IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 445 OF 2021

Arising from the Decision of Commission for Mediation and Arbitration in Labour Dispute No. CMA/DSM/KIN/516/19/289.

OMARY SALUM JUMA &20 OTHERS .....APPLICANTS

VERSUS

UPAMI GROUP CO. LTD .....RESPONDENT

JUDGMENT

K. T. R Mteule, J

25/8/2022 & 8/9/2022

This is an application for revision against the decision of the Commission for Mediation and Arbitration of Dar es Salaam Kinondoni (CMA) seeking for this court to call for the record of the **Labour Dispute No. CMA/DSM/KIN/516/19/289**, for purposes of satisfying itself as to its correctness and legality of the award.

The application is supported by an affidavit of the applicants whose names are Regina Narasco Mveyange, Casto Jofrey Kanwela, Geofrey J. kashaga, Geofrey W. Waitara, Gradson Kitwanga, Hamis Hassan Rajabu, Hemed Amiri Ally, Keneth G. Limota, Matius Bernard Mlyowa, Michael

Lucas Masole, Muharami Yusuph Mintanga, Pendaeli H. Ntisi, Rajabu Kombo Hussein, Ramadhan Siasa Ramadhan, Said M.Kingomela, Said H.Ntandu, Said Juma Mkoki, Salumu Mohamed Sudi, Salumu Yohana Silvester and Shedrack Hassa. The Application is contested by the Respondent who filed a counter affidavit to dispute the material facts of the affidavit.

From what I gather from the sworn statements of the parties in the affidavit and counter affidavit and from the CMA record, the applicants were former employees of the respondent on a written unspecified contract with daily payment of TZS 4000 payable after every two weeks. A dispute arose amongst the Applicants and their Employer which was referred to the CMA, claiming breach of contract by the respondent. The Respondent disputed breach of contract and claimed that the respondents refused to work and went on strike out of the workplace claiming to have been not sufficiently paid.

The arbitrator found that there was no breach of contract, but the Applicants terminated themselves from their employment. The arbitrator dismissed the applicants' application. Being aggrieved with the CMA decision, the applicants preferred this revision application.

The application was heard by written submissions where the applicants were represented by Mr. Emmanuel D. Kusekwa while the Respondent was represented by Mr. Eneza Msuya. From their submissions the main issue in this matter is whether there are sufficient grounds to warrant revision and setting aside of the CMA award.

Although the affidavit enumerated a number of issues, during the submission the applicant had one issue as to **whether it was the respondent who terminated the applicants or the applicants terminated themselves**. This will be considered in a bid to answer the main issue.

In his submissions, Mr. Emmanuel challenged the arbitrator's evaluation of evidence asserting that could the arbitrator properly evaluated the evidence he would have found that it was the respondent who issued a notice to 44 employees including the 21 applicants titled "a suspension order for unknown period of time". The counsel faulted the notice admitted as exhibit DW1 which was publicised on the same date as the notice of warning. According to the applicant's submission, the notice of warning is fictitious made without naming any name issued at the time when the applicants had already forced to vacate. Mr. Emmanuel

considered it as an ineffective document to communicate with the applicants who were already ordered to vacate the premises.

According to Mr. Emmanuel, since it was the respondent who terminated the applicants from employment, he ought to have complied with the procedure of termination for employees who are alleged to have participated in unlawful strike. He described the procedure to be the conducting of investigation and holding of disciplinary meetings.

Mr Emmanuel referred to **Section 41(1) (b) of the Employment and Labour Relation Act 2004**; which provide for Circumstances under which an Employer may suspend an Employee and that such suspension can only be sustained for 4 weeks with half pay to allow investigation of the allegation against the Employee.

He further referred to Rule (14) (2). (3)(4), (5). (6) (7) and (8)of GN 42 of 2007 and submitted that termination of an Employee who participated in unlawful strike among others shall prior to the termination involve a trade union to discuss the Course of action.

He cited the cases of **Tanzania Revenue Authority v. Elias Joseph Huruma, Lab, Div, Dsm, Rev. No. 572 of 2016, 18/05/18. (Labor Court Case Digest Rev No.64/2018) MashakaJ; Peter Mnyanyi V Registered Trustee of Efatha Ministry, Lab. Div.,DSM, Rev. No.**

329 of 2017, 14/12/18, Aboud J. (Labour Court Case Digest Rev No.7/2018) and the Court of Appeal in case of Benjamin P.Masota (Supra) and that of **Mzumbe University Vs. Nardin jella, Civil Appeal No.23 of 2010, CA DSM (unreported).**

In reply the respondent condemned the applicants for having participated in unlawful strike in disregard of the fact that each party to an employment contract has a duty to perform. Having explained the economic effects the applicants alleged strike caused in respondent's business, the applicant cited the **provision of 99 (3) of the Employment and Labour Relations Act, Cap 366 and Rule 4 (6) of the Employment and Labour Relations (Code of Good Practice)** and submitted that the circumstances of the business of the respondent justified deviation from procedure. In his view, collective misconduct can justify departure from the normal procedure. Mr. Msuya submitted that the Respondent initiated disciplinary procedure, but the respondents did not turn up.

