

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

LABOUR REVISION NO. 313 OF 2021

*Arising from the Commission for Mediation and Arbitration of Dar es
Salaam, Ilala in Labour Dispute No. CMA/DSM/ILA/326/2020/195
(Kokusiima A, Arbitrator) dated 27 July 2021*

NAS DAR AIRCO CO. LIMITED.....APPLICANT

VERSUS

GLADY'S GASPER.....RESPONDENT

JUDGMENT

K.T.R. Mteule

24/08/2022 & 1/9/2022

This application is seeking for revision of the award delivered in Labour Dispute No. CMA/DSM/ILA/326/2020/195. The applicant is seeking for the court to revise the said award, quash and set it aside.

The parties had an employment contract. Due to financial reasons, the Applicant undertook a retrenchment process where the Respondent became one of the retrenched employees. She was dissatisfied and lodged a Labour Dispute in the CMA to challenge the fairness of the process. The arbitrator agreed with the Respondent's argument that there was unfairness in the criteria used to select the retrenched employees and declared the process to be partially unfair

and ordered compensation to the Respondent to the tune of 6 months remuneration which totaled TZS 4,260,000. Being dissatisfied with the award, the Applicant (employer) preferred this application for revision.

This application was heard by written submission where the Applicant was represented by Mr. Anold Peter while the Respondent was represented by Mr. Lucas Nyagawa.

Mr. Anold having adopted as part of his submission the affidavit of Musa Daudi Kuboja he decided to condense the five issues in the raised in the Application into one, which is **whether there was partial irregularity of procedure for retrenchment as held by the Hon. Arbitrator at CMA**. He submitted that, it was undisputed at the CMA that the Respondent was terminated by the applicant due to operational reasons. According to him, the only issue in the CMA was whether the procedure was followed. He submitted that the Respondent did dispute the procedure solely on the fact that she alleged she was not satisfied with the criteria of selection of employee.

According to Mr. Anold the Applicant followed all the retrenchment procedures from giving the general notice to all staff members to attend the meeting of which the Respondent attended. He stated

further that the Respondent was also a member of Trade Union known as COTWU and the said Trade Union leaders and its members also attended the meeting.

According to Mr. Anold, the applicant followed the procedures stipulated under S. 38 (1) of the Employment and Labour Relations Act, Cap 366 R.E 2019 and Rule 23, 24 & 25 of the G.N 42 of 2007. According to Mr. Anold, through the annexures and exhibits, there is sufficient evidence that there was a notice on intention to retrench, there was also consultation meetings, and full disclosure by the applicant of the relevant financial documents to prove the reason and that is why the reason was not disputed.

Mr. Anold questioned the silence of the Respondent during the retrenchment process for having never complained but filed a dispute at CMA disputing the process which he himself attended in person as well as his Trade Union. In his view, this shows that the Respondent and the Trade Union were all satisfied with the process of retrenchment since the agreement was signed by the leaders of the Trade Union and the Management, meaning that even the Trade Union was satisfied with the retrenchment process including selection criteria, which was prompt and fair. Mr. Anold blamed the Hon. Arbitrator for having not taken this fact into consideration.

According to Mr. Anold, the Hon. Arbitrator mistakenly considered PW2 as the head of Department, the fact that contradicts the evidence by PW2. He referred to page 9 & 11 of the award pointing out that no association of introductory remark of PW2 when taking oath when introducing himself as operator and Branch secretary of Trade Union. According to Mr. Anold, this mistaken identity influenced the decision of the arbitrator.

Mr. Anold questioned the legality of Respondent's dispute on the selection criteria without identifying which criteria was not complied with but only came out with bear assumption. He considered unfounded the respondent statement given on cross examination that employees who were employed after her were not retrenched and this was the reason given by the CMA in the words 1st in last out principle not followed as they appear at page 3 of the award.

Mr. Anold reiterated the Applicant's prayer that this Court sets aside and quash the award that was delivered in favor of the Respondent and declare that the retrenchment procedure was complied with by the Applicant and any other relief the Court feels just to grant.

In response, having adopted the counter affidavit of Gladys Gasper to form part of his submissions, Mr. Nyagawa informed the court that the Respondent is disputing to be among the selected employees to

be retrenched because the agreed criteria for selection were not followed. He to page 5 of the award, where DW1 who was Human Resource Manager responding to the Respondent's question about the criteria used for her selection stated;-

"Ni kama kifo tu, wewe umetangulia wengine watakufuata."

According to Mr. Nyagawa, this answer from the person who was responsible with the exercise indicate failure to explain the criteria used to select.

It is Mr. Nyagawa's submission that in any proceedings about unfair termination, it is a burden on the employer to prove that the termination was fair as per **S.39 of the Employment and Labour Relations Act**. In his view, the employer failed to discharge his statutory the duty.

Mr. Nyagawa remarked that the fact that there were same criteria which was not followed was not disputed or cross examined at CMA. In his view, failure to cross examine on a certain fact means the facts are not disputed. He concluded that the arbitrator was right to Rule that there were same partial unprocedural process when they were selecting employees to be retrenched as said at page 9 paragraph 2 of the award.

He thus prayed for this Application to be dismissed and the decision of CMA to be upheld.

Mr. Anold, made a rejoinder where he refuted the HR Manager to have made the statement,

"ni kama kifo tu umetangulia na wengine watafuata."

In his view, this was not evidence but were allegation by the Respondent and was never a statement given by the HR Manager. According to him the Human Resource Manager clearly stated as per paragraph 3 of the award that the criteria used were the ones agreed on 23 March meeting which is reflected in the agreement in **exhibit A5**.

From the above submissions this Court is inclined to address one issue as to whether the CMA was correct in finding a partial unfairness in the retrenchment procedure. In the CMA it was not disputed that there was a valid and fair reason for the retrenchment exercise. The epicenter of the debate is on whether the applicant did not follow the criteria for selection. It is the assertion of the Applicant that there was no proof in the CMA that the criteria of selection were not followed because the Respondent never mentioned which criteria was not followed.

I have as well went through the proceedings of the CMA but I could not find specifically which criteria was left unfollowed in retrenching the Applicant. I took note that all other procedures were followed including holding of consultative meeting which was attended by the Respondent and the Applicant. The only specific criteria mentioned by the Respondent was that there were employees who were employed after her but they were not retrenched. This statement according to the award (see page 3 3rd paragraph), came to be contradicted on cross examination where the Respondent failed to mention a person spared from the retrenchment who was employed after the Respondent.

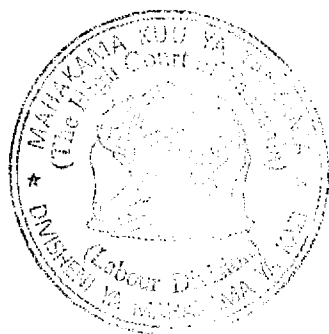
In my view, so long as the procedures under **section 38 (1) (a) Cap 366** were followed, any allegation to unfairness needs to be proved by the person who is alleging. In this matter, it was the duty of the Respondent to prove in the CMA which criteria was left out in the retrenchment.

From the foregoing, I differ with the arbitrator in her holding that there was partial unfairness in the retrenchment procedure. As such the issue as to whether the CMA was correct in finding a partial unfairness is answered in the negative.

From the above findings, I find the revision well founded and allow it.
The CMA award is hereby quashed and set aside. Each party to bear
its own costs.

It is so ordered.

Dated at Dar es Salaam this 1st Day of September 2022.



KATARINA REVOCATI MTEULE

JUDGE

1/9/2022