

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

REVISION NO. 16 OF 2022

LOCK FORT SECURITY (T) LTD APPLICANT

VERSUS

JAMES MATHEW ALUTE RESPONDENT

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

(Kiangi : Arbitrator)

Dated 10th December, 2021

in

REF: CMA/DSM/KIN/271/2020/349

JUDGEMENT

12th & 28th September, 2022

Rwizile, J

This application is for revision. This Court has been asked to call for the records of the Commission for Mediation and Arbitration (CMA) in labour dispute No. CMA/DSM/KIN/271/2020/349 in order to revise and set aside the award.

Factually, it has been stated that the respondent was employed by the applicant in a control room. He was employed on 22nd February 2018. His work relationship with the employer was good until 11th December 2019,

when a notice of retrenchment was issued. Termination followed on 10th January 2020.

But before termination, the respondent was suspected to have stolen a TV set in the office premises. He was interdicted and reported to the police. When the case was pending for investigation, termination occurred. The respondent was not happy with termination. He filed a dispute with the CMA. He claimed for reinstatement or benefits due to unfair termination. The CMA successfully found termination was unfair and awarded him 12 months compensation, and salary arrears totalling the sum of TZS 5,200,000.00. This decision however did please the applicant. He filed this application alleging to have followed all procedures of termination through retrenchment due to economic difficulties which caused delay in salary payment.

The application is supported by the applicant's affidavit sworn by Marco Mageni, applicant's principal officer that advanced the following grounds;

- i. Whether it was proper for the arbitrator to award in favour of the respondent without considering and satisfying herself as per the standard rules and procedures adhered regarding employee's retrenchment.*

- ii. Whether it was proper for the arbitrator to deliver the award without considering evidence of the applicant.*
- iii. Whether it was proper for the arbitrator to decide in favour of employee who breached his contract of employment.*

The hearing proceeded orally. Both parties were represented. Mr. Mukhtary Hassan, learned Advocate was for the applicant while the respondent enjoyed the service of Mr. Gabriel Songora, Personal Representative.

Mr. Mukhtary abandoning ground one proceeded to submit that the CMA decided as if the respondent was under permanent contract. He stated that the matter was not for unfair termination but for breach of contract. He continued to argue that the employment contract of the respondent started on 22.02.2018 and was supposed to end on 22.02.2021 but was terminated on 10.01.2020. Reference was made to the case of **Asanterabi Mkonyi v Tanesco**, Civil Appeal No. 53 of 2019, Court of Appeal of Tanzania at Dar es Salaam.

He then submitted that the evidence, a contract which is D1 was for a fixed term and so was not right to award 12 months compensation. In his view, the award was supposed to be the remaining period of the contract. He then prayed for the application to be quashed and set aside.

In reply Mr. Gabriel submitted that the respondent had a contract of one year. For him the award was proper as the dispute was for unfair termination and that the procedure was not followed.

After perusal of arguments of the parties, I think I have to determine the following contested issues;

- i. What type of employment contract had the parties entered to*
- ii. Whether retrenchment was substantiative and procedurally fair.*

Dealing with the type of contract. According to exhibit D1, an employment contract, it is clearly shown that the employment contract was of three years. But exhibit P1 shows nothing about the duration of the contract. It is unfortunate that the CMA did not discuss the validity of the two contracts tendered and admitted without objection from each side.

Exhibit D1 was tendered by the employer. It tallies in all aspects with exhibit P1, tendered by the respondent, except on the tenure of the contract. While P1 shows no specific time of the contract, which is left blank, exhibit D1 stated, it is three years. The respondent therefore, had a feeling that this contract is a permanent one. This is reflected in CMAF1 which shows prayers are pegged in terms of permanent contract. Under section 15(6) of Employment and Labour Relations Act. It was the duty of

the employer to clear down the air and prove to the satisfaction of the CMA that the same was a fixed term contract.

I have carefully considered the arguments of the parties especially at this stage. I think, in the obtaining circumstances, I have to construe the terms of the contract in favour of the respondent. On this aspect the contract which needed to be considered here is exhibit D1, this is because exhibit P1 does not support what the respondent has stated through his personal representative. The respondent stated that the employment contract is permanent but it did not state the length of the employment contract. I therefore hold, it was a fixed term contract of three years.

On the second issue of retrenchment, it has been provided under rule 23(1) of the Employment and Labour Relations (Code of Good Practice) G.N. No. 42 of 2007, that retrenchment is: -

"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 who is the employer stated that he faced economic difficulties which brought delay in salary payment. According to her, it necessitated retrenchment. There is no dispute however that salaries were delayed. But the records tendered at CMA, does not show the applicant encountered economic difficulties. To prove so, the applicant had to procure solid evidence including documentary evidence showing economic difficulties. Delaying to pay salaries is not in itself a sufficient reason necessitating retrenchment. Proving economic hardship is something material because it forms the basis of reasons for retrenchment. In the absence of such evidence therefore, I hold, there were no valid reasons for retrenchment. The CMA was right.

In terms of the procedure for retrenchment. Section 38 of the Employment and Labour Relations Act [CAP. 366 R.E. 2019], it is provided that: -

"(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."*

The CMA records shows nothing in terms of procedure to retrenchment that was followed. There is no evidence to prove the notice of

retrenchment was issued. Disclosure of relevant information as to retrenchment and consultation as well were not proved done. The law cited plainly provides, the issuance of the notice as soon as retrenchment is contemplated, proceeding to make consultation with the employee(s) or the trade union are mandatory legal requirement that cannot be dispensed with safely by the employer. In brief, it is safe to hold that the procedure was as well not complied with.

Lastly, as it has been determined in the first issue that the employment contract was of three years. Therefore, reliefs have to flow following breach of the said contract.

Exhibit D1 shows employment contract commenced on 22.02.2018. It was supposed to end on 22.02.2021. Exhibit D2 shows termination of employment contract of the respondent was on 10.01.2020. This shows there were thirteen months remaining before the employment contract could come to an end. I thus hereby order the respondent to be paid as hereunder:

- i. Remaining contract period for thirteen months $300,000.00 \times 13$ months = TZS 3,900,000.00
- ii. Salary arrears, the sum of TZS 1,600,000.00

- iii. Notice of termination as per section 41(5) of Employment and Labour Relations Act [CAP. 366 R.E. 2019] the sum of TZS. 300,000.00

I therefore order the applicant to pay the respondent a total amount of TZS. 5,800,000.00. The application is partly allowed to the extent explained. Each party has to bear own costs.


A.K. Rwizile

JUDGE

28.09.2022