IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 35 OF 2021

BETWEEN

MOHAMED SAID MAWELA ..... 1ST APPLICANT

JAMES BONIFACE MWAMPOSA ..... 2ND APPLICANT

MOHAMED MKANDE KIVUGO ..... 3RD APPLICANT

HUSSEIN ATHUMAN ..... 4TH APPLICANT

EZEKIEL SIMON ..... 5TH APPLICANT

SAID HASSAN DEGE ..... 6TH APPLICANT

ASHA RAJABU ..... 7TH APPLICANT

TATU ABASI ..... 8TH APPLICANT

ZINDUNA ISSA .....9TH APPLICANT

FROLA GABRIEL ..... 10TH APPLICANT

GRACE WILSON ..... 11TH APPLICANT

ANGEL PETER ..... 12TH APPLICANT

AND

CHANG YOU RECYCLING PLASTIC CO. LTD ..... RESPONDENT

JUDGEMENT

S. M. MAGHIMBI, J.

The applicants were aggrieved by the award of the Commission for Mediation and Arbitration for Kinondoni ('CMA') in Labour Dispute No. CMA/DSM/KIN/508/19 delivered by Hon. Hilary N.J, Arbitrator on 11/12/2020, which declared the termination of the applicants to be fair. The applicants then lodged the present application raising the following legal issues:-

i. Whether it was proper for the trial Arbitrator to decide that the respondent was correct to breach the applicants' employment contracts while the respondent totally failed to prove reason for such breach.

ii. Whether it was proper for the trial Arbitrator to decide that the respondent was correct to breach the applicants' employments contracts while he failed to prove proper procedure during breach of their employment contracts.

The application emanates from the following background; the applicants were employed by the respondent on different positions and at different dates on fixed term contracts of one-year. On 21/06/2019, the applicants were terminated from employment on the ground of retrenchment. Aggrieved by the termination the applicants referred the matter to the CMA. After considering the evidence of both parties the CMA found that the applicants were fairly terminated from their employment both substantively and procedurally hence the current application. The application was argued by way of written submissions. Before this court, the applicants were represented by Mr. Edward Simkoko, Personal Representative whereas Ms. Grace Msuya, learned advocate, appeared for the respondent.

Arguing in support of the first issue, Mr. Simkoko submitted that the applicants' employment contracts were terminated on the ground of operational requirement however, the respondent failed to prove the validity of such reason pursuant to section 37(2)(a)(b) of the Employment and Labour Relations Act, [Cap 366 RE 2019] ('ELRA'). He stated that the alleged reason that the government prohibited production of plastic bags was not true because the respondent's company produced other materials such as plastic bottles. He added that the respondent did not tender any document such as Memorandum of Association and Article of Association or certificate of incorporation to prove the activities engaged by the respondent's company. Further that after termination of the applicants the respondent did not close his business, but instead, she employed other employees.

As to the second issue, Mr. Simkoko simply submitted that the procedures for termination on the ground of retrenchment are provided under section 38(1)(d)(i) of ELRA and that the respondent did not adhere to the same. In the upshot, Mr. Simkoko urged the court to revise and set aside the CMA's award and award the applicants remaining period of their employment contracts.

Responding to the first ground, Ms. Msuya submitted that the respondent had valid reason to terminate the applicants and he

complied with section 37(2)(b)(ii) of ELRA. That the respondent being a plastic company lost its business following the government's decision to burn the use of plastic bags in June 2019 a fact known to all Tanzanians. She submitted that the respondent depended on the recycling of plastic to make row material for the manufacture of plastic bags which was the source of livelihood of the respondent's business. She stated that in the circumstances, the applicants became redundant.

Ms. Msuya continued to submit that the respondent had valid reason to terminate the applicants and that after closing of the company for more than two months, the company decided to make few allowed plastic materials such as plastic bags, water packages and bread hence rehiring of some retrenched employees. Ms. Msuya insisted that retrenchment was necessary in the circumstances of this case, denying allegation that ten employees were retained. She argued instead, the company was closed for more than two months and after they came up with another business as alluded above, some employees were rehired.

Regarding the second issue, Ms. Msuya submitted that the retrenchment procedures in this case were followed as they are provided under section 38 of the ELRA. That all employees were served with notice to attend consultation meeting and they attended accordingly as evidenced by the minutes of consultation meeting. She submitted that

the applicants also agreed on the payment of their terminal benefits which they collected the day after retrenchment together with their certificate of service.

On the allegation of representation, Ms. Msuya submitted that the applicants were afforded opportunity to bring representatives of their own choices but they did chose not to do so. She added that there was no trade union around the working place. To support her submissions, she referred the court to the case of **Peter Jacob Weroma & 11 others v. Ako Group Limited, (Labour Revision No. 16 of 2019) [2020] TZHC (24 April 2020).**

Ms. Msuya submitted further that the applicants are not entitled to the relief claimed because there was no breach of contract, but end of the contract due to operational requirement. She therefore prayed for the court to dismiss the application for want of merit.

