IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 413 OF 2021

LONAGROTANZANIA LIMITED ..... APPLICANT

VERSUS

DANIEL MUGITTU..... RESPONDENT

(From the decision of the Commission for Mediation and Arbitration of DSM at Kinondoni)

(Wilbard: Arbitrator)

Dated 20th August, 2021

in

REF: CMA/DSM/KIN/260/16/209

JUDGEMENT

18th August & 24th August, 2022

Rwizile, J

This Application is for revision. The applicant is asking this court to examined and set aside the award made by the Commission for Mediation and Arbitration (CMA) dated 20th August 2021.

It has been alleged that the respondent was employed by the applicant on contract. The same was retrenched on 30th November, 2018. Upon retrenchment, because the respondent and another were not happy with

retrenchment, they filed a dispute at CMA for unfair termination. The award was in favour of the respondent (Daniel Mugittu).

The applicant was ordered to pay him, a compensation of TZS. 45,148,974.00 for unfair termination. The applicant was aggrieved, hence this application.

The application is supported by the affidavit sworn by Kashyap Godavarthi, the applicant's principal officer. In opposition, Daniel Mugittu filed a counter affidavit. The applicant advanced one ground for revision stated as hereunder;

> *Whether it was legally proper for the trial arbitrator to hold that applicant had fair reason and followed fair procedures and went ahead awarding compensation to the respondent.*

The hearing was conducted orally. The applicant was represented by Gilbert N. Mushi, learned Advocate. The 1st respondent appeared in person. Mr. Mushi submitted that for termination to be fair, there should be reasons for termination and the procedure for termination has to be followed as provided for under section 37 of Employment and Labour Relations Act [CAP. 366 R.E. 2019]. He further argued that the onus of

proving termination was fair lies to the employer as provided under section 39 of [CAP. 366 R.E. 2019].

He stated that Dw2 through his testimony and exhibits A1 – A5 tendered proved that there was reason for termination and that, the procedure was followed. Dw1 on the other hand, he said, proved the procedure for termination to have been complied with. In his view as the arbitrator held that there was reason for termination and that the procedure was followed, hence there were no need to award any compensation.

In reply Mr. Mugittu submitted that there were two meetings, which he did not attend, they were held on 26th July 2016 and 16th November 2016. He stated that during the first meeting, he was transferred to a sales executive from his first post. The meeting held, according to him, made important decisions. He stated that the Human Resource officer sent to him a letter notifying about his salary change from TZS 3,155,000.00 to 725,000.00. As for the second meeting, it was from 07th October 2016 to 18th November 2016, he was bedridden at Dar group hospital and later at Muhimbili for surgery.

On 24th November 2016, he added, he went to see the director and was told that the director could not see him. According to him, the meeting held on 16th November 2016 retrenched him. He stated that there were 53 employees and only 17 attended the meeting. In his view, only the minority attended the meeting and that he was not consulted, which is against the law. He then prayed; the application be dismissed.

In a rejoinder, Mr. Mushi submitted that as what has been stated by the respondent was not in the count affidavit, so they should not be considered, since submissions are not evidence. He stated that the respondent did not complain when his salary was reduced and did not take any step at the CMA to complain about the salary. He continued to argued that the respondent did not challenge the award when stated that he had knowledge of the second meeting. In his view, the award was not proper, it should be set aside.

Having heard the parties, I think, I have to determine if *there were proved reasons for retrenchment and* if the *procedure for retrenchment was followed*

Dealing with the first issue, rule 23(1) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007 provides for retrenchment as: -

"A termination for operational requirements (commonly known Operational as retrenchment) means a termination of employment arising from the requirements 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."

The applicant stated that he had economic problems which led to closing some of the branches of her office. She tendered her annual reports which were admitted as exhibits L1, L2, L3 and L4. They show she was getting a loss. It showed in the year 2015 got a loss of 1,998,810 and in 2016 got a loss of 3,143,543. Also, it showed in 2017 got a loss of 4,230,729 and in 2018 a loss of 5,092,424. This trend of loss increasement as the arbitrator found, proves that the applicant had reason to retrench some of her employees.

The second issue is whether the procedure for retrenchment was followed. Section 38 of ELRA provides for the procedure to be followed as hereunder:

Section 38"(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 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 retrenchment,

(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 recognised trade union;

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

As the law provides, there must be a notice of the meeting issued to the employees so as to discuss on retrenchment. Evidence tendered by the applicant which were marked as exhibits L5 and L6 does not show if the respondent attended the consultation meetings. Exhibit L5, a notice to the meeting refers to an agreement made on 26th July 2016. It stated: -

> *"Dear All*
>
> *Good afternoon.*
>
> *Reference is made from the retrenchment notice dated on 19th July 2016 and retrenchment agreement dated 26th July 2016 which we agreed on reducing approximately 15 employees and the first phase reduced 4 employees only so 11 left.*
>
> *Now, management would like to inform all of you that we are going for the second phase as the announcement herewith attached."*

This notice means that there was a meeting made, which discussed retrenchment but was not tendered at CMA as evidence. Instead, evidence tendered was the attendance of retrenchment meeting held on 16th November, 2016. It was marked as exhibit L6. Going through the said exhibit, there is a list of names of participants but there is no name of the respondent. This proves that the respondent was not consulted on the

issue of retrenchment. This is in line with his evidence and submission which clearly point out that the same was absent when consultation meetings were held. Since as it has been submitted, the applicant was cast with the onus of proving her case, I see, no proof of proper retrenchment procedure.

On part of relief, as retrenchment was proved to be reasonably fair but procedurally unfair. I have to apply the holding in the case of **Felician Rutwaza v World Vision Tanzania**, Civil Appeal No. 213 of 2019, Court of Appeal of Tanzania at Bukoba, at pages 15-16: -

> *"In the context of the case in which the unfairness of the termination was on procedure only, guided by some decisions of that court, the learned Judge reduced compensation from 12 to 3 months. With respect we agree with her entirely. ... under the circumstances, since the learned Judge found the reasons for the appellant's termination were valid and fair, she was right in exercising her discretion ordering lesser compensation than that awarded by the CMA. We sustain that award."*

I thus hereby order for the respondent to be paid the remaining balance of his salary for three months, because the same was reduced and a compensation for six months as follows: -

i. remaining balance

actual salary TZS 3,155,000.00

reduced salary TZS 729,000.00

deducted salary 2,426,000/= * 3 months = 7,278,000.00

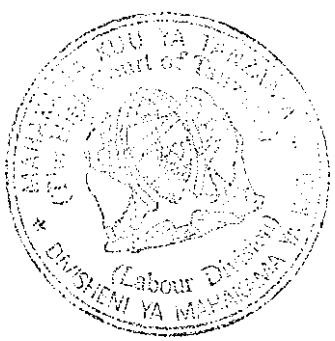
ii. six months compensation 3,155,000 * 6 = 18,930,000.00

iii.

remaining balance + six months compensation

7,278,000 + 18,930,000 = 26,208,000.00

I therefore order the applicant to pay the respondent total amount of TZS. 26,208,000.00. For that matter, the application is partly allowed to the extent explained. This being a labour matter, each party has to bear own costs.



A. K. Rwizile

JUDGE

24.08.2022