

TANZANIA / JUDGMENT

apolinary ringo vs access bank t ltd

2023 tzhcld 1498 29 november 2023

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29 November 2023

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IN THE HIGH COURT OF TANZANIA LABOUR DIVISION AT DAR ES SALAAM REVISION
APPLICATION NO. 229 OF 2023 (Arising from Award issued on 31/03/2023 by Hon. Chacha, L.C.,
Arbitrator, in Labour Dispute No. CMA/DSM/ILA/1230/18/144/21) APOLINARY RINGO
..... APPLICANT VERSUS ACCESS BANK (T) LTD
..... RESPONDENT

JUDGEMENT

Date of Last Order: 27/11/2023 Date of Judgement: 29/11/2023 B. E. K. Mganga, J. Brief facts of this revision application are that, on 1st August 2018 Access bank (T) Ltd, the abovenamed respondent entered unspecified contract of employment with Apolinary Ringo, the abovenamed applicant. In the said unspecified period of employment, Applicant was employed as customer marketer officer at monthly salary of TZS 850,000/=. In the said unspecified contract, the parties agreed that applicant will be under probation for six months and that his duty station was at Manzese area within Dar es Salaam. It happened that on 28th November 2018, 1 respondent terminated employment of the applicant allegedly due to operational requirements. On 28th December 2018, applicant filed labour dispute No. CMA/DSM/KIN/1230/18/144/21 before the Commission for Mediation and Arbitration henceforth CMA at Kinondoni complaining that respondent terminated his employment unfairly. In the Referral Form(CMA F1), on substantive fairness, applicant indicated that respondent did not prove loss hence she had no valid reason for termination. On procedural fairness, he indicated that he was not afforded right to be heard, was not given an opportunity for consultation, there was no discussion on retrenchment package or alternative work, there was no criteria for selection and that, traded union was not involved in the process of retrenchment. Based on the foregoing, applicant was claiming to be paid 24 months' salary as compensation for unfair termination. On 30th March 2023, Hon. Lucia Chrisantus Chacha, Arbitrator, having heard evidence of the parties issued an award dismissing the dispute on ground that termination was fair both substantively and procedurally. Applicant was aggrieved with the said award as a result, he filed this application for revision. In his affidavit in support of the Notice of Application, applicant raised two grounds namely:- 2

- i. The honourable arbitrator erred in law and fact when she misdirected herself in determining the validity of retrenchment basing on the document which was never tendered or recorded as an exhibit. ii. That, the honourable arbitrator erred in law and fact by failing to analyse evidence brought before the Commission hence reached to an illogical and irrational award that there was valid reason for retrenchment and that the procedure was followed. In opposing the application, respondent filed the counter affidavit sworn by Humphrey Mwasambona, Advocate. When the application was called on for orders on 18th October 2023, Humphrey Mwasambona, Advocate for the respondent prayed the application be argued by way of written submissions. Mr. Mahamoud Mwangia, Advocate for the applicant had no objection to the prayer as a result an order was issued that the application will be argued by way of written submission and timeframe was set for each party to file. It is unfortunate that, it is only the applicant who complied with the order hence in this judgment, there will be no reference to submissions made on behalf of the respondent. This being a revision application arising from CMA, I will discuss evidence adduced by the parties at CMA and submissions made on behalf of the applicant to clarify on the issue of law and evidence that was adduced because submissions are not evidence. There is a litany of case laws to that position. See for example the case of 3 Bruno Wenceslaus Nyalifa vs Permanent Secretary Ministry of Home Affairs & Another (Civil Appeal 82 of 2017) [2018] TZCA 297 Tanzlii, [2018] T.L.R. 58 [CA], Registered Trustees of the Archdiocese of Dar es Salaam v. The Chairman, Bunju Village Government & 11 Others, Civil Appeal No. 147 of 2006, Drtc Trading Company Ltd vs Malimi Lubatula Ng'holo & Another (Civil Application 89 of 2020)
- [2022] TZCA 352(unreported), Attorney General vs Mkongo Building & Civil Works Contractors Ltd & Another (Civil Application 81 of 2019)
- [2019] TZCA 229 Tanzlii, [2019] 1 T.L.R. 109 [CA] , Zuberi Athumani Mbuguni vs National Bank of Commerce Limited (Civil Application No.311/12 of 2020) [2023] TZCA 17290 (unreported), to mention but a few. Submitting on the 1st ground, Mr. David Mganga Chillo, advocate who is also on the notice of representation representing the applicant, argued that, in the award, the arbitrator used a document that was annexed to the pleading of the parties but was not tendered or admitted in evidence. Having quoted the above paragraph from the award, learned counsel for the applicant cited the case of Burito Emmanuel Mwangoma vs. Seaciff Casino Limited, Revision No. 168 of 2023, HC(unreported), 4 Imran Murtaza Dinani vs. Ballore Transport & Logistics Tanzania Ltd, Revision No. 253 of 2023, HC (unreported) and Commercial Workers (TUICO) vs Tanzania Breweries Public Limited Company, Revision No. 130 of 2023, HC(Unreported) to implore the court to hold that trial was a nullity because the arbitrator considered a document that was not tendered and admitted as evidence and denied the other party right to be heard. Arguing the 2nd ground, counsel for the applicant submitted that, respondent did not give notice of the purported retrenchment, the applicant was never consulted about retrenchment and no alternative measures was communicated to the applicant. Counsel cited the provisions of section 38 of the Employment and Labour Relations Act[Cap.366 R.E. 366 R.E. 2019] and

