IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 158 OF 2020

BETWEEN

INVIOLATA RWELAMIRA ITATIRO ..... APPLICANT

AND

TIMES RADIO FM LIMITED ..... RESPONDENT

JUDGMENT

Date of last order: 01/03/2022
Date of Judgment: 22/3/2022

B.E.K. Mganga, J

on 1st July 2016, applicant entered into unspecified contract of employment with the respondent as Corporate sales Marketing Manager. The employment relationship between the two ended on 10th January 2017 when applicant received a letter terminating her employment. Aggrieved by the said termination, on 25th January 2017, applicant filed labour dispute No. CMA/KIN/R. 98/17 before the Commission for Mediation and Arbitration henceforth CMA at Kindondoni claiming to be paid (i) TZS 240,000,000/=being salary for 48 months' compensation for unfair

termination, (ii) TZS 10,500,000/= in lieu of leave of 63 days, (iii) TZS 5,000,000/= in lieu of notice and (iv) TZS 4,666,666/= as severance pay on ground that there was no valid reason for retrenchment and further that procedures were not followed.

Having heard evidence of both parties, on 24th March 2020, Hon. Muhanika, J, arbitrator, issued an award that applicant resigned and ordered respondent to pay the applicant (i) TZS 2,000,000/= as notice pay, (ii) TZS 2,153,846 being severance pay and (iii) TZS 4,538,461/= being payment for 63 days leave accrued all amounting to TZS 8,692,307/=.

Applicant was further aggrieved by the said award as a result she filed this application for revision. In an affidavit in support of the notice of application, applicant stated that in January 2017, she received sms notification through her mobile phone requiring her to attend meeting involving all employees of the respondent. That, in the said meeting, respondent informed employees that she is facing economic hardship and gave three options namely (i) closure of the company but later found this option as not viable, (ii) employees to agree to 50% remuneration cut off and (iii) retrenchment of employees. Applicant stated further that, she opted for retrenchment, but the respondent did not carry out consultation.

In her affidavit in support of the application, applicant raised four (4) grounds namely:-

1. *That the arbitrator erred in law and fact for holding that applicant was fairly terminated on the basis that she opted for retrenchment, without analyzing whether retrenchment process was legally executed under the obtaining circumstances.*
2. *That the arbitrator erred in law and fact in holding that termination was by the applicant without considering the evidence adduced before her.*
3. *That the arbitrator erred in law and fact in holding that the respondent (sic) was procedurally fair while the respondent did not adhere to any procedure of retrenchment.*
4. *That the honorable arbitrator erred in law and fact for failure to analyze properly the evidence before her hence occasioned injustice to the applicant.*

Respondent opposed the application and filed the counter affidavit of Reginald Martine, her advocate.

When the application was called for hearing, Mr. Arobogast Anthony Mseke, Advocate, appeared and argued for and on behalf of the applicant while Mr. Lugiko John, advocate argued for and on behalf of the respondent.

In arguing the 1st ground, Mr. Maseke, learned counsel for the applicant submitted that, in the award the arbitrator held that termination of employment of the applicant was fair and that it is the applicant who terminated her employment. But, on 3rd January 2017, a meeting was held

between the respondent and her employees wherein applicant was invited through SMS (exh. P2) without disclosure of the agenda. He argued further that, in the said meeting, the respondent's General Manager came up with three options i.e., (i) closure of the respondent company, (ii) 50% of salary cut off to all employees and (iii) retrenchment. Counsel for the applicant submitted that applicant opted for retrenchment if respondent wished to embark on retrenchment process. Counsel went on that Procedures for retrenchment were not adhered to.

It was submitted by counsel for the applicant that on 9th January 2017, applicant reminded the respondent's General Manager as per exhibit P3 to carry out retrenchment consultation but respondent replied that she was still in consultation on how the same should be carried out. Counsel for the applicant submitted that, surprisingly, on 10th January 2017, applicant received a letter terminating her employment (exh. P.5). That in the said letter, respondent informed the applicant that her resignation letter has been accepted and that she has been terminated from employment. Counsel for the applicant submitted that, this is the base of CMA award that it is the applicant who terminated her employment. Counsel for the applicant submitted that there was no resignation letter by the applicant. Mr. Maseke learned counsel for the applicant concluded that

it was an error for the arbitrator to hold that applicant terminated her employment.