After going through the rival submissions of the parties and the CMA records as well as applicable laws, the issue for determination was whether the termination of the applicants was fair substantively and procedurally. Starting with the first issue on the validity of the reason; as the record speaks, the applicants were terminated from employment on the ground of retrenchment which is one of the recognized ways to end employment relationship in our labour laws. The term retrenchment

is also referred to as operational requirement, which is defined under Section 4 of ELRA to mean a requirement based on the economic, technological, structural or similar needs of the employer. The circumstances and procedures justifying termination on operation requirements are clearly stated under Section 38 of the ELRA and Rule 23 of the Employment and Labour Relations (Code of Good Practice) Rules GN. No. 42 of 2007 ("the Code"). The Rule provides that:

> *"23 (1): A termination for operational requirements (commonly known as retrenchment) means a termination of employment arising from the operational requirements of the business. An operational requirement is defined in the Act as a requirement based on the economic, technological, structural or similar needs of the employer.*
>
> *(2) As a general rule the circumstances that might legitimately form the basis of a termination are-*
>
> *(a)* ***economic needs*** *that relate to the financial management of the enterprise;*
>
> *(b)* ***technological needs*** *that refer to the introduction of new technology which affects work relationships either by making existing jobs redundant or by requiring employees to adapt to*

the new technology or a consequential restructuring of the workplace;

(c) ***structural needs*** *that arise from restructuring of the business as a result of a number of business related causes such as the merger of businesses, a change in the nature of the business, more effective ways of working, a transfer of the business or part of the business.*

[Emphasis is mine]

In the instant matter, the applicants were terminated on the basis of structural need of the business. The respondent alleged that following the government burning of the use of plastic bags which was the only business of the respondent, she had no other option but to retrench the applicants. As rightly submitted by Mr. Simkoko, there is no any evidence on record tendered by the respondent to prove that his company only engaged on the production of plastic bags or that plastic bags were the only material depended on the production other plastic materials. The respondent was to show how the Government Order effected his retain of the applicants and what steps he took over time because the burn was not of immediate effect. It is also undisputed that the respondent re-hired some of the employees within a short spun, which raises question whether the government burn affected the

respondent because the production of burnt plastic bags wasn't the only thing the respondent was producing, as alleged by the applicants. If the applicants strongly argued that the company engaged in the production of other materials including the production of plastic bottles, the evidence which was disproved by the respondent; then the respondent ought to have tendered evidence to prove that the company had no any other business apart from the production of the burnt plastic bags. Further evidence was supposed to be tendered to establish how the burning of plastic bags affected the respondent. In absence of such evidence on record, this court finds that retrenchment was used as a pretext to terminate the applicants. This practice is prohibited by the law and it has been discouraged in numerous decisions including the case of **Bakari Athuman Mtandika v. Superdoll Trailler Ltd, Revision No. 171/2013** Labor Court at Dar es salaam (Unreported) where it was held that;

> *"To ensure that operational reasons are not used by the employer as pretext to terminate an employee unfairly at the employer's will; thus circumventing the employee's right to security of tenure guaranteed under the parties contract of employment."*

In that same case the Court went on to hold that:-

"the basic duty of decision maker in unfair termination dispute, where operational reasons are raised as a cause for terminating an employee.....among issues to be framed should be whether or not operational grounds were genuine reason justifying termination or a pretext."

Therefore, unlike with what was found by the Arbitrator, that the respondent had a valid reason to terminate the applicants, this court is of a different finding which is that the respondent failed to prove the validity of the reason for termination.

As to the second issue relating to the fairness of the procedures; the procedures for retrenchment are provided for under 38 of the Act which provides:

"(1) In any termination for operational requirements (retrenchment), the employer shall comply with the following principles, that is to say, be 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"

In the matter at hand, the respondent submitted that she followed the above stipulated procedures in terminating the applicants. On the outlook, the evidence indicates that the above procedures were followed. The applicants were notified to attend to consultation meeting (exhibit D1), the meeting was dully conducted as evidenced by the consultation minutes (exhibit D2) then the applicants were paid their terminal benefits accordingly (exhibit D3 collectively). However, the fact remains that the respondent failed to prove the necessity of retrenchment.

In the event, the court finds that the applicants were unfairly terminated from employment for respondent's failure to prove validity of the reason for retrenchment. On such basis, the applicants are entitled

to reliefs for unfair termination of a fixed term contract before its expiry. It is undisputed that all applicants were on fixed term contracts of one year, they are therefore entitled to be salaries for the remaining period of their contracts as compensation.

All the above said and done, this application is found to be partly meritious. The CMA's award is hereby revised to the extent that the termination of the applicants was substantively unfair. The respondent is ordered to pay the applicants a total of Tshs. 16,250,000/=. The payment of each applicant should be made in accordance with the document attached with the referral form CMA F1.

It is so ordered.

Dated at Dar es Salaam this 13th July, 2022.

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S.M. MAGHIMBI

JUDGE.