IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 08 OF 2020

BETWEEN

PANAFRICAN ENERGY TANZANIA LIMITED ..... APPLICANT

VERSUS

JACKLINE KAWISHE ..... RESPONDENT

JUDGEMENT

S. M. MAGHIMBI, J

The dispute at hand from a terminated employment relationship between the two parties above. The respondent was employed by the applicant on 13th February, 2012 as a Corporate Affairs Officer, she later on promoted to the position of Personal Assistant of Government Relations Coordinator with effect from 25th January, 2016. On, 19th April, 2018 the respondent was again promoted to the position of Public Relations Liaison Officer, the position held until her termination on 30th October, 2019. According to the applicant, the reason for respondent's termination was retrenchment.

Aggrieved by the termination, the respondent referred the matter to the Commission for Mediation and Arbitration for Kinondoni ("the CMA") and a matter which was registered as Labor Dispute No. CMA/DSM/KIN/786/19/415. After considering the parties' evidence, the CMA concluded that the respondent was unfairly retrenched from employment. Following such a finding the CMA ordered the applicant to pay the respondent sum of Tshs. 84,457,344/= being twelve months remuneration as compensation for unfair termination. Being resentful with the CMA's award, the applicant filed the present application inviting the court to determine the following legal issues: -

i. Whether the applicant had fair reasons for retrenching the respondent
ii. Whether the retrenchment of the respondent was procedurally unfair because the applicant failed to consider alternative job before resorting to retrenchment.
iii. Whether the Arbitrator denied the applicant the right to be heard by not considering its written submission.
iv. Whether the Arbitrator acted with material irregularity by not considering the amount paid by the applicant in calculating the 12 month's compensation.

The application was disposed by way of written submissions. Mr. Vitalis, learned advocate represented the applicant while Mr. Juventus Katikiro, learned advocate represented the respondent. Arguing in support of the first issue, Mr. Vitalis submitted that the Arbitrator's finding that the applicant made the respondent redundant by outsourcing her duties to an independent consultant namely Khangarue Media is a misappropriation of the applicant's evidence. That the applicant outsourced its public relation matters from the named media since July, 2017 before the respondent was appointed to the position of Public Relations Liaison Officer as evidenced by exhibit D4. He further submitted that the position of Liaison officer was created by the applicant in April 2018 in order to save the respondent's job after her former position of Personal Assistant became redundant.

Mr. Vitalis continued to submit that it was not Khangarue Media or its desk officer who took the position of the respondent as misconceived by the Arbitrator. That the applicant had already outsourced its public relations to an independent consultant and that the respondent was assigned the position of liaison officer in an attempt to save her job, however, the efforts proved ineffective because the applicant had no work to assign the respondent.

Mr. Vitalis went on submitting that the arbitrator mixed up the applicant's evidence regarding the cause of the respondent's removal from the position of Personal Assistant to the country chairman with the reason for the respondent's retrenchment. He stated that the respondent was removed from the position of PA because the country chairman agreed with the respondent that there was no need of the chairman having a PA as testified by DW1. He added that it was impossible to reinstate the respondent to her former position of corporate affairs officer because that position no longer existed in the corporate structure at the time of retrenchment in 2009.

On the second issue, Mr. Vitalis submitted that all three witnesses called by the applicant proved that before the respondent was retrenched, she was offered the position of receptionist but she declined the same. He stated that there was no alternative position for the respondent.

Submitting on the third ground, Mr. Vitalis argued that in composing the award, the arbitrator did not consider the final submissions or even summarizing the arguments raised by the parties in the award pursuant to Rule 27(3)(d) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007 (GN No.67 of 2007.

He argued further that the relevant provision imposes mandatory obligation on the arbitrator to summarize final arguments raised by the parties in the award. That when the word shall is used, then the action is mandatory. To support his submission, he cited the case of Erick Raymond and 2 others v. Elias Marcos and another, Civil Application No. 571/02 of 2017; **Puma Energy Tanzania Ltd vs Ruby Roadways Tanzania Ltd (Civil Appeal 35 of 2018) [2020] TZCA 186 (15 April 2020).** He added that the omission invalidates the award which is in violation of the principles of natural justice. To booster his submission, he cited the case of **Deo Shirima and others v. Scandnavian Service [2009] 1 EA 127; Mbeya- Rukwa Auto Parts and Transport Limited v.Justina George Mwakyoma [2003] TLR 251.**

As to the last issue, he submitted that the applicant paid the respondent an amount equal to 6 months' salary and that The arbitrator did not consider such amount when he was awarding the 12 months' salary payable to the respondent. In the result, he urged the court to revise and set aside the CMA's decision.

