IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

LABOUR REVISION NO. 362 OF 2022

JOHN RONALD KIMEI..APPLICANT

VERSUS

ISON XPERIENCES (T) LTD AND ANOTHER .... RESPONDENTS

JUDGMENT

K.T.R, Mteule, J

2nd March 2023 & 15th March 2023.

This is an application for revision lodged by the Applicant John Ronald Kimei seeking for this Court to revise and set aside the award of the Commission for Mediation and Arbitration of Dar es Salaam at Kinondoni (CMA), in Labour Dispute **No. CMA/DSM/KIN/20/21/129/21.**

In the CMA, vide CMA Form No. 1, the applicant lodged a labour dispute against **ISON XPERIENCES TANZANIA LIMITED** claiming to have been unfairly terminated and for a payment of a total of **TZS 13,097,200.00** which constituted one month salary in lieu of Notice, compensation of 12 months' salary and severance pay. According to the CMA Form No. 1, item 6 additional information was added stating that at the time of employment the respondent was in the name of **ISON PBO TANZANIA LIMITED** but during his termination of, he was in the name of **ISON EXPERIENCES TANZANIA LIMITED**.

From the CMA record, it appears that the respondent undergone a retrenchment exercise which involved several employees including the applicant. While under consultative meetings, the Respondent declined to cooperate in the retrenchment exercise and stopped to attend at work.

What I gather from the record and evidence, the act of the applicant's refusal to cooperate with the retrenchment exercise and leave the office for more than five days prompted disciplinary hearing which found him guilty of abscondment. He was consequently terminated.

During the retrenchment and the termination exercise, the Respondent was operating by the name of **ISON EXPERIENCES TANZANIA LIMITED** while the Applicant's contract of employment bears the name of **ISON PBO TANZANIA LIMITED** as the employer.

Being dissatisfied with the termination of his employment, the Applicant preferred this revision application challenging the capacity of the 1st Respondent to terminate his employment while the employment contract bears the name of the 2nd Respondent.

In the CMA, the arbitrator found that **ISON PBO TANZANIA LIMITED** and **ISON EXPERIENCES TANZANIA LIMITED** is one thing and the same employer of the respondent. The arbitrator

continued to identify the respondent in the new name of **ISON EXPERIENCES TANZANIA LIMITED,** and proceeded to determine whether there was a reason for termination of the applicant's employment and whether the procedure was followed. The arbitrator found that there was a valid and fair reason for termination and that the procedure was followed. The arbitrator dismissed the dispute.

The applicant still feeling that his employment was terminated by a person who was not his employer, he continued to protest the exercise and lodged the instant revision application.

The applicant has brought 4 legal grounds of Revision which are paraphrases as follows:-

1. Whether the Arbitrator was proper in holding that there was a change of the names of the Respondents without any exhibits adduced to prove the changes.
2. Whether it was proper in the holding of the arbitrator that the changes of name of the employer without notice to, and consent of the other part to the employment contract would not affect any right or obligation of the parties in any legal proceedings.
3. Whether it was proper for the arbitrator to rule on retrenchment and termination by misconduct without

ascertaining among the Respondents who was the right employer capable to terminate or to retrench.

4. Whether it was proper for the arbitrator to observe that the applicant admitted the offence of misconduct and no need of compliance with legal procedures.

The Application was heard by oral submissions, where the applicant was represented by Mr. Hamza Rajabu, P.R and the Respondent by Mr. Mikidadi.

In his submissions, Mr. Rajab addressed all the 4 grounds jointly. In his submissions Mr. Hamza Rajab acknowledged that on 10/2/2020, the 1st Respondent **ISON XPERIENCES TANZANIA LIMITED** initiated retrenchment exercise which involved the applicant.

According to Mr. Rajab the exercise was disputed by the applicant because he never recognized the 1st Respondent as his employer because his contract and all other records by that time were in the name of the 2nd Respondent and not the 1st Respondent who was terminating him.

Mr. Rajabu pointed out an incident where the second Respondent lodged a dispute concerning the retrenchment exercise but the said dispute was later, after one year, withdrawn. **(Exhibit P-2).**

He challenged the act of the 1st Applicant to have terminated the contract between the applicant and the 2nd Respondent as per the Letter of termination (**Exhibit P-3**).

Mr. Rajabu, countered the evidence of DWI that the 2nd Respondent changed her name to the name of the 1st Respondent. According to Mr. Rajabu there was no evidence to prove any change of name. He challenged the arbitrator's holding that there was a fair and just termination of employment even after having noted that there was no evidence of change of name.

