IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 435 OF 2022

BETWEEN

HASHIMU ALLY DIGELLO ..... 1ST APPLICANT

MARIAM JUMA ..... 2ND APPLICANT

SHANI JUMA MATANDIKO ..... 3RD APPLICANT

HELENA JOSEPH KAMBANGWA ..... 4TH APPLICANT

DIANA GAUDENCE SHAYO ..... 5TH APPLICANT

VERSUS

ALPHAKRUST LTD ..... RESPONDENT

JUDGEMENT

***Date of last Order**: 12/05/2023*
***Date of Judgement**: 02/06/2023*

MLYAMBINA, J.

In this application there is no dispute between parties that the Applicants were employees of the Respondent. The dispute arose when the Applicants alleged breach of their contracts by the Respondent. Being disatsfied, they filed a labour dispute at the Commission for Mediation and Arbitration (herein CMA) registered with No. CMA/DSM/ILA/16/21/92/21. The matter was heard by Honourable Mbeyale R. (Arbitrator). The Award was pronounced in favour of the Respondent on 29th November, 2022. Being aggrieved with the decision of CMA, the Applicants opted for this application for revision supported by their affidavit having grounds that:

i. *The Honourable arbitrator erred in law to dismiss the dispute when the Respondent did not follow the procedures for terminating their contracts.*

ii. *The Honourable arbitrator was erred in law in holding that the dispute was not settled in the workplace (premature) when the Respondent admitted to carrying out the agreement despite the fact that he had violated it.*

iii. *The Honourable arbitrator erred by failing to consider the evidence presented by the witnesses (the Applicants) for being detained by guards to enter at workplace instead he wanted them to go to the employer.*

The matter proceeded orally whereby the Applicants were represented by Mr. Majaliwa Musa, Personal Representative. The Respondent was represented by Cecilia Lyimo, Human Resource Manager.

Mr. Majaliwa Musa submitted that the procedure in retrenching the Applicants were violated and their right were not paid. He stated that the matter at CMA was dismissed by alleging that it was prematurely filed and no reiefs were granted, hence this application for revision. He prayed to the court to order for the Applicants to be reinstated and be paid their wages

and other rights. If the matter is prematurely filed, he prayed the Applicants to be paid TZS 9,531,395.

He further submitted that the Respondent in terminating the Applicants violated the procedure. So, it was improper for the arbitrator to dismiss the application for being premature as the Respondent had intention to retrench workers as per the meeting held on 31st March, 2020 between the Respondent and TUICO. The Respondent was advised by TUICO to follow the law and comply with procedure for retrenchment (exhibit D1). But the Respondent did not involve the workers in the meeting contrary to the advice from TUICO.

It was the submission of Mr. Majaliwa that; on 22nd July, 2020 the Applicants were terminated without complying with retrenchment procedures as provided under *Section 38(1)(a)(b)(c)(i)(ii)(iii)(iv)(v) and (d) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] and Rule 23 (1)(2)(a)(b)(c)(3)(4)(a)(b)(c)(d)(e)(f) and (5) of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007.*

Mr. Majaliwa went on to submit that the arbitrator erred in law by holding that the dispute was premature while the Respondent admitted that she honoured agreement which did not exist. In his view, it was not stated

how the dispute was premature. The Applicants were left in dilemma as they expected to be reinstated at work. He went further arguing that; exhibits D2 and D8 were disputed as were not signed by the employees and exhibit D4 was not served to the Applicants, but the arbitrator admitted them. He again submitted that there was no agreement of retrenchment between the Applicants and the Respondent.

On the last ground, Mr. Majaliwa submitted that the arbitrator erred by not considering Applicants' evidence as they were stopped by the guard from discharging their duties and this happened after the Applicants had refused to retrenchment letter. He stated that even though DW3 proved that the Applicants were stopped by neither the award nor the proceedings reflect the evidence of DW3.

In reply, Ms. Cecilia Lyimo, Respondent's Human Resource submitted that they complied with the advice from TUICO on the procedure for retrenchment. It was by way of agreement during Corona period. She continued to reply that the letters were already drafted but the Applicants did not receive them. The payment is to be done in accordance to the labour laws and procedure.