In reply, Mr. Katikiro submitted the first and second grounds together. He submitted that the Applicant had neither adhered to the procedures

laid down by labour laws to retrench the Respondent's employment nor had valid and sound reasons to terminate the Respondent's employment through retrenchment. He argued that the Applicant had her intention from the first day of consultation intending to retrench the Respondent from employment. He referred to paragraph 2 at page 4 of the award, through the testimonies of both the Applicants witness as DW1 and DW2, it is noted that the Respondent was the only selected employee to be retrenched from employment despite the fact that the Applicant had several employees and had an opportunity to look for an alternative position that the Respondent could fit to work for the Applicant. He further pointed to paragraph 3 at page 5 of the award where DW1 testified that the only alternative position offered to the Respondent was receptionist though regarding the academic and experience of the Respondent it was not fine for her to work in that position despite the same being offered to her.

He submitted further that looking at all the reasons and procedurally aspects articulated by the Applicant during retrenchment process, it is true that the Applicant had neither valid reasons to retrench the Respondent nor did follow the procedure stipulated by the labour laws in force in Tanzania. That all what the Applicant did was in

the requirement of the law illegal as there was no any consultation made as required by the law but rather her intention to terminate the Respondent's employment at whatever risk. He then referred to the provisions of Section 38(1) c of Employment and Labour Relations Act, 2004 which provides:

> *"in any termination for operational requirements (retrenchment), the employer shall comply with the following principles, that is to say, he shall on operational requirements 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.*

He further cited the provisions of Rule 23(6) of the Code of Good Practice GN. 42 of 2007 which provides that in order for it to be effective, the consultation process shall commence as soon as possible as the employer contemplates a reduction or retrenchment. That there

are number of High Court decisions on this position of the law that require the employer to issue notice to employees addressing to them the intention to retrench employees, he cited the decision of the High Court of Tanzania [Labour Division] at Dar es salaam in **Labour Revision No. 318 of 2016 between Walk Water Technologies Versus Recho Charles,** (Unreported) at page 16 where the Court held that,

> *"It is the mandatory obligation to the employer under section 38(1) of the Employment and Labour Relation Act to conduct consultation to employee prior to retrenchment where contrary of it renders the termination illegal and unfair"*

He argued that the Applicant did not conduct this mandatory requirements of the law that require the employer to conduct prior consultation to the employee before retrenchment henceforth this termination was illegal, unlawfully and unfair for failure to follow the mandatory requirement of the law. He concluded that the Applicant's application has no merit and the same be dismissed for lack of merit and the CMA award be confirmed as it was proper decided in favour of the Respondent after being terminated unfairly from the employment.

On the third ground, Mr. Katikiro submitted that during hearing, both parties were accorded the right to present evidence and testimonies and at the closure of both parties' evidences parties were given right to file their respective submission. That the award delivered is in reflection of the parties' testimonies and evidences tendered during hearing in compliance of the requirement of Rule 27(3)(a),(b),(c),(d),(e) and (f) of the Labour Institutions (Mediation and Arbitration Guidelines) G.N No. 67 of 2007. He argued that the CMA did not deny any party an opportunity to be heard as she recorded all testimonies and evidences tendered by parties during hearing and the same award was delivered in conformity of the requirement of Rule Rule 27(3)(a),(b),(c),(d),(e) and (f) of the Labour Institutions (Mediation and Arbitration Guidelines) G.N No. 67 of 2007.

He submitted further that it is a trite law that the Court is not bound by written submission filed by the parties, but rather the court is just bound by evidences and testimonies by both parties tendered during hearing and not written submissions as they are not authoritative in arriving at a final decision. He supported his submissions by citing the decision of the Court of Appeal of Tanzania in **Civil Application No. 25/8 of 2019 between Shadrack Balinago Vs. Fikiri Mohamed**

@Hamza and 2 Others, at page 16 when making reference to **Civil Appeal No. 147 of 2006 between the Registered Trustees of the Archdiocese of Dar es Salaam Vs. The Chairman, Bunju Village Government and 11 others,** had made emphasize in respect of the status of written submission in Court that,

> *"Submissions are not evidence. Submissions are generally meant to reflect the general features of a part's case. They are elaborations or explanations on evidence already tendered. They are expected to contain arguments on the applicable law. They are not intended to be a substitute for evidence."*

On the allegation by the Applicant that she was not heard as the arbitrator did not reflect her arguments, his reply was that submissions are not evidence to substitute the evidence already tendered in Court during hearing and the same having been reflected in the award in conformity with the provision of Rule 27(3)(a),(b),(c),(d),(e) and (f) of the Labour Institutions (Mediation and Arbitration Guidelines) G.N No. 67 of 2007. He prayed that this ground is dismissed.

On the last ground, Mr. kitikiro submitted that the arbitrator arrived at awarding compensation of twelve months' salary after she had found the retrenchment processes were not compiled by the Applicant.

