IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 454 OF 2020

BETWEEN

KISARAWE CEMENT COMPANY LTD .... APPLICANT

VERSUS

ISSA O. BWEHA & 38 OTHERS .... RESPONDENTS

JUDGEMENT

S.M. MAGHIMBI, J:

The Applicant filed the present application challenging the decision of the Commission for Mediation and Arbitration for Kibaha (CMA) delivered on 28th September, 2020 by Hon. L. J. Christopher in labour dispute No. CMA/PWN/KBH/040/2020 ("the Dispute"). The application emanates from the alleged closure of the business of the factory. She informed the Respondents and they agreed to terminate the employment contracts. The respondents were paid their terminal benefits on 28th February 2020. Aggrieved by the applicant's decision, the respondents successfully referred the matter to the CMA claiming for unfair termination where they were awarded compensation of 6 months'

salaries each. Being dissatisfied by the CMA's decision, the applicant filed the present application on the following grounds: -

i. That the trial Arbitrator erred in fact and law by awarding all 38 respondents without considering that no representative statement which authorize PW1 to testify and claim on behalf of the respondents.

ii. That the Trial Arbitrator erred in fact and law for not considering PW-1 testified by tendering only Issa Omar Bweha's contract of employment and notice of termination the same is not sufficient proof to award all 39 respondents.

iii. That the trial Arbitrator erred in fact and law for failure to properly analyse evidence before her hence reached adverse decision against the applicant.

iv. That the trial arbitrator erred in law for considering the testimony which was made by only one witness PW-1 which did not proof the claim for other respondents.

The application was argued by way of written submissions. The applicant was represented by Omar Abubakar Ahmed, Learned Advocate whereas Mr. Abraham John Mkenda, a representative from TUICO appeared for the respondents.

On the first ground of revision, Mr. Ahmed submitted that there was no any statement of representation which gave mandate one Issa Omary Bweha to represent other employees. That in the CMA F1 the respondents attached the list of the complainants employees with their signatures named *'Orodha ya Walalamikaji kiwanda cha Kisarawe'.* He argued that the referred Kiwanda cha Kisarawe is distinctive from the applicant herein whose name is Kisarawe Cement Company Limited. He argued that the complaint at the CMA was contrary to Rule 5(1) and (2) of the Labour Institutions (Mediation and Arbitration) Rules of 2007 G.N. No. 64 of 2007 (GN 64/2007) which requires the list of the represented employees to be attached with the CMA F1.

Mr. Ahmed continued to submit that the Arbitrator ought to have considered the failure by the respondents to have mandated one employee to represent them and signing documents on their behalf because they had no locus stand to prosecute their case for want of representation.

As to the second ground, Mr. Ahmed submitted that, the Arbitrator wrongly considered only PW1's (Issa Omar Bweha) testimony in awarding all respondents. That there is no any proof which was tendered by PW1 regarding the salaries of each employee before the

CMA and no employment contracts of the 38 employees or their notices of termination to prove their claims.

On the third ground, Mr. Ahmed submitted that when an employee seeks remedies for unfair termination, it is the duty of that employee to prove his/her entitlement arising from employment. That in this case, the respondents failed to prove their remunerations paid in the course of their employment. Mr. Ahmed argued that due to the fact that there is no any proof which justified the amount in respect of remuneration of each employee, it was improper for the arbitrator to award each employee without regarding documentary evidence which proved the same.

Turning to the last ground that the trial arbitrator erred in law for considering the testimony which was made by only one witness PW-1 which did not prove the claim for other respondents. Mr. Ahmed submitted that the arbitrator only considered the evidence of one witness to award other respondents. He stated that the alleged evidence was not sufficient to prove the respondents claims as the said witness did not testify anything in favour of the remaining 38 respondent. That he did not even mention their names or state that he is representing

them. In conclusion, his prayer was rgar rge award of the CMA is revised and set aside the award.