Mr. Rajabu challenged the holding of the arbitrator that the applicant was fairly terminated while the termination was done by someone who was not his employer. In his view, the arbitrator should not have held that there was a reason for termination and that the procedure was followed while he noted that the applicant was terminated by a person who was not his employer. He stated that a person who is not an employer cannot have reason or comply with fair procedure of termination. He supported his contention with the case of **Stella Temu vs. Tanzania Revenue Authority (TLR) 178 2005** and **St. Joseph Kolping Secondary School vs. Alvera Kashushura**, where the Court held at page 15 that termination must be based on fair reason and procedure.

In reply, Advocate Mikidadi referred to page 7 of the award where the issue of change of name was raised and submitted that witness DW1 testified that the Company changed her name. According to him, there was no denial against that evidence from the applicant as shown at paragraph 4 of the counter affidavit where the Respondent is stating that it is the same Company.

Being guided by the provision of **Section 31 (1) and (4) of the Tanzania Company Act R.E 2019**, Mr. Mikidadi submitted that the Respondent's change of name by itself does not exonerate the company from liability. According to him, the CMA correctly held that as much as only the name of the company was changed, the liability still remained, and it does not occasion any harm.

Mr. Mikidadi invited this Court to take the holding of the Court in the case of **Katavi & Kaputi Mining Co. ltd vs. Innocent Lembo Salida, Labour Revision No. 6 of 2020** at page 16 of the typed Judgment. He stated that in that case, it was held that change of name should not be used to impugn an award.

Mr. Mikidadi challenged the relevance of the case of **St. Joseph vs. Alvera Kashushura**. According to him, in that case, the issue was who employed the applicant and this meant that there were two entities. He is of the view that Kashushura's case presents a different scenario from our case where the entity is only one with different

names in different periods. He added that, in this case, you will never find an entity **ISON BPO TANZANIA LIMITED** because it is the same entity now operating with the name of **ISON XPERIENCES TANZANIA LIMITED**.

Mr. Mikidadi proceeded to submit that since **ISON XPERIENCES TANZANIA LIMITED** was the employer of the applicant, what remains is:- was there a reason for termination? And if yes, was the procedure followed? He continued to submit that, as stated by the personal representative of the applicant, there was a retrenchment process which was initiated by the respondent. He recalled the evidence of **DW1** who tendered **Exhibit D1** which was a notice of termination dated 10/2/2020, **Exhibit D2** which were minutes of consultative meeting and **Exhibit D4** and submitted that these exhibits demonstrate what happened during the retrenchment. Mr. Mikidadi referred to the decision of **Kuehne and Nagel Limited vs. Grace Urassa Labour Revision No. 190 of 2019** which defined what retrenchment is starting from page 8 to 15, giving guidance on what is required in handling retrenchment. According to him, all the procedures were followed by the 1st Respondent.

He further referred to the case of the Court of Appeal, in **Haider Mwinyimvua & 99 Others vs. Deposit Insurance Board Civil**

Appeal No. 250 of 2018, where at page 12 the Court itemized the mandatory requirements to be complied with in retrenchment.

It is Mr. Mikidadi's submission that the retrenchment procedure was followed by the respondent. In his view, the employer had reasons which is retrenchment, and he followed the procedure. He prayed for the CMA award to be upheld.

Mr. Rajabu made a rejoinder which is also taken into account in determining this application.

Having considered the submissions of the parties, I will start by addressing the main contention in this matter which centers on who is the employer of the Applicant. In the CMA, the Applicant sued the two instant respondents. The first Respondent is **ISON XPERIENCES TANZANIA LIMITED** and the second Respondent is **ISON BPO TANZANIA LIMITED.** Initially, the Applicant lodged CMA Form No. 1 against **ISON XPERIENCES TANZANIA LIMITED.** Later on, he amended the CMA Form No 1 to add the name of **ISON BPO TANZANIA LIMITED ISON BPO TANZANIA LIMITED.** During cross examination DW1 testified that the two respondents were one entity because **ISON BPO TANZANIA LIMITED** was the same entity which changed its name to **ISON XPERIENCES TANZANIA LIMITED.**

The dispute began with the Applicant's claim to have been terminated with a Company which was not his employer. The two respondents are claiming to be the one and the same entity.

The arbitrator was convinced by the evidence of DW1 given on oath to state that the two respondents constitute one legal entity which was once in time known as **ISON PBO Tanzania Limited but later changed the name to ISON EXPERIENCES Tanzania Limited.** The applicant continued to insist that the Applicant had to prove by documentary evidence.

