IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT ARUSHA

REVISION APPLICATION NO. 43 OF 2021

(Arising from Labour Dispute No. CMA/ARS/ARS/198/2020)

KIBO GUIDES (T) LIMITED.....APPLICANT

VERSUS

HANS JOHN ASSEY..... RESPONDENT

EXPARTE JUDGMENT

11.05.2022 & 15.06.2022

N.R. MWASEBA, J.

The applicant, Kibo Guide (T) Limited, seeks for revision of an award of the Commission for Mediation and Arbitration (CMA), Arusha in Labour Dispute No. CMA/ARS/ARS/198/2018. The application is supported by an affidavit sworn by Mwanili H. Mahimbali, Learned Counsel for the Applicant.

The facts relevant to this application reveal that, the respondent was an employee of the applicant at the position of Driver Guide (Tour Guide/safari Guide) until 25th day of July 2020 when he was retrenched.

The records revealed further that the retrenchment did not follow the required procedures of the law, that is why the respondent claims to be awarded notice, leave, severance pay, salary arrears and compensation following the unfair termination.

After the hearing, the CMA decided that there was a fair reason for the applicant's retrenchment following the outbreak of Covid-19 but the procedures for retrenchment were not followed. Thus, they ordered the applicant herein to pay the respondent a total of Tshs. 1, 832,308/= being compensation for six (6) months and severance pay.

Aggrieved, the applicant filed this application seeking for revision of the award on the following grounds:

i) The Learned Arbitrator misapprehended the evidence leading to improper or irrational conclusion that the retrenchment process was procedurally unfair against the Respondent.

ii) The Learned Arbitrator misapprehended the law and applied wrong principles to determine issues before him. In finding that the Respondent was unfairly retrenched by the Applicant, the Learned Arbitrator reasoned that there were consultations and the Applicant attended. However, on consultation process there was no agreement extorted from the Respondent. And that being the case, the

Applicant ought to, but did not follow a fair process in retrenching the respondent.

iii) The learned arbitrator misapprehended the evidence before him. The learned arbitrator did properly examine Exh. P2 collectively since the name of the Respondent appears in both retrenchment consultation minutes and attendance register. Also, the Learned Arbitrator did not consider the unchallenged testimony of Pw-1 who testified that the Respondent attended and signed retrenchment consolation minutes.

iv) The Learned Arbitrator misapprehended DW-1 testimonies who during his testimonies before the trial commission did not state that he did not agree with the retrenchment but rather disputing the criteria used to select him being among those to be retrenched. Dw-1 testimonies did not damage the Applicant's evidence in regard with retrenchment process.

The application was determined orally. The applicant enjoyed legal representation from Mr Mwanili H. Mahimbali, Learned Advocate while the respondent never entered appearance for reasons best known to himself despite being served with the summons.

Submitting in support of the application, Mr Mahimbali prayed to adopt their affidavit supporting the application to be part of their submission.

He added that they had no dispute regarding the reason for retrenchment as the same was decided on their favour. Their dispute is based on the procedures for retrenchment which was declared unfair. He went further submitting that **Section 38 of the Employment and Labour Relation Act** No. 6 of 2004 provides procedures to be taken in conducting retrenchment including giving notice to the employee and disclosing all necessary information relevant for retrenchment and consultation between the parties.

He added that, at CMA the applicant proved that all the procedures were met including giving notice (Exhibit. P1) and the attendance meeting (Exhibit P2). Further to that, he submitted that at page 7 of the award, the Hon. Arbitrator stated that the respondent was never involved in the minutes but only in the attendance sheet and more to that they did not reach the agreement. However, Mr Mahimbali argued further that Exhibit P2 shows that the respondent signed the minutes by the name of Hans John Peter which is the same name appearing on exhibit D1 and D4, which is a contract and bank statement of the respondent though in this application he named himself as Hans John Assey.

