IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 103 OF 2023

(Arising from an Award issued on 17/02/2023 by Hon. Kokusiima, L, Arbitrator, in Labour dispute No. CMA/DSM/ILA/137/21/98/21 at Ilala)

FAITH MAMKWE ..... APPLICANT

VERSUS

AGA KHAN UNIVERSITY ..... RESPONDENT

JUDGMENT

Date of last order: 20/06/2023
Date of Judgment: 11/07/2023

B. E. K. Mganga, J.

Brief facts of this application are that, on 6th January 2014, the Aga khan University, the herein respondent employed Faith Mamkwe, the herein applicant as faculty Administrative Support Officer for unspecified period contract. The two enjoyed their employment relationship until on 16th April 2021 when respondent served applicant with termination letter alleged that respondent was in financial constraint that was caused by

Labour Court Tz.

COVID 19 pandemic. Applicant was aggrieved with the said termination as a result, she filed Labour dispute No. CMA/DSM/ILA/137/21/98/21 before the Commission for Mediation and Arbitration henceforth CMA at Ilala complaining that respondent had no valid reason for termination of her employment and further that respondent did not adhere to fair procedures of termination of employment. In the referral Form (CMA F1), applicant indicated that she was claiming to be paid TZS 20,000,000/= as solatium for unfair labour practice, TZS 30,000,000/= being general damages for psychological torture and be paid 7 months as salary compensation.

On 17th February 2023 Hon. Kokusiima, L, Arbitrator, having heard evidence of the parties, issued an award that termination was both substantively and procedurally fair and dismissed the dispute filed by the applicant. Applicant was further aggrieved hence this application for revision. In support of the application, applicant filed her affidavit in which she raised two issues namely: -

1. *Whether termination was fair in terms of procedure and,*
2. *Whether termination was fair in terms of reasons.*

Labour Court TZ

Respondent filed both the Notice of Opposition and the Counter Affidavit sworn by Flora Njau, her Human Resources Officer to resist the application.

When the application was called on for hearing, Mr. Mecky Humbo, Personal Representative, appeared and argued for and on behalf of the applicant while Mr. Timon Vitalis, Advocate, appeared and argued for and on behalf of the respondent.

Arguing in support of the 2nd issue namely whether respondent had valid reason to terminate employment of the applicant, Mr. Humbo submitted that, on 30th April 2021, respondent retrenched only the applicant amongst her employees allegedly due to COVID 19. He argued that, there was no reason for termination because respondent did not prove how she was affected by Covid 19. He submitted further that; the financial statement of the respondent cannot be relied upon. In his submissions, Mr. Humbo conceded that applicant did not object at the time of tendering the said financial statement.

Arguing the 1st issue namely, whether respondent complied with procedural fairness, Mr. Humbo submitted that, termination was unfair

Labour Court TZ

procedurally. Mr. Humbo submitted further that, respondent consulted the applicant in February 2021 when the Trade Union was unaware. He went on that, in terms of guideline 2(1) of Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007, respondent was supposed to consult the Trade Union prior to consulting the applicant. He argued further that, respondent did not serve applicant with a letter of contemplation of retrenchment. He added that, applicant was retrenched at the time she was on maternity leave hence she did not participate in previous consultation meeting. He argued that applicant participated only in the final meeting and was thereafter served with termination letter. Mr. Humbo went on that, evidence of the respondent is contradictory as to the number of persons who were retrenched and that there was no list of those who were retrenched.

Mr. Humbo submitted further that, respondent did not prove selection criteria. He argued that, there was no retrenchment agreement tendered in evidence by the respondent. He added that, there was no disclosure of information to the applicant at the time of consultation but

Labour Court TZ

respondent only tendered evidence of disclosure while at CMA. He concluded his submissions by praying that the application be allowed.

Responding to submissions made on behalf of the application, Mr. Timon Vitalis, learned counsel for the respondent submitted that, evidence which was adduced by the respondent at CMA clearly established that respondent had valid reasons to terminate applicant's employment and that she adhered to fair procedures of termination. Learned counsel for the respondent submitted that, DW1 and DW2 in their oral testimony and exhibits A7 collectively proved economic reasons for retrenchment. Counsel argued further that, there is no law that requires retrenchment based on economic reason to be proved by bank statement. He submitted that, audited financial statement that was tendered in evidence shows income and expenditure and assets and liability and proved that respondent was facing economic hardship. Counsel for the respondent submitted further that, that evidence was not controverted by applicant, hence respondent proved that she was in financial difficulties.

