THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 174 OF 2022

(*Arising from the Ruling of Hon. Mikidadi. A, Arbitrator, issued on 06th April 2022 in Labour dispute No. CMA/DSM/TEM/289/2020/127/2020 at Temeke)*

TANZANIA PRINTING SERVICES LIMITED.....APPLICANT

VERSUS

PIUS AUGUSTINO LEMA & 3 OTHERS..... RESPONDENTS

JUDGMENT

Date of last Order: 13/09/2022
Date of Judgment: 7/10/2022

B. E. K. Mganga, J.

Brief facts of this application are that, on 1st July 2019, applicant employed Pius Augustino Lema, the 1st respondent as a Packer. On 1st December 2019, applicant employed Grace Francis Kadinde, the 2nd respondent as a binder. On 1st October 2018 applicant employed Sophia Hassan Ramadhan, the 3rd respondent as a binder and Pendo Masami Mwijarubi, the 4th respondent as a Stitching Assistant. Respondents worked with the applicant from the date of their employment until on 6th March 2020 when respondent retrenched them allegedly, on ground of financial difficulties. Aggrieved with termination of their employment, on 27th March 2020, respondents filed Labour dispute No.

CMA/DSM/TEM/289/2020/127/2020 before the Commission for Mediation and Arbitration (CMA) at Temeke complaining that applicant unfairly terminated one-year fixed term contract each respondent had. In the Referral Form (CMA F1), respondents indicated that they were claiming to be paid the unexpired period of the said one-year fixed term contract.

On 6th April 2022, Hon. Mikidadi A, arbitrator, having heard evidence of the parties, issued an award that termination of employment of the respondents was unfair both substantively and procedurally. The arbitrator, therefore, awarded (i) Pius Augustino Lema, the 1st respondent be paid TZS 390,000/=, (ii) Grace Francis Kadinde, the 2nd respondent be paid TZS 1,040,000/=, (iii) Sophia Hassan Ramadhan, the 3rd respondent be paid TZS 1,040,000/= and (iv) Pendo Masami Mwijarubi, the 4th respondent be paid TZS 1,040,000/= all amounting to TZS 3,510,000/=.

Applicant was aggrieved with the said award, as a result, on 9th June 2022, she filed this application beseeching the court to revise the said CMA award. In support of the Notice of Application, applicant filed the affidavit sworn by Christopher Mumanyi containing two (2) grounds as hereunder: -

1. *The Arbitrator erred in law for failure to consider evidence of both sides.*
2. *The arbitrator erred in law to award the respondents to be paid salary for the remaining six (6) months of their contracts without considering that they were already paid.*

In resisting the application, respondents filed both the Notice of Opposition and the counter affidavit sworn by Pius Augustino Lema, the 1st respondent on their behalf.

At the hearing of this application, applicant was represented by Victoria Mgonja, learned Advocate whereas respondents were represented by Mr. Boniphace Kigosi, representative from TUICO, a Trade Union.

Submitting in support of the 1st ground of application, Ms. Mgonja, learned advocate for the applicant, argued that the arbitrator only considered evidence of the respondents and failed to consider evidence of the applicant. She went on that the arbitrator only considered evidence of one respondent while there were four and argued further that all respondents were supposed to adduce evidence and not only one of them. However, after being asked by the court and upon reflection, she conceded that PW1 who testified on behalf of the other respondents testified and tendered contracts of his co-respondents and therefore

evidence covered all respondents. Ms. Mgonja argued further that, in his evidence, DW1 testified that termination was by agreement, but the arbitrator held that there was no agreement. She strongly submitted that respondents were retrenched after holding separate consultation meetings for each respondent. When asked by the court as to whether the procedure adopted by the applicant to hold separate meetings with each respondent was proper in law, she readily concede that it was not.

Arguing the 2nd ground, Ms. Mgonja, submitted that respondents were paid 6 months salaries of the remaining period of their contracts before retrenchment and days worked for, hence, they were not entitled to be awarded to be paid again.

Responding to submissions made by Ms. Mgonja on the 1st ground, Mr. Boniphace Kigosi, a representative of respondents from TUICO, submitted that the arbitrator considered evidence of DW1, the only witness for the applicant, who testified that respondents were called individually in Office as there was no consultation meeting. Mr. Kigosi submitted further that, the alleged consultation meetings violated section 38(1) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019]. He also submitted that the argument that only one witness testified on behalf of the respondents has no merit because the one who

testified (PW1) was representing his co-respondents and that his evidence proved the case in favour of all respondents.

Submitting on the 2nd ground, Mr. Kigosi argued that arbitrator found that retrenchment process was unfair and ordered applicant to pay the respondents the remaining period of their contracts. He therefore prayed the application be dismissed.

In rejoinder, Ms. Mgonja, learned advocate had nothing new to add.

I have examined evidence in the CMA record and considered submissions by the parties and find that the central issue is whether there was valid reason for termination or not.