It was his further submission that as long as the respondent received termination letter and retrenchment package it suffices to say that he

did agree with the retrenchment process. So, it was wrong for the Hon. Arbitrator to award six (6) month compensation to the respondent. To buttress his argument, he cited the case of **Resolution insurance Ltd Vs Emmanuel Shio and 8 Others**, Labour Revision No. 642 of 2019, Labour Division at DSM (Unreported).

In the end, he prayed for the application to be allowed and the award of CMA be quashed based on the grounds submitted herein.

Having gone through the submission of the counsel for the applicant, Labour laws, CMA records the issues for determination are whether retrenchment procedures were adhered to.

Starting with the issue of procedures for retrenchment, the same are provided for under **Section 38 of the Act** read together with **Rule 23 & 24 of the Employment and Labour Relations (Code of Good Practice)** G.N 42 2007.

Section 38 (1) of ELRA provide that:

> *"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 the intended retrenchment;

(ii) any measures to avoid or minimise 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 retrenchments

(d) give the notice, make the disclosure and consult, in terms of this subsection, with-

(i) any trade union recognised in terms of section 67;

(ii) any registered trade union with members in the workplace not represented by a recognised trade union;

(iii) any employees not represented by a recognised or registered trade union.

In the application at hand, the CMA's award reveals that the respondent's retrenchment was found to be unfairly done due to the fact that no agreement was reached between the respondents and the applicant and nothing was submitted regarding those who did not agree with the applicant at the consultive meeting. More so, the respondent's name did not appear on the minute which state that "We have agreed each other" it appeared on the attendance register only.

Section 38 (3) of ELRA states that:

> "*Where, in any retrenchment, the reason for the termination is the refusal of an employee to accept new terms and conditions of employment, the employer shall satisfy the Labour Court that the recourse to a lock out to effect the change to terms and conditions was not appropriate in the circumstances.*"

Having gone through the cited provision, this court decided to revisit the trial Commission's proceedings particularly exhibit P2 Collectively (the minutes for retrenchment). It has been noted that, the applicant signed the minutes for agreement (Exh. P2 Collectively) "**MUHTASARI WA KIKAO CHA MAJADILIANO NA MAAZIMIO KATI YA WAFANYAKAZI WA KIBO GUIDES NA UONGOZI WA KIBO GUIDES (T) LIMITED KUHUSIANA NA UPUNGUZWAJI WA WAFANYAKAZI.**"

Under Article 3.2 they agree on "**STAHIKI WATAKAZO STAHILI KUPATA WAFANYAKAZI WATAKAOATHIRIKA NA ZOEZI LA UPUNGUZWAJI KAZINI.**" And further under Article 3.2.13 they agreed on the benefit to the employees who will be affected by the retrenchment. And among the employees who signed this agreement there is a name of Hans John Peter. It was not clear as under which criteria did Hon. Arbitrator at the CMA prove that "Hans John Peter" and "Hans John Assey"'are two different persons since under the employment contract the respondent appeared with two names only which are "Hans John". If the applicant denied the name of Hans John Peter, then there is no assurance that the respondent herein is the same person going by the name of Hans John as it appeared under the Employment Contract, Exhibit D1, since there is no person by the name of Hans John Assey.

Besides, the court went further to determine the signature signed by the employee in his employment contract (exhibit D1) and in exhibit P2 (Collectively) particularly the agreement between the employees and the employer regarding the issue of retrenchment and noted that they look alike although it was not scientifically proven. This proves that the respondent did attend the meeting and consented to the matters agreed.

For the foregone reasons, I concur with Mr Mahimbali learned counsel that the procedures for retrenchment as provided for under Section 38 of the ELRA were met by the employer. I hereby allow the application and proceed to

quash and set aside the CMA award. Since this is a labour matter, I make no order as to costs.

DATED at **ARUSHA** this 15th Day of June 2022.

N.R. MWASEBA

JUDGE

15.06.2022