On procedural fairness, counsel for the respondent submitted that, there is no law that requires initial consultation meeting to be held with the

Labour Court TZ

Trade Union prior the same to be held with the employees because not all employees of the respondent were Trade Union members. He added that, applicant was a member of a Trade Union as per exhibits A4 and A5. Counsel for the respondent argued further that, Guideline 2(1) of GN. No. 42 of 2007 (supra) provides that the notice must be served to the employee. Counsel for the respondent submitted further that there were consultations in February 2021 as evidenced by exhibit A8 prior to issuing notice of retrenchment. He added that, the notice was issued on 09th April 2021 as evidenced by exhibit A9. He went on that; the notice was addressed to both the employees and the Trade Union. He argued further that, on 15th April 2021, consultation meeting was held with the Trade Union and the employees separately. Counsel for the respondent submitted further that, the Trade Union was consulted on behalf of its members, applicant inclusive. Counsel submitted further that, at the time of consultation, applicant was on leave from 19th November 2021 to 20th February 2021 as per exhibit A6. Counsel was quick to submit that applicant also attended consultation zoom meeting which was done on 02nd February 2021 via Zoom platform as evidenced by exhibit A8. Counsel

Labour Court TZ

submitted that, retrenchment notice and retrenchment itself was done in April 2021 when applicant was back from maternity leave. Counsel submitted further that, Section 38(3) of the Employment and Labour Relations Act [Cap. 366 R.E. 2019] and Rule 23 of GN. No. 42 of 2007 (supra) requires consultation and not consensus otherwise there cannot be retrenchment.

On failure to serve a list of targeted employees to be retrenched, counsel for the respondent submitted that, there is no law requiring the employer to serve list of the targeted employee to be retrenched because that would have rendered consultation meaningless. He argued that DW1 testified that individual consultation meeting was done on 16th April 2021 to every employee who was selected for retrenchment and Criteria of selection was discussed with the Trade Union as well as the employees as per exhibit A9.

On the complaint that only applicant was retrenched, counsel for the respondent submitted that, DW1 testified that even the Head of Finance and Lecturers were retrenched, and that evidence was never shaken. On

Labour Court TZ

the complaint that there was no disclosure, counsel for the respondent submitted that, there was disclosure prior to the retrenchment notice and that during retrenchment meetings with the Trade Union and the employee. He added that, DW 1 testified that due to Covid 19, donors did not fund the respondent who made efforts to avoid retrenchment. Counsel for the respondent concluded by praying that the application be dismissed for want of merit.

In rejoinder, Mr. Humbo maintained that, evidence of the respondent did not prove reason for termination because consultation was not properly done. In his submissions, Mr. Humbo conceded that, he was not aware that respondent participated in consultation meeting through zoom. He conceded further that, applicant's maternity leave ended on 21st February 2021 and retrenchment was conducted in April 2021. He strongly submitted that, respondent was supposed to tender documentary exhibit to prove that, apart from the applicant, other employees were also terminated. He added that, oral evidence of DW1 that other persons were retrenched cannot, in absence of documentary evidence, prove that fact.

Labour Court TZ

He insisted that, there was no disclosure of information and prayed for the application to be allowed.

At the time of composing my judgment, I perused the file and find that, when Flora Njau (DW1) was testifying, exhibits were admitted while there was no prayer from DW1 to tender those exhibits. More so, applicant was not asked to comment whether she is objecting or not. On the other hand, when Faith Mamkwe (PW1), the applicant was testifying, the record shows that she prayed to tender exhibits and respondent was asked to comment. With that observation, I summoned the parties and shown them handwritten CMA proceedings and asked them to address the court as whether that procedure was proper and the effect thereof.

Responding to the issue raised by the court, Mr. Humbo submitted on behalf of the applicant that the procedure adopted by the arbitrator is not proper. He went on that, by that procedure, exhibits by the respondent were not properly admitted in evidence and therefore cannot form part of respondent's evidence. He added that if those exhibits will be expunged, then, respondent will be affected. He concluded that, in the interest of

Labour Court Tz

justice, proceedings should be nullified, and the award be quashed and set aside and order trial de novo.

On his part, Tumaini Michael, learned counsel for the respondent submitted that, parties were not served with CMA proceedings which is why they did not notice the irregularities. He submitted further that, the said irregularities were caused by the arbitrator and that with those irregularities, it appears that respondent did not tender exhibits while in fact she tendered them. Counsel for the respondent concurred with submissions and prayers made on behalf of the applicant to nullify CMA proceedings and order trial de novo before a different arbitrator.

