IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 118 OF 2021

MERCHANISED CARGO SYSTEM (T) LIMITED .....APPLICANT

VERSUS

MOHAMED MKUMBA ..... RESPONDENT
(From the decision of the Commission for Mediation and Arbitration of DSM at Ilala)

(Ndonde: Arbitrator)

Dated 05th February 2021

in

CMA/DSM/ILA/444/2020/256

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JUDGEMENT

28th June & 11th August 2022

Rwizile J

The applicant filed the present application for revision to challenge the decision of the Commission of Mediation and Arbitration (CMA) in CMA/DSM/ILA/444/2020/256. The application is supported by an affidavit of Nuru Hassan Maneno, the applicant's Operations Manager. On the other hand, the respondent challenged the application through his counter affidavit. The applicant prays for the following orders: -

i. That this Honourable court be pleased to revise, quash and set aside the Award of the Commission for Mediation and Arbitration delivered by Hon. Ndonde, S. Arbitrator in CMA/DSM/ILA/444/2020/256 on 05.02.2021 and served upon the applicant on 22.02.2021.

ii. Any other relief this Honourable Court may deem fit and just to grant.

The dispute emanates from the following background; on 15th October 2013, the respondent was employed by the applicant as a Driver in a permanent contract which is exhibit D1. He was terminated from employment on 14th May 2020 on the ground of retrenchment as stated in the termination letter which is exhibit D3. Aggrieved by the termination, the respondent referred the matter to the CMA claiming for unfair termination where it was decided in his favour. The applicant was ordered to pay the respondent a total of TZS. 3,307,692.00 for one month salary in lieu of notice, leave payment, severance pay of TZS. 376,923.00 salary for the days worked before termination amounting to TZS. 130,769.00, twelve months salary as compensation for the alleged unfair termination as well as certificate of service. Being dissatisfied by

the CMA decision, the applicant filed the present application urging the court to determine the following issues: -

i. *Whether it was proper for the trial Arbitrator to hold that the procedure for retrenchment was not followed*

ii. *Whether it was proper for the respondent to refer the matter to the Commission for Mediation and Arbitration challenging the procedure and subsistence of termination after signing of retrenchment agreement.*

iii. *Due to the nature of employment of the respondent, whether it was proper for the trial Arbitrator to rule that the absence of consultative minutes of retrenchment meeting between the applicant and the respondent denoted no procedure was followed.*

iv. *Whether the Commission for Mediation and Arbitration had power to invalidate the retrenchment agreement.*

v. *Whether issues framed were consistent to the opening statements of the parties.*

The application was heard orally. The applicant was represented by Mr. Caesar Sebastian Kabissa, learned Counsel whereas Mr. Benjamin Paul Marwa, learned Counsel appeared for the respondent.

In his submission in support of the application Mr. Kabissa abandoned the first and fifth issues. Arguing the second issue, Mr. Kabissa submitted that the notice of retrenchment is given under section 38 of the Employment and Labour Relations Act, [Cap 366 RE 2019] (ELRA). He submitted that section 38(1)(d)(i) of ELRA requires employer to consult a trade union before retrenchment. He stated that TUICO was the Trade Union at the respondents' work place and the applicant consulted them on retrenchment as testified by Dw1.

The counsel strongly submitted that the respondent was consulted through TUICO. To support his submission, he referred this court to the cases of **Singita Garment Resource v E. Burito** Revision No. 31 of 2012 at page 261 Labour Court Digest 2013 and **Metal Product Ltd v Mohamed Mwerangi and 7 others** Rev. No. 148 of 2008.

As to the third issue Mr. Kabissa submitted that section 38(2) of ELRA and Rule 23(1) of The Employment and Labour Relations (Code of Good Practice) Rules GN 42 of 2007 ('GN. 42/2007') is clear that whoever is not satisfied with retrenchment is to file a dispute at the CMA before

signing the Collective Bargaining Agreement (CBA). He submitted further that, in this case the CBA was signed and the respondent had no right to challenge the same since it was in closed hands.