In his reply submissions, Mr. Mkenda adopted the respondent's counter affidavit to form part of his submission. As to the first ground, he submitted that the Arbitrator was right to award the Respondents to be paid compensation for the alleged unfair termination as the CMA F.1 was filled with the attachment of the names and signatures of all respondents. That the only difference was the language used whereby the Applicant was referred as Kisarawe Cement Company Limited while the attached document containing names and signatures of the Respondents, the Applicant was referred as Kiwanda cha Sementi Kisarawe. Mr. Mkenda argued that the referred names when they are translated from Swahili to English, they mean the same. He argued that the use of Swahili language in the attached document should be considered as a minor error which cannot prejudice the applicant in this matter.

Mr. Mkenda further submitted that all Respondents were employees of the Applicant, a reason considered by the Arbitrator to award them compensation for unfair termination. He argued that the Arbitrator complied with the law in awarding the respondents pursuant

to the provision of Section 88 (4) of the Employment and Labour Relations Act, Cap. 366, R.E. 2019 ('ELRA') which require the Arbitrator to deal with the substantial merits of the dispute with the minimum of legal formalities. He insisted that the Arbitrator complied with that law in rewarding the Respondents.

Regarding the second ground, Mr. Mkenda submitted that all respondents had the same cause of action, sued the same employer hence it was proper to call only one witness to testify on their behalf. He also submitted that the respondents were properly awarded because the contract and notice of termination tendered by PW – 1 was sufficient to prove such claim.

Responding to the third ground Mr. Mkenda submitted that the Arbitrator was keen in recording and analysing evidence. He stated that in making sure justice is served to both parties, instead of compensating the respondents 30 months sought in the CMA F.1, the Arbitrator compensated them with 6 months' salary.

Turning to the last ground, Mr. Mkenda submited that as provided under Section 39 of the ELRA, the burden of proof lies to the employer and not employee. That the employer was supposed to prove that the termination was fair and that the applicant failed to prove that

termination was fair in this case hence the Arbitrator had no any other option than to award the respondents. He therefore urged the court to dismiss the application with costs and uphold the CMA's decision.

In rejoinder Mr. Ahmed argued that though the Arbitrator has discretion to conduct arbitration in a manner he considers appropriate, such discretion should be exercised pursuant to the provision of Rule 22(1) and (1) of the Labour Institution (Mediation and Arbitration Guidelines) G.N. No. 67 of 2007 (GN 67/2007) which require parties to present their cases and give evidence accordingly.

On the allegation against the name of the applicant, his rejoinder submission was that he stated that Kiwanda cha Kisarawe Sement and Kisarawe Cement Company Limited in the legal view means two different legal persons. He insisted that the remaining respondents did not prove their cases because the Arbitrator only relied with the evidence of PW – 1. He urged the court to allow the application.

Having heard submissions for and against the application, I find the court is called upon to determine the following issues; whether PW-1, Issa Omary Bweha had mandate to represent the remaining 38 employees (grounds (i), (ii) and (iv); whether the arbitrator properly

analysed the evidence ground (iii) and the reliefs are the parties entitled.

Starting with the first issue as to whether PW-1, Issa Omary Bweha had mandate to represent the remaining 38 employees, the applicant is strongly alleging that the named respondent had no mandate to represent others. Representative suit in the CMA is governed by Rule 5 (1) (2) (3) of GN 64/2007. The relevant provision provides as follows: -

> *'Rule 5 (1) A document shall be signed by the party or any other person entitled under the Act or these rules to represent that party in the proceedings.*
>
> *(2) where proceedings are jointly instituted or opposed by more than one employee, documents may be signed by an employee who is mandated by other employees to do so.*
>
> *(3) Subject to sub-rule (2) a list in writing, of the employees who have mandated a particular employee to sign on their behalf, must be attached to the document. The list must be signed by the employees whose names appear on it.'*

I have carefully perused the records in the application at hand, the respondents attached the list of their names in the CMA F1 titled as

'Orodha ya wafanyakazi kiwanda cha sementi kisarawe'. I am in agreement with Mr. Mkenda's argument that though the respondents indicated in their list that they are employees of Kiwanda cha Sementi Kisarawe such name when translated to English it carries the same meaning as Kisarawe Cement Co. Ltd, the applicant herein. Thus, I find the allegation that the employees in the attached list are from different company from the respondent is illogical. As long as the applicants are listed in a list that they signed, having one of them representing others in testimony is not illegal for as long as their case is proved.