In his evidence, Christopher Mumanyi (DW1), the only witness for the applicant testified that the only reason for retrenchment of the respondents is death of the owner of the company that led the company to be manned by his children, as a result, production became low hence a reason for retrenchment. In his evidence, DW1 did not explain how production became low and for how long and whether there was not possibility to increase it. In other words, DW1 did not testify as to whether applicant made all efforts to avoid retrenchment of the respondents. I have noted that DW1 gave that reason after being asked

by the arbitrator as to why applicant retrenched the respondents. While under cross examination, DW1 stated that respondents were daily workers hence there was no need to hold consultation meetings. It is clear in my mind that, applicant was of the view that she can fire a person at her own will and without procedure, which is why DW1 claimed that respondents were dayworkers, and that no consultation was needed. It is my considered opinion and findings that, there was no valid reason for retrenching the respondents as the arbitrator did and further that, applicant used economic hardship to achiever her desired to termination respondents unfairly. In his evidence, DW1 is recorded stating while under cross examination as follows: -

> *"Walalamikaji ni wafanyakazi wa kutwa hatukuhitaji makubaliano yoyote katika kuwapunguza kazi."*

I have noted and it is on record that while under examination in chief, DW1 testified that respondents had a one-year fixed term contract and tendered the said contracts as exhibit D2 collectively. With this, in my view, there was no valid reason for retrenchment. The claim that respondents were dayworkers is unsupported by evidence. DW1 gave self-shooting evidence to the applicant and carried forward claims by the respondents that they were unfairly terminated. It is my view therefore, that it was the duty of the applicant to prove, in terms of section

37(2)(b) and 39 both of the Employment and Labour Relations Act [Cap. 366 R.E. 2019], that termination was fair due to operational requirements. As explained hereinabove, applicant failed to discharge this burden.

Again, from evidence of the parties, it is clear in my mind that, fair procedures for retrenchment provided for under the provisions of section 38 of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] were not adhered to. It was testified by both DW1 and PW1 that respondents were individually called in the office of the applicant and given documents to sign (exh. D3 collectively). During submissions, Ms. Mgonja, advocate for the applicant, correctly conceded that procedural fairness including consultation was flawed. It is my settled opinion that calling individual employee in office and cause the employee to sign exhibit D3 collectively, did not amount to consultation envisaged under the provisions of section 38(1)(c) of Cap. 366 R.E 2019 (supra). This was also the position of the Court of Appeal in the case of **Security Group Tanzania Ltd vs. Samson Yakobo & Others**, Civil Appeal No. 76 of 2016 [2020] TZCA 6 where in that case a meeting was held with the employees to determine the amount of severance allowance after respondents had been retrenched. In the application at hand, applicant

was supposed to issue notice to the respondents prior retrenchment and disclose relevant information relating to anticipated retrenchment as required by the provisions of section 38(1)(a), (b) and (d) of Cap. 366 R.E. 2019 (supra). Since applicant did not comply with the requirements of section 38 of Cap. 366 R.E. 2019 (supra), I conclude as the arbitrator did, that termination was also procedurally unfair.

It was submitted by Ms. Mgoja, learned advocate for the applicant in the 2nd ground of revision that respondents were paid 6 months of the remaining period of their contracts before retrenchment and days worked for, hence they were not entitled to be awarded to be paid. On the other hand, Mr. Kigosi was of the view that respondents were entitled to that pay. In disposing this ground, I have examined evidence of the parties and find that, there is no dispute that respondents were terminated prior expiry of their fixed term contracts and that respondents were paid severance pay.

In his evidence, Pius Augustino Lema (PW1) testified that his one-year fixed term contract commenced on 1st July 2019, that contract of the 2nd, 3rd and 4th respondents commenced on 1st December 2019 and that all were terminated on 6th March 2020. But in the award, the arbitrator found that respondents were terminated on 14th March 2020.

The findings of the arbitrator that respondents were terminated on 14th March 2020 are not supported by evidence on record. More so, respondents indicated in the CMA F1 that the dispute arose on 6th March 2020, which is the date of termination of their employment. It is my view that, 1st respondent's contract was expiring on 30th June 2020 hence it was terminated three months prior to its expiry. It was evidence of DW1 that respondents were paid TZS 5000 that means 130,000/= per month. The 1st respondent was therefore entitled to be paid TZS 390,000/= for the remaining three months of the fixed term contract less the amount that he was paid as severance pay. According to the evidence, 1st respondent was paid TZS 35,000/=. Therefore, 1st respondent was supposed to be paid TZS 355,000/= after deducting the amount that he was paid as severance pay. Contracts of the 2nd, 3rd and 4th were expiring on 1st November 2020 hence they had 8 months' remaining to their contracts. Grace Francis and Sophia Hassan, 2nd and 3rd respondents respectively were entitled to be paid TZS 1,040,000/=each for the remaining period of the contract. Evidence shows that 2nd and 3rd respondents were paid TZS 245,000/= each as severance. Therefore, 2nd and 3rd respondents are entitled to be paid TZS 795,000/= each. Pendo Msami, 4th respondent was entitled to be paid TZS

1,040,000/=each for the remaining period of the contract. Evidence shows that she was paid TZS. 175,000/= as severance. She is therefore entitled to be paid TZS. 865,000/=. In total applicant is hereby ordered to pay TZS 2,810,000/= instead of TZS 3,510,000/= that the arbitrator awarded the respondent.

For the foregoing, I allow the application to the extent only explained hereinabove.

Dated in Dar es Salaam on this 7th October 2022.

B. E. K. Mganga
JUDGE

Judgment delivered on this 7th October 2022 in chambers in the presence of Victoria Mgonja, Advocate for the Applicant and Boniface Kigosi, from TUICO, a Trade Union for the respondents.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) (Labour Division) DIVISHENI YA MAHAKAMA YA KAZI

B. E. K. Mganga
JUDGE