Mr. Maseke, counsel for the applicant submitted further that, there is no proof that the respondent was in economic hardship as alleged. Counsel went on that respondent was duty bound to commence retrenchment process in terms of Section 38 of the Employment and Labour Relations Act [Cap. 366 R. E. 2019 and that respondent was supposed to avail to employees the financial report to prove that she was in economic difficulty, but it was just by mere words. Counsel cited the case of ***Managing Director Southern Link v. Hamis M. Mgeleka, Labour Revision No. 227 of 2010*** wherein it was held that employer has duty to prove that retrenchment was fair. Counsel cited also cited the case of ***Samora Boniphance and 2 others v. Omega Fish Limited Revision No. 56 of 2011*** (unreported) wherein it was held that employees have the right for their contracts if prematurely terminated, to be compensated and that economic hardship cannot be used to circumvent that right. Counsel for the applicant referred the court to the case of ***Bakari Athuman Mtandika v. Superdoll Trailer Limited, Revision No. 171 of 2013*** to the position that employers are required to prove existence of fair reasons justifying termination and that procedures for termination must be followed. Counsel

submitted that no consultation was made prior retrenchment and that procedures for retrenchment provided for under section 38 of the Employment and Labour Relations Act [Cap. 366 R. E. 2019] was not adhered to. It was the submission of Mr. Maseke learned counsel for the applicant that arbitrator did not properly analyze evidence of the applicant especially exhibits P2, P3 collectively, exhibit P.4 and P5.

Counsel for the applicant prayed the application be allowed and reliefs claimed by the applicant in CMA F1 be granted.

In opposing the application, Mr. John, counsel for the respondent submitted that respondent was in economic hardship and communicated to all employees three options as submitted by counsel for the applicant and that a meeting was held on 3rd January 2017. Counsel for the respondent submitted that applicant attended the said meeting wherein the said three options were discussed and minutes recorded. During the meeting, all employees were informed that respondent was in economic difficulty even unable to pay salary as it was testified by DW1. It was submission of counsel for the respondent that, there was no retrenchment, but employees agreed to 50% reduction of their salaries. Counsel for the respondent conceded that there is no provision authorizing employer to deduct salary of employees by 50%.

In his submission, counsel for the respondent submitted that applicant and another employee were unhappy with the options. That, on 9th January 2017 applicant opted for retrenchment as evidenced by exhibit D3. Counsel for the respondent submitted further that on 7th March 2017, applicant wrote a resignation letter (exh. D5). Counsel for the respondent cited the case of ***Kobil Tanzania Limited v. Fabrice Ezaovi, Civil Appeal No. 134 of 2017*** (unreported) that when there is resignation of the employee, employer cannot be blamed and prayed the application be dismissed.

In rejoinder, Mr. Maseke, counsel for the applicant submitted that ***Kobil's case*** was cited by counsel for the respondent out of context as it is not applicable to the circumstances of the application at hand. Counsel went on that, resignation letter (exh.D5) is also quoted out of context because the same is dated 15th February 2016 and was rescinded. Mr. Maseke submitted further that, minutes of the meeting held on 3rd January 2017 (exh. D2) does not qualify to be a proper consultation for retrenchment. Counsel reiterated his submission in chief and prayed the application be allowed by revising the CMA award.

Having heard the submissions of the parties and examined evidence in the CMA record, I find that the main rival issues are whether; the applicant resigned or she was unfairly terminated or retrenched.

I will start with the contention that applicant resigned. It was submitted by counsel for the respondent that applicant was not terminated rather she resigned. Counsel for the respondent submitted that on 7th March 2017 applicant wrote a resignation letter (exh. D5). On the other hand, counsel for the applicant submitted that there was no resignation and that exhibit D5 was referred out of context. I have carefully examined the said resignation letter (exh.D5) and find that it is dated 15th February 2016. In the said resignation letter, applicant notified the respondent that the last day of her employment will be 15th March 2016. I agree with counsel for the applicant that, there was no resignation as from 15th March 2016 applicant continued to work with the respondent up to 3rd January 2017 when respondent held a meeting with all employees, applicant inclusive to discuss her economic position. In fact, the evidence of Rehure Nyaulawa (DW1) is clear that when he received resignation letter dated 15th February 2016, he discussed with the applicant and sorted the issue as a result applicant continued to work. With due respect to counsel for the respondent, the argument that applicant resigned pegging that argument

to exhibit D5 is not correct. In my view, ***Ezaovi's case*** (supra) is not applicable in the circumstances of the application at hand.