In rejoinder Mr. Majaliwa submitted that all the Applicants were proper employees of the Respondent as they all had NSSF cards. They abided to

Section 61(a) - (g) of the Labour Institutions Act [CAP. 300 R.E. 2019]. To support his point, he referred to the case of **Elizabeth Silayo vs Halmashauri ya Manispaa Morogoro**, Revision No. 11 of 2019, High Court of Tanzania at Morogoro (unreported), pp 7 – 8.

After perusal of both parties' submission, records and exhibits thereto, I have been called to determine; *whether the Applicants had filed their application at CMA prematurely and to what relief are the parties entitled to.*

Rule 10(1) of the Labour Institutions (Mediation and Arbitration) Rules, G.N. No. 64 of 2007 requires that labour disputes between the employer and the employees are to be taken to the CMA. The Rule is about time limitation to file a dispute of unfair termination at CMA but it also states clearly when the dispute should be taken to the CMA. For easy of reference, Rule 10 provides:

> Disputes about the fairness of an employee's termination of employment must be referred to the Commission within thirty days **from the date of termination or the date that the employer made a final decision to terminate or uphold the decision to terminate** (Emphasis is mine).

The above shows that until the final decision of termination is out that is when the employee has to take the matter to the CMA. In this application, the Applicants took their dispute at CMA alleging that they were told by the guard that their service was no longer needed at the Respondent's office. This is according to their testimonies at CMA. For easy reference, PW1 stated:

> *S. Kuhusu kuvunjwa mkataba 22/6/2022 unao uthibitisho kuwa ulivunjiwa mkataba?*
> *J. Hakunipa mkataba. Tulipofika getini Mlinzi aiituzuia tusiingie kazini, kwamba alipewa majina ya watu 19 tusiingie kazini...*
> *S. Ulijiridhisha ofisini?*
> *J. Hapana ilikuwa usiku kesho yake hatukuja, tulifungua mgogoro Tume na Tuico.*

The ordinary translation to the afore PW1's evidence means that:

> *S. About termination of contract on 22/6/2022 did you have any evidence to prove the termination?*
> *J. I was not served with the termination letter, when we reached at the gate the guard stopped us from entering the Respondent's working place and that he was given 19 names of the people who were not allowed to enter at work place...*
> *S. did you go to the office to prove the allegation.*

J. No, as it was night time. The next day, we went at CMA and Tuico to file the labour dispute.

Rule 10 (supra) is very clear that the dispute should be taken to CMA when the employer had finalized her decision. There is no proof of the termination letter presented by the Applicants as the ones claimed for being terminated by the Respondent. Also, the guard who is alleged to have given information to the Applicants did not testify at CMA. It is the Applicants who were supposed to prove their allegation of unfair termination. *Section 60(2)(a) of the Labour Institutions Act [Cap. 300 R.E. 2019]* provides that:

(2) In any civil proceedings concerning a contravention of a labour law-

(a) The person who alleges that a right or protection conferred by any labour law has been contravened shall prove the facts of the conduct said to constitute the contravention unless the provisions of subSection (1)(b) apply.

Also, *Section 110(1) and (2) of the Evidence Act [Cap.6 R.E. 2022]* states that: -

(1) whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) when a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

bars the Applicant from raising a complaint for unfair termination.

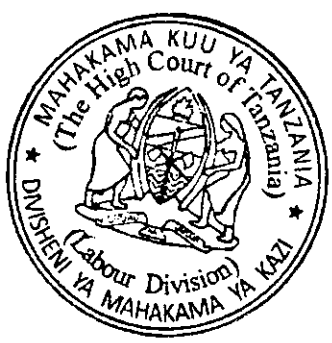
In the final result, I find no reason to fault the arbitrator's findings that the matter was brought at CMA prematurely. I therefore dismiss the application for being devoid of merits. Given that this is a labour matter, I order no costs to either party.

Y.J. MLYAMBINA

JUDGE

02/06/2023

Ruling delivered and dated 2nd June, 2023 in the presence of the 1st and 2nd Applicants and the Applicants Personal Representative one Majaliwa Mussa and Cecilia Lyimo, Human Resource Manager for the Respondent.



Y.J. MLYAMBINA

JUDGE

02/06/2023