The counsel submitted that the CBA was admitted at the CMA as exhibit D2, thus, the CMA had no powers to invalidate the same. To support his argument, he cited the case of **Philipo Joseph Lukonde v. Faraja Ally Said** Civil Appeal No. 74 of 2019. The counsel continued to submit that the CBA can only be challenged when it contravenes the law. He strongly submitted that the retrenchment procedures were followed in this case.

Responding to the application, Mr. Benjamin adopted the respondent's counter affidavit to form part of his submission. He submitted that the retrenchment procedures were not followed. He stated, there was no minutes showing there was an agreement reached. Mr. Benjamin continued to submit that the respondent was not party of the CBA, since he was not represented by any trade union. The learned counsel added, there is no evidence to show that the respondent had a TUICO membership and that it was a recognised bargaining agent at the workplace in terms of section 67(3), (4) of ELRA hence. He ought to have been personally consulted pursuant to section 38(1)(d)(iii) of

ELRA. The counsel further argued, cases cited by the applicant are distinguishable to the case at hand.

Mr. Benjamin submitting further, he held the view that the CMA was right in invalidating the CBA. He stated, the application has no merit and it should be dismissed with costs for being frivolous and vexatious.

In rejoinder Mr. Kabissa had nothing to add. He reiterates his submissions in chief.

After considering the rival submissions of the parties, the court notes the centre of dispute is whether retrenchment procedures were followed. The court notes further that the reason for retrenchment is not disputed by the parties.

As rightly submitted by both counsel, retrenchment procedure is provided for under section 38 of the ELRA which reads together with Rules 23, 24 and 25 of GN 42 of 2007. In this application the respondent strongly alleges, he was not consulted before retrenchment. On his part the applicant firmly submitted that the respondent was consulted through a trade union representative (TUICO).

The law empowers the trade union which represents the majority of the employees to be the bargaining agent of the employees at the workplace. As submitted, this is pursuant to section 67(1) of ELRA which provides as follows: -

> *"A registered trade union that represents the majority of the employees in an appropriate bargaining unit shall be entitled to be recognised as the exclusive bargaining agent of the employees in that unit."*

In this application there is no direct evidence which proves that TUICO was the exclusive bargaining agent of the applicant's employees. However, the fact that TUICO was the only trade union consulted and about 35 employees were retrenched following the collective bargaining agreement between TUICO and the applicant, the fact suggests that TUICO was the exclusive bargaining unity at workplace.

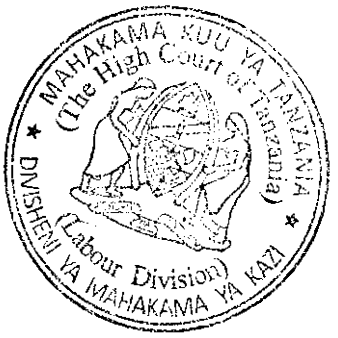
In the circumstances, I therefore hold, the respondent was consulted through trade union representative. Had that not been the case, the respondent ought to have referred a matter to the CMA before the CBA was obtained by the parties. This position is supported by the case of **Singita Grumet Reserves Ltd (supra)** where this court held that: -

"In a fair retrenchment process, an employer does not need to consult with individual employees in a working place where there is a trade union recognized in terms of section 67 of the Act. In such a situation, the union is assumed to work for the benefit of its members, which is the essence of application of principle of collective power of labour."

It should further be noted that from the beginning of the process, the applicant had no intention to retrench the respondent and other retrenched employees. The record indicates that the proposal for retrenchment was initiated by the employees themselves then the applicant implemented the same. This is evidenced by clause 4 of the Collective Bargaining Agreement between the applicant and TUICO (Exhibit D2). In fine, it was not practicable for the employer to follow the retrenchment procedures to the letter as I have efforted to show before.

What is of paramount importance, I think, is that the retrenched employees were properly consulted and clause 1 of the CBA proves that the applicant and retrenched employees had two previous meetings before reaching into an agreement.

In the end, I find the present application has merit. The CMA's findings that the applicant did not follow the required retrenchment procedure is not merited. Consequently, the application is allowed, the award is quashed and set aside, an order for costs is declined.



A. K. Rwizile

JUDGE

11. 08.2022