I have read the entire evidence of PW1, the Applicant in the CMAI could not find anywhere the witness denied the Respondent's change of name but only protested that he was terminated b a person who did not employ him. DW1 completely kept silent on the evidence that the first and the second respondent is one legal entity. Since the Applicant did not dispute the evidence of DW1 that the two respondents are actually one legal entity, in my view, there was no further evidence needed to prove what DW1 stated on oath. The unchallenged evidence was sufficient to prove that the two applicants were a one person. If the Applicant does not recognize **ISON XPERIENCES TANZANIA LIMITED** as its employer, he should have sued the right employer.

On top of the above, it is apparent that **ISON XPERIENCES TANZANIA LIMITED** has not denied responsibility. It is upon the Applicant to identify his respondent and he did so and sued two names but in the proceedings, he did not complain as to whether the second respondent was not the right party. The Arbitrator was guided by the provision of **section 31 (4) of the Companies Act, Cap 212 of 2019 R.E** which provides:

> *"31 - (4) A change of name by a company under this section shall not affect any rights or obligations of the company or render defective any legal proceedings by or against the company, and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name."*

In this application, in whichever name the respondent should have, the envisaged names were made party to the proceedings. I fail to understand what the problem with the Applicant if he had both of the purported respondents as parties to the case. The best option was to have his substantive rights determined against any name amongst the Respondents' names, the option he do not seem to accept. I subscribe to the findings of the CMA that the two names of the respondents constitute one employer of the applicant.

Now I will go to the issue of fairness of the termination of the applicant. To start with reasons, I had a look at **Exhibit P3** which is a letter of termination. It is apparent that the applicant was terminated on the reasons of abscondment from the work. **Exhibit P3** indicates that there were disciplinary proceedings to deal with the Applicant's abscondment. **DW1** narrated clearly that the applicant absconded after refusing to cooperate with the retrenchment exercise. In the evidence of the Applicant, there was no direct denial of abscondment, but he was recorded to have stated that he stopped going to the office because he was not paid his salary. Nonpayment of salary has never been an issue in the CMA. It was not even one of the claims in the CMA Form No. 1. It is not disputed that abscondment in law can amount to reasons for termination. The foregoing having being said, I do not see any reason to differ with the arbitrator's findings on the fairness of the reasons for termination.

As to whether the Respondent followed the procedure of termination, Mr. Rajabu submitted that the arbitrator erred in holding that the procedure of termination was fair while it was affected by a person who was not the employer of the respondent. Mr. Mikidadi insisted on the fairness of the retrenchment exercise. With due respect to Mr. Mikidadi, the applicant was not terminated due to the retrenchment exercise.

Nevertheless, I have already found that the 1st Applicant was the right employer of the Applicant. What remains is whether she followed the procedure of termination. DW1 did not explain in the CMA which steps the Respondent took when the applicant absconded although according to **Exhibit D3**, which is the letter of termination, it is stated that there was a disciplinary hearing which found the Applicant guilty of abscondment. No minutes of the Committee were produced in the CMA. The Arbitrator condoned the act of the respondent not to follow the procedure of termination on the ground that the Applicant did not dispute the abscondment, so the respondent had a right to dispense with the requirement of following procedures. The arbitrator referred to **Rule 13 (11) GN No 42 of 2007** which allow the employer to dispense with the guidelines in exceptional circumstances.

According to the CMA record, although the Applicant admitted to have absconded, he had a defense of not being paid salaries. The employer should have held a disciplinary hearing to determine the substance and the strength of that defense. The application of **Rule 13 (11)** supra is restricted to exceptional circumstances. No such exceptional circumstances featured in the instant matter. It was a normal abscondment which should have been dealt with according to the set-out procedure. The mere letter of termination is not sufficient

to prove that the procedure was followed. It is on this regard, I differ with the arbitrator's finding that the Respondent could dispense with the termination procedure in this matter. I find the termination to be unfair in terms of procedure due to lack of evidence to indicate that the procedure was followed.

Having found unfairness in the procedure of termination, the first issue as to whether there are sufficient reasons to interfere with the CMA decision is answered affirmatively.

Regarding relief, since the unfairness is based only on the procedure, the Applicant is entitled to compensation plus other statutory terminal benefits if not yet paid, but the compensation should not be of the quantum equivalent to a situation where unfairness is in terms of both procedure and reasons. **(See Felician Ruhoaza vs. World Vision Tanzania, Civil Appeal No. 213 of 2019, CAT, Bukoba) (Unreported).**

Consequently, I hereby revise the CMA proceedings and vary the award by granting the Applicant 3 months remuneration as compensation. The application therefore succeeds to the extent discussed herein. It is so ordered.

Dated at Dar es Salaam this 15th Day of March 2023

KATARINA REVOCATI MTEULE

JUDGE

15/3/2023