That during hearing of the employer's case, the employer's witnesses tendered Exhibit D13 and D17 that shows that the Respondent was paid the amount equal to six months remuneration as handshake package. That at the composition of the award, the trial arbitrator ordered the Applicant to pay the Respondent the amount equal to twelve months only out of sixty months sought by the Respondent in her case at the Commission for Mediation and Arbitration [CMA] through her CMA Form No.1. that in reaching the decision, the arbitrator found retrenchment process to be unfair and not justified on the reasons advanced to retrench the Respondent. He referred to the last paragraph at page 22 of the award where the trial arbitrator ordered the payment of twelve months salary and the reason advanced by the trial arbitrator was genuine as follows

".....Tume ilihitimisha kwa kujibu hoja ya mwisho, na kuona kuwa ni sahihi kumwamuru mlalamikiwa wa hauri hili kumlipa mlalamikaji jumla ya mishahara ya miezi kumi na mbili kwani stahiki zingine alishapatiwa kwa mujibu wa vielelezo D13 had D17."

That the award was pursuant to Section 40(1)(c) of the Employment and Labour Relation Act, 2004 after considering evidences

and testimonies of both parties The Arbitrator had delivered her award in favour of the Respondent after she had found that the termination of the Respondent's employment being both procedural and substantive unfair. In the upshot, he prayed that the CMA Award be confirmed and the Applicant's application for Revision be dismissed for lack of merit. In rejoinder Mr. Vitalis reiterated his submission in chief.

After considering the parties will now address the grounds at hand as to their order. The first and second issues will be jointly addressed as it was jointly argued. The first issue of whether the applicant had fair reason for retrenching the respondent. The record shows that the respondent was retrenched from employment following the structural need of the business. That the applicant outsourced the management of public relations affairs from the company namely Khangarue Company. It is undisputed that the applicant outsourced the same as evidenced by the agreements thereto (exhibit D4 and D6). Following such outsourcing the applicant decided to terminate the respondent because her duties were performed by the outsourced company.

It is also undisputed fact that the applicant started to outsource its service from the mentioned company from 2017 as reflected in exhibit D4, before the respondent was promoted to the position of Public

Relations Liaison Officer. On the basis of the evidence on record it is also revealed that before retrenching the respondent, the applicant made effort to find another position suitable to the respondent unfortunately his efforts bore no fruits. Therefore, on the basis of the above analysis I find the applicant's reason for retrenchment falls under structural need of the business falling under Rule 23 (2) (c) of GN 42 of 2007. Thus, the applicant had valid reason to retrench the respondent.

On the second ground as to retrenchment procedures, the same are provided under section 38 of the ELRA reading together with Rule 23, 24 and 25 of GN 42 of 2007. Looking at the matter at hand, most of the procedures stipulated in the mentioned provisions were followed by the applicant. Just to mention few, the respondent informed of the intended retrenchment, summoned to a consultation meeting. In the consultation meeting the record shows that the parties did not agree as to retrenchment packages. Despite their disagreement the applicant proceeded to terminate the respondent from employment on the ground of operational requirements. The applicant's decision to proceed with retrenchment without agreement of the parties is contrary to section 38 (2) of ELRA which provides as follows: -

'Section 38 (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.'

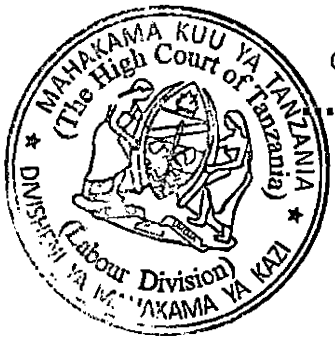
The retrenchment in this matter was in violation of the above cited provision. The last retrenchment meeting was held on 29th October, 2019 where the parties did not agree with the retrenchment packages. Immediately on 30th October, 2019 (as reflected in exhibit D13) the applicant proceeded to retrench the respondent without affording her enough time to refer the matter to mediation. The applicant's conduct in this case shows that he made his decision and there was no room for negotiation as correctly submitted by Mr. Katikiro. Thus, the retrenchment procedures were not followed in this case as rightly found by the Arbitrator. Therefore, the allegation that the Arbitrator did not consider the evidence of the applicant lacks merit. As properly submitted by Mr. Katikiro the evidence of both parties is reflected in the award.

As to the last issue of parties' reliefs, the respondent prayed for 60 months remuneration as compensation for unfair termination. Taking into consideration that upon retrenchment the respondent was paid 5.25 months salaries as a retrenchment package, it is my view that the award

of 6 months salaries will suffice justice in this case as the unfairness is only on the procedural aspects and not substantive. Therefore, the award of 12 months salaries is hereby reduced and set aside.

In the event, I partly allow the application, the substantive reason of the termination is found to be fair. The procedures were not followed hence the termination was procedurally unfair. The compensation amount is varies and the applicant is ordered to pay the respondent the sum of Tshs. 42,228,672/= as compensation which is equivalent to 6 months' salaries. It is so ordered.

Dated at Dar es Salaam this 21st day of February, 2022.



.....

S.M. MAGHIMBI
JUDGE