The issue before the CMA was whether the termination of the respondents was fair procedurally and substantively. The transaction leading to the termination was the same and in such circumstance where the respondents' benefits are identical and arise from the same transaction, there was no need to have all the respondents testify as long as none of the respondent denies to have allowed the said Omary to represent them. After all, the objection should have been raised at the earliest opportunity which is during arbitration and not to wait for this long time to be raised. That said, I find the grounds I, ii and iv to be lacking merits and are hereby dismissed.

The third ground is that the trial Arbitrator erred in fact and law for failure to properly analyse evidence before her hence reached adverse decision against the applicant. Mr. Omar submitted that in the CMA Form No. 1, the respondent's claim was for unfair termination and the reliefs sought were compensation. He argued that Section 40(1) provides for compensation of an employee when the termination is found to be unfair, the amount is not less than 12 months' remuneration. That Section 4 of ELRA defines remuneration as the total value of all payments, in money or in kind, made or owing to an employee arising from the employment of that employee. He then submitted that when an employee seeks for compensation for unfair termination it is his duty to prove to the arbitrator what she seeks before the arbitrator can award it. As for this case, it is Mr. Omar's submission that the arbitrator failed to analyse the evidence on what is to be paid to the employees' from their employment as that was not testified by PW1 and that no document was tendered to that effect. That because there was no any proof justifying the amount to be paid, the arbitrator erred in awarding such compensation.

In reply, Mr. Mkenda submitted that the Arbitrator awarded each Respondent to be paid 6 months' salary as compensation for unfair

termination instead of 30 months' salary as requested in CMA Form No. 1. He argued that there is no any substance in this ground as the Trial Arbitrator considered evidence adduced by both parties and decided the above labour dispute and thus served justice to both parties.

Looking at the evidence adduced, the applicant had informed the respondents that they intend to use better machine therefore there will be reduction of the employees. The respondents were not involved in the process, only that the employer had claimed that he was terminating the respondents on operational requirements, the procedure for termination of employees on operational requirements are provided for under Section 38(1) of the Employment and Labor Relations Act, Cap. 366 R.E 2019, it provides that:

(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;

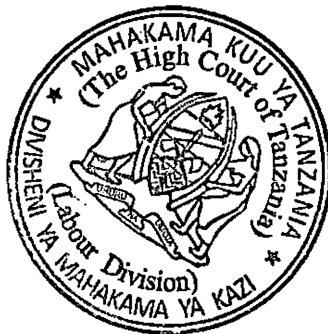
(iii) Any employees not represented by a recognized or registered trade union.

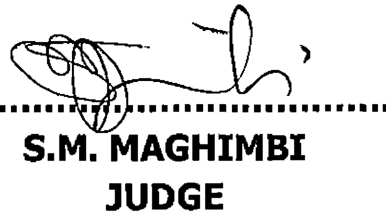
The first requirement in retrenchment according to the law is the notice of intention to retrench (Sect. 38(1)(a)), under Section 38(1)(b) the notice should disclose all relevant information on the intended retrenchment for the purpose of proper consultation. As per the evidence the applicants were only issued with notice to terminate their employment, something which cannot be purported to be the notice

under Section 38(1). In conclusion, the applicant failed to prove the operational requirements that forced her to retrench the employees, neither were the procedures followed. I therefore see no reason to conclude that the arbitrator misapprehended the evidence.

In the result, I see no reason to fault the decision of the CMA. The revision is lacking merits and it is hereby dismissed in its entirety.

Dated at Dar es Salaam this 07th day of February, 2022.





S.M. MAGHIMBI
JUDGE