From submissions of the parties on the issues raised by the applicant and the court, I find it prudent and for obvious reason, in disposing this application, start with the issue raised by the court.

It was correctly submitted on behalf of the parties that, the procedure adopted by the arbitrator in admitting exhibits of the respondent without showing in the record that there was a prayer from the respondent's witness to tender exhibits, was improper. It was also correctly in my view, submitted on behalf of the parties that, it was improper for the

Labour Court TZ

exhibits to be admitted without asking applicant to comment whether she had objection or not. In short, all exhibits referred to by counsel for the respondent were improperly admitted in evidence. One of those exhibits is the financial statement that was relied upon by the respondent to prove that she was facing economic difficulties after some donners has pulled out. Though, in his submission, Mr. Humbo personal representative of the applicant conceded that at the time of tendering the financial statement he did not object, the same is not reflected in the CMA proceedings that applicant was asked to comment whether she had objection or not. In my view, applicant was not properly heard in relation to the said financial statement and all exhibits that were tendered on behalf of the respondent. The Court of Appeal had an advantage to discuss the effect of improper admission of exhibit and its use thereof, in the case of ***Mhubiri Rogega Mong'ateko vs Mak Medics Ltd*** (Civil Appeal 106 of 2019) [2022] TZCA 452 where it held *inter-alia*:-

> *"It is trite law that, a document which is not admitted in evidence cannot be treated as forming part of the record even if it is found amongst the papers in the record… Therefore, it is clear that the two courts below relied on the evidence which was not tendered and admitted in evidence as per the requirement of the law. This omission led to miscarriage of justice because the*

Labour Court TZ

appellant was adjudged on the basis of the evidence which was not properly admitted in evidence…"

See also the case of ***M.S SDV Transami Limited vs M.S Ste Datco*** (Civil Appeal 16 of 2011) [2019] TZCA 565, **Japan International Cooperation Agency vs. Khaki Complex Limited** [2006] T.L.R 343 and ***Imran Murtaza Dinani vs Bollore Transport & Logistics Tanzania Ltd*** (Rev. Appl 253 of 2022) [2023] TZHCLD 1170.

Any document or physical object, in order to form part of evidence, (i) must be tendered by a witness and (ii) must be admitted in evidence by the court. In fact, the Court of Appeal put it clear in the case of **Zanzibar Telecommunication Ltd vs Ali Hamad Ali & Others** (Civil Appeal No. 295 of 2019) [2020] TZCA 1919 when it held :-

*As earlier alluded to above, applying a document which was not **tendered/presented** in evidence as exhibit, is tantamount to condemning the party/parties without according him /them the basic right of being heard. Since the right to be heard is a cardinal principle of Natural Justice, we are sufficiently convinced by the submission which was made by the learned counsel for the appellant, that the act by the learned trial Judge, to base his judgment on a document which had **not been tendered and admitted** in evidence as exhibit, vitiated the proceedings.* (Emphasis is mine)

Labour Court Tz.

It is my view that, it is the duty of the witness who intends a document or physical object to form part of his or her evidence, to pray to tender it and in fact, must tender it and if no objection is raised and sustained, the court must admit it in evidence. In the application at hand, the CMA record does not show that respondent's witnesses prayed to tender or that they tendered exhibits in question. What is clear is that the arbitrator simply admitted exhibits for the respondent without indicating that the same were tendered by witnesses for the respondent. More so, as pointed hereinabove, applicant was not afforded right to comment whether she objects or not. Since respondent's exhibits were improperly admitted in evidence without being tendered by the witness, those exhibits cannot form part of her evidence. It was correctly submitted on behalf of the parties that, the omission was done by the arbitrator and that once those exhibits are expunged, respondent will be prejudiced. For the interest of justice, the parties submitted that the whole CMA proceedings be nullified, the award arising therefrom be quashed and set aside and order trial *de novo*. I entirely agree with their submissions because that is the course

Labour Court TZ

that was taken by the Court of Appeal and this court in the above cited cases.

What I have discussed hereinabove has disposed the whole application. I will, therefore, not consider the issues raised by the applicant.

For the foregoing, I hereby nullify the whole CMA proceedings, quash and set aside the CMA award arising therefrom and order trial *de novo* before another competent arbitrator without delay.

Dated at Dar es Salaam on this 11th July 2023.

B. E. K. Mganga
JUDGE

Judgment delivered on 11th July 2023 in chambers in the presence of Bwake Mwaisemba, from RAAWU, a Trade Union for the Applicant and Tumaini Michael, Advocate for the Respondent.

B. E. K. Mganga
JUDGE

Labour Court Tz.