It was submitted by counsel for the applicant that respondent had no valid reasons for retrenchment and that procedures were not followed. It was further argued on behalf of the applicant that there was no consultation hence termination was unfair. This submission was countered by counsel for the respondent that, in the meeting that was held on 3rd January 2017, all employees opted for 50% salary deduction but not retrenchment, as such, respondent did not go on with retrenchment. It was further submitted by counsel for the respondent that applicant opted to be retrenched but that was not what was agreed by the parties.

In resolving the issue of retrenchment or termination, I have examined evidence of Rehure Nyaulawa (DW1) and Josephat Mathew Riwa (DW2) and find that their evidence is clear that respondent was facing economic hardship as a result, applicant held a meeting with all employees and gave them three options namely (i) closure of the business, (ii) reduction of salary by 50% until when the situation becomes normal and (iii) retrenchment of employees. Both DW1 and DW2 testified that employees opted and agreed to the option of reduction of salary by 50%. Evidence of these witnesses shows that after the meeting, applicant opted

for retrenchment, an option that was rejected by all other employees. DW1 testified further that applicant handed over her duties and stopped attending at office. When DW1 was giving his evidence in re-examination stated:-

> *"Sikuwahi kumueleza inviolata kuwa nitamretrench. Inviolate alikuwa anajua financial problems kwa kuwa yeye ndo head of sales. Kama kampuni na w/kazi wote tulikubaliana kupunguza mishahara na kampuni ndio ina opt retrenchment sio m/kazi yeye ndo alitaka retrenchment".*

On the other hand, Inviolata Rwelamila Itatiro (PW1), the applicant, stated in her evidence that on 3rd January 2017 all employees held a meeting and were informed that the company is in economic crisis. She testified that she did not agree with 50 % salary reduction as a result she opted for retrenchment. She stated further that, retrenchment is a process and that she expected to be notified, and or, consulted to negotiate among other things, retrenchment package, but to her surprise, she was served with termination letter.

From the afore evidence of the parties, the rival issue is whether employment of the applicant was terminated by the respondent based on retrenchment or not. It seems clear to me that applicant opted for retrenchment while respondent opted for reduction of salary by 50% as it was agreed at the meeting with all employees save for the applicant who

later approached DW1 arguing that she was opting for retrenchment. In my view, termination of employment of the applicant cannot be said was based on retrenchment because the said termination was not initiated by the respondent. I am of that view because for retrenchment to occur, it must be initiated by the employer. This is clearly stated in Guideline 1(1) of the retrenchment procedure issued under the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007. The said guideline reads:-

> *"1(1) This procedure shall apply where* ***an employer contemplates to terminate*** *the employment of employee on the basis of operational requirement".*

The said Guideline is in line with section 38 of the Employment and Labour Relations Act [Cap. 366 R. E. 2019] that provides the procedure for retrenchment or termination based on operational requirement. In my view, an employee cannot opt for retrenchment if the employers have not so opted. In the application at hand, it is clear from the evidence of both DW1 and DW2 that, after employees had opted for 50% salary reduction, the option for retrenchment ceased. Applicant cannot therefore claim that there was retrenchment. More so, on 9th January 2017 applicant served the respondent with an email showing that she had handed over all marketing files and contacts. In my view, by that email, applicant was informing the

respondent that she has terminated employment with the respondent. It is illogical, in my view, to hold that respondent terminated employment of the applicant while the later handed over her duties before termination of her employment had occurred thereafter require the respondent to follow retrenchment procedure. This appears to be strange in my view, and contrary to the law. Applicant was supposed, prior to handing over her duties, to discuss with the respondent about her fate.

For all stated hereinabove, if find that the application is devoid of merit and proceed to dismiss it. I therefore revise the CMA award, quash, and set aside.

Dated at Dar es Salaam this 22nd March 2022.

B.E.K. Mganga
JUDGE