. He contended that the contract of employment of the applicant was terminated as per clause 2 2.1 and 2.2 of the signed contract and as per **Rule 4 (2) of G.N. No. 42 of 2007** which provide that where the contract of employment is one of the fixed term contract, the contract shall terminate automatically after the expiration of the time of the contract.

Mr. Tesiel refuted existence of any contract of employment between the applicant and the respondent as the respondent notified the applicant of the intended retrenchment that after the expiration of the 2015 contract there will be no renewal of the contract. Referring to **Rule 23 (2) (a) of G.N. No. 42/2007**, he submitted that, employers may retrench employees if there are economic hardship save that the said retrenchment should be of valid reasons and fair procedures. Recalling the evidence of DW1 and DW2 in the commission that the respondent

suffered economic hardship, he submitted that the applicant was dully made aware of the retrenchment exercise with a notice containing relevant information as per **section 38 (1) (a). (b). (c) of Cap 366 R.E 2019 (Act No. 6/2004)** which read together with **Rule 23 (4) of G.N. No. 42/2007**.

According to Mr. Tesiel, the applicant also was given information and she accepted the offer (D10) of retrenchment package but changed her mind after loan deduction.

He challenged the applicant's counsel's views regarding notification by submitting that **Section 38 (1)** cited above does not mean to be observed in a checklist fashion but just as a guideline to make sure that retrenchment is fair. In his views, because the respondent gave notice to the applicant and made consultation as to the retrenchment benefits of which the applicant objected while others signed, then the procedure for notification was complied with.

He cited the case of **Tujijenge Tanzania Limited Versus Thomas Some Rev No.654/2019,** Z.G. Muruke, J. citing with approval the case of **Metal Product Limited Vs. Mohamed Mwerangi & 7 Others, Revision No. 148/2008** at page 9, where she said that the various stages itemized under Section 38 are not meant to be applied in

a checklist fashion but just as a guideline to ensure that the consultation is conducted so as to meet amicable settlement. It is the submission of Mr. Tesiel that in the instant matter the consultation was made through notice of the intended retrenchment.

With regards to lack of minutes of consultation meeting, Mr. Tesiel submitted that under **Section 143 of the Evidence Act Cap 6 R.E 2019** the facts can be proved orally without requiring exhibits. To support his argument, he cited the case of **A9PBAS CONDO GEDE VS R. Criminal Appeal No. 442/2007 (unreported)** at page 21 para 1 and 3 where the Court of Appeal of Tanzania held oral evidence as one of the methods of receiving evidence in court of law.

In his view, since DW1 and DW2 testified in the CMA that there was a consultation meeting then the absence of the minutes of the meeting as submitted by the applicant does not mean that consultation meeting was not conducted by the respondent as DW1 and DW2 concluded that offer and retrenchment benefits were communicated during consultation meeting.

With regards to violations of law in the procedure used to terminate the Applicant, it is the views of Mr. Tesiel that the claim of the applicant is somehow contradictory in asserting the contract would come to an end

in 2017 which is evident that the contract was for specific terms. According to him claiming unfair termination as presented in referral Form No 1 is misconception of the two because remedies of specific terms contract does not extend to unfair termination. He cited the case of **Mtambua Shamte and 64 Others Vs. Care Sanitary and Suppliers Revision No. 154 of 2010 R.M Rweyemamu, J** at page 8 para 2 where it was stated that principles of unfair termination under the Act do not apply to specific task or fixed terms contract which come to an end on the specified time or completion of a specific task.

Acknowledging that the applicant was employed by the respondent for specific contract from 2014 to 2015, Mr. Tesiel submitted that the claims before the CMA was supposed to be breach of contract and therefore it is not right for the applicant to benefit from the remedies of unfair termination while the contract was for specific terms.

He finally submitted that the respondent followed procedures of retrenchment in retrenching the applicant hence the application deserves nothing than dismissal for want of merit.

From the parties sworn statements, submissions and the CMA record, I am inclined to address one issue as to **whether there are sufficient grounds adduced by the applicant to warrant this court's**

interference with the CMA award in Labour Dispute No. CMA/DSM/ILA/I245/2016. In addressing this issue, the five issues raised in the affidavit will be considered and resolved in the due course.