Mr. Msuya challenged the applicability of the cases cited by the applicants' counsel. He continued to insist that the Respondent never intended to terminate the employment of the Applicants.

Although parties travelled to cover a wide range of scenario, I will confine this judgment on the purpose of this application for review which is to satisfy the court as to the legality and correctness of the CMA award and proceedings. In doing this, I formulate one issue as to whether the Applicant have established sufficient grounds to warrant revising of the decision of the CMA. In labour matter, to determine existence of fair labour practice, assessment needs to be done on fairness of procedure and reason. To address the above issue, three questions features for purpose of this matter.

In addressing the issues raised I have to determine, firstly, whether the arbitrator was correct to find that the applicants were not terminated from employment. The applicants are asserting that the arbitrator did not properly evaluate the evidence. I have read the award I could not see how the arbitrator evaluated the evidence to arrive at the conclusion he landed on. There is an important documentary evidence which is **Exhibit P1** which was the notice of the Respondent which the applicants alleged to have been issued to bar them from entering the workplace. Throughout the matter, the respondent has not countered this document but the arbitrators did not give it any attention. According to PW1, the applicants tried to enter the work premises, but they were obstructed by the respondent.

It was stated by the Applicants that through **Exhibit P1**, the applicants were suspended for unknown period. In my view, the suspension which does not specify the time may constitute termination. The applicants had reasons to believe that they were terminated. Otherwise, it should have amounted to abscondence and if it was abscondence, then the respondent should have conducted disciplinary proceedings to ascertain it and take necessary disciplinary measures. Short of this, then the Respondent knew why the applicants were not at work. On this reasoning, I differ with the arbitrator in his finding that there was no termination. In my view, the applicants were terminated.

The question which follows is whether there was a fair reason for such termination. The applicants were alleged to have participated in unlawful strike. Three respondent's witnesses, DW1, DW2 and DW3 all testified that the Applicants went on strike at 2 pm on the material date. The aim of the strike according to the respondent was to compel the respondent to pay them salaries before the agreed time. The arbitrator found unlawful the act of the Applicants to go on strike without a good cause. I agree with the arbitrator, going on strike in compelling the employer to effect payment contrary to agreed terms constitute unlawful act. The termination was based on the ground of applicant's participation in this

unlawful strike. In my view, this constitutes a fair reason of terminating the applicants.

The third question is whether the procedure for the termination was properly complied with. There is no evidence that there was any procedure which was complied with in terminating the applicants' employment. The Respondent claimed that the applicants terminated themselves which is already found to be the other way round. This renders the questioned to be answered negatively that there was no fairness in procedure in terminating the respondents.

Secondly, whether the arbitrator was correct in finding that the applicants are not entitled to any relief. It is already found that there was no fair procedure in terminating the Applicants. They are therefore entitled to reliefs due to the unfairness of the reason in the termination. In awarding compensation, I will take into consideration the fact that the reason was for termination was fair. Unfairness is only based on procedure. I understand, reliefs under unfair termination is guided by **Section 40 (1) of the Cap 366.**

However, since the unfairness is only on procedure, I will be guided by the authority in **Felician Rutwaza vs World Vision Tanzania (Civil Appeal 213 of 2019) [2021] TZCA 2** where it is established that the

amount of compensation should not be strictly confined in not less that 12 months even in a matter where unfairness is only on procedure. Basing on this guidance, I find an award of three months compensation to be fair to compensate the unfairness in procedure.

It is on the above reason I find the framed issue as to whether there are sufficient grounds to warrant revision is answered affirmatively. Consequently, I revise the CMA award, quash and set it aside. I hereby award each applicant to be paid 3 months remuneration as compensation for unfair procedure in the termination. The applicants will be further entitled only to other statutory terminal benefits if not yet paid.

It is so ordered.

Dated at Dar es Salaam this 08th Day September 2022

KATARINA REVOCATI MTEULE

JUDGE

08/09/2022