The applicant is claiming unfairness in the termination of her employment. Having read the record of the CMA and the submissions of the parties, I noted a controversy on the status of the applicant's contract of employment. I thought I am obliged to firstly resolve the controversy. The applicant alleged to have been employed under a one-year contract which expired in 2015 without formal renewal while continuing working for the applicant until 2017 when she was retrenched. The respondent agrees about the existence of that contract but asserts that the applicant was issued with a notice of non-renewal of the contract after the expiry of 2015th contract. As well in the CMA, the respondent tendered a contract which was signed by the respondent only without the signature of the applicant purporting to show that the contract was renewed with a new contract which commenced from **1st January 2016** and ended on **31st December 2016**.

The applicant questioned the veracity of the respondent's story in the CMA and validity of the evidence of one-sided contract which in her view, should not have been relied upon by the arbitrator in deciding the

matter. She further questioned the viability of the retrenchment exercise if the contract had already expired.

I scrutinized the matter to see if either of the parties tendered any agreement to substantiate the nature of contract which existed amongst the parties at the time of the applicant's exit in 2016. **Exhibit D1** indicated that there was a fixed term contract of one year which commenced **1st October 2014** and expected to expire on **31st August 2015.** It is undisputed that the applicant exited from the said employment in **December 2016**. It remains that the time between **August 2015** when the contract lapsed to **December 2016** when the notice not to renew the contract on operational requirements was issued, there was a certain employment relationship between the applicant and the respondent which is not clearly defined amongst the parties. I agree with the applicant that the contract which is not signed by both parties cannot have a binding effect and therefore it cannot be relied upon to explain the parties' relationship between **August 2015** when the contract lapsed to **December 2016** when the applicant exited the employment. The one-sided contract should not have been relied upon in the CMA.

Further to above, I have considered Ms. Ligema questioning the viability of retrenchment in a contract which had already expired. In the CMA, the arbitrator mainly focused on the retrenchment exercise. This is because retrenchment was the dominant feature of the termination of the applicant's employment and not the expiry of the contract. This signals that the argument of contract expiry vanished with the circumstances under which the applicant continued to work after the termination.

Furthermore, the notice not to renew was issued on 8th December 2016. This leaves a lot to be desired to explain the kind of relationship between the applicant and the respondent between August 2015 to December 2016 the non renewal notice was issued.

It is to be noted that it is the employer who has a duty to keep record and prove fairness in termination. Any ambiguous situation regarding termination must be cleared by the employer. In this matter, in the CMA, the employer neglected this duty and presented a confusing state of affair demonstrating retrenchment and contract expiry at the same time, which in my view should be interpreted in the benefit of the employee. The type of termination being retrenchment, automatically extinguished the assertion that the applicant's contract lapsed. I agree

with the applicant's counsel that, if there was no living contract of employment amongst the parties, there should not have been a retrenchment.

It remains that there is no evidence that the contract was formally renewed between **August 2015 to December 2016**. The lack of evidence to substantiate the type of contract, leaves a conclusion that there was a contract amongst the parties which was not disclosed in the CMA but terminated by a way of retrenchment.

I agree with the Applicant that in this kind of a situation, the contracts should be taken as having been renewed by default as between 1st S2015 to 31st August 2016 and another one 1st September 2016 expected to end on 31st August 2017. **Rule 4 (3) of the Employment and Labour Relations (Code of Good Practice) Rules, GN 42 of 2007)** provides:-

> *"(3) Subject to sub-rule (2), a fixed term contract may be renewed by default if an employee continues to work after the expiry of the fixed term contract and circumstances warrants it".*

In this matter, the employment ended in December 2016. Counting from December 2016 to 31st August 2017 when the latest contract was

expected to expire, there were 8 months which remained in the contract to complete another circle of one year term. In my view, the aforesaid is the status of the employment relationship between the applicant and the respondent that there was a fixed term contract renewed by default which was to expire on 31st August 2017. I conclude that the Applicant was therefore terminated 8 months before the end of her term contract.

Now comes to the fairness of the termination. The arbitrator having confirmed existence of economic hardship in the respondent which necessitated retrenchment, found that the respondent had a valid reason for termination. I have gone through the CMA record. It was not disputed that such economic reasons did exist. In my view, the arbitrator was right in her finding in terms of the fairness of the reasons for termination.

Another controversy lies on the procedural compliance in the termination exercise. The arbitrator found that the procedure was complied with in the retrenchment as the employees were notified about the exercise and signed the retrenchment package. The Applicant's counsel is of the view that, the meeting announced in the notice never took place. I have gone through the CMA record. I could not find the minutes of the meeting which discussed the retrenchment exercise. Mr. Tesiel wants to convince

me that the evidence of DW1 & DW2 was enough to confirm that the consultation meeting took place. In my view, this could have been the situation if not disputed by the applicant. Since the applicant gave evidence to counter existence of that meeting, the minutes of the meeting needed to be tendered to corroborate the oral evidence of DW1 & DW2. The evidence on the record shows that there was a notice of retrenchment and an offer of retrenchment package, but no minutes of consultation meeting.

As to whether issuance of notice of retrenchment and its package offer amounted to sufficient compliance with the procedure, I reproduce Section 38 of Cap 366 which guides retrenchment. It provides:

"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,

(vi) 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 recognised trade union;

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

(2) Where in the consultations held in terms of sub-section (1) no agreement is reached between the parties, the matter shall be referred to mediation under Part VIII of this Act.

(3) Where the mediation has failed, the dispute shall be referred for arbitration which shall be concluded within thirty days during which

period no retrenchment shall take effect and, where the employees are dissatisfied with the award and are desirous to proceed with revision to the Labour Court under section 91(2), the employer may proceed with their retrenchment."

From the record, I could not see how Section 38 (1) (c) was fully complied with. The section includes discussion concerning severance allowance among others.

My interpretation to the provision makes me understand that the outcome of consultation is the termination agreement. In this matter, the Applicant did not sign the termination agreement. Despite of this, the arbitrator continued to hold the termination to be fair in terms of reasons and procedure.

Mr. Tesiel submitted that the existence of consultation was proved by oral evidence of DW1 and DW2. In my view, a consultation of whatever nature, having resulted into disagreement, the respondent was bound to follow the procedure under the above **Section 38 (2) of Cap 366** as submitted by the counsel for the applicant by referring the dispute to the CMA. The arbitrator having found disagreement in the retrenchment exercise, and the employer having proceeded to retrench despite of such disagreement, he ought to have found unfairness in procedure.

Mr. Tesiel challenged the applicant's claim of unfair termination for a fixed term contract. In my view, I don't see any fatal effects in the terminology "termination" since the contract was still alive when it was ended. It would have been the position thought by Mr. Tesiel if the contract ended by expiry. In the instant matter, the contract ended before expiry. Calling it termination does not cause any fatal results.

It is on this background that I differ with the arbitrators' findings on procedure. Consequently, the first issue as to whether there are sufficient grounds adduced to warrant interference with the arbitrator's award is answered affirmatively.

With regards to the relief, in the CMA, the applicant sought for payment of outstanding balance of the contract period to the tune of **TZS 4,451,200.00.** I have already found above to have 8 months which remained before the expiry of the terminated contract. The arbitrator awarded the statutory terminal benefits and declined the payment of the outstanding salaries. In my view, the applicant is entitled to be paid compensation due to unfairness in the termination. But since the unfairness is based only on the procedure and not reasons, I will award her only 4 months remuneration on top of the statutory terminal benefits awarded by the arbitrator if not yet paid.

From the foregoing, I allow the application. The CMA award is hereby revised and varied by holding that there was unfair termination of the applicant's employment in terms of procedure. The applicant is entitled to four months remuneration as compensation and other statutory benefit if not paid, to wit, notice payment, leave for 16 days, severance allowance and one-month outstanding salary. If the applicant's debt is still unpaid, then it shall be deducted from what she is awarded. It is so ordered.

Dated at Dar es Salaam this 13th Day of December 2022

KATARINA REVOCATI MTEULE

JUDGE

13/12/2022