Rule 23 of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No. 42 of 2007 that provides obligations to be complied by the employer who considers retrenching her employees. Mr. Chillo further submitted that, according to evidence on the proceedings, applicant was notified about the intended retrenchment via email on 22nd November 2018 around 17:00hrs, and that the said notice 5 stipulated nothing other than informing applicant to attend a meeting on 23rd November 2018. He added that, that was not adequate notice because it did not give applicant time for consultation. He concluded by praying the court to quash the award so that applicant can be compensated 24 months salaries because retrenchment was done in violation of the law. The issue to be resolved by this court are (i) whether respondent had valid reason for retrenchment, (ii) whether procedures were adhered to and (iii) to what reliefs are the parties entitled to. I have examined the CMA record and find that in his evidence, Kinamila Nassoro(DW1), the only witness for the respondent, stated in chief that respondent was facing economic hardship that led to closure of both Mbagala and Manzese branches. While under cross examination, DW1 stated that, respondent issued a notice, consultation was done and that, agreement was reached hence retrenchment. On the other hand, it was evidence of Apolinary Ringo(PW1), the applicant while testifying in chief that, no notice was issued and that, trade union was not involved in the process of retrenchment. PW1 testified further that, on 22nd November 2018 at 16:00hrs he was told that there is a meeting at Wanyama Hotel and that, on 23rd November 2018 he 6 attended the said meeting. He added that, while in the said meeting, the Chief Executive informed them that Manzese branch will be closed because the bank is incurring loss. He went on that, they discussed and agreed to be paid two(2) months' salary as retrenchment package and termination of contract. It was evidence of PW1 that, on the same date, he signed an agreement which he had but, did not tender at CMA. It was further evidence of PW1 that Manzese branch was closed. PW1 added that, after the said agreement and payment of money, he filed the dispute at CMA. In his own words, PW1 is recorded stating:- "...23/11/2018 nilifika hapo kwenye kikao mtendaji mkuu wa Bank alisema wamefikia hatua kusitisha ajira tawi la Manzese wanapata hasara hivyo ofisi inafungwa...Baada ya Afisa utumishi kueleza hayo hamna aliyeshauri upunguzwaji usifanyike. Tulijadili malipo na tulitoa mawazo tulipwe nini na mwisho walitupa mishahara ya miezi 2 na fedha ya kuvunja mkataba. Baada ya malipo hayo na kikao kile nikaja Tume kufungua shauri...Tulipofanya maongezi siku hiyo tulisaini makubaliano na walinipa ninayo ila sijatoa mbele ya Tume. Tawi la Manzese lilifungwa." I should point out that PW1 was not cross examined because he gave his evidence in the absence of the respondent after closure of respondent's case by the arbitrator due to non-appearance after DW1 has testified promising to call more other witnesses. 7 It is clear from evidence of the parties that Manzese branch where applicant was stationed was closed due to loss respondent was incurring. Under normal circumstances, no employer can continue to work under loss. There is no evidence from the applicant showing that loss was not the reason for closure of the said branch. In my view, there was valid reason for retrenchment. I therefore answer the 1st issue in affirmative. On procedural aspect, it was submitted on behalf of the applicant that

respondent did not adhere to procedures of retrenchment provided for under section 38 of Cap. 366 R.E. 2019(supra). It is my view that, that complaint cannot be entertained in the circumstances of this application. I am of that view because, in his evidence quoted hereinabove, applicant stated that he attended a meeting in which, after discussions, agreed to be paid retrenchment packaged and in fact, he was paid. It was after the said agreement and payment thereof, applicant went to CMA and file the dispute complaining that he was unfairly terminated. It is my considered view that, if applicant felt that there was no valid reason for retrenchment or procedures thereof were flawed, he was, in terms of section 38(2) of Cap. 366 R.E. 2019(supra), supposed to refer the matter at CMA for mediation before accepting payment. If the said mediation would have failed, then, in terms of section 38(3) of Cap. 366 R.E. 2019(supra), 8 applicant would have referred the dispute to arbitration and if dissatisfied with the award, he would have filed an application for revision before this court. Unfortunately, applicant took a different route other than what is provided under the law. It is my view that, after accepting retrenchment package, applicant was estopped to challenge both validity of reason and fairness of procedure of his retrenchment. See the case of Getha Ismail Ltd V. Soman Brothers [1960] EA 26 and Ngaile V. National Insurance Corporation of Tanzania Ltd [1973] EA 56, Denis s/o Magabe vs Republic, Criminal Appeal No. 7 of 2010 [2011] TZCA 45, Bytrade Tanzania Limited vs Assenga Agrovet Company Limited & Another, Civil Appeal No. 64 of 2018 [2022] TZCA 619, Trade Union Congress of Tanzania (TUCTA) vs Engineering Systems Consultants Ltd & Others, Civil Appeal No. 51 of 2016 [2020] TZCA 251, Muhimbili National Hospital vs Linus Leonce, Civil Appeal No. 190 of 2018 [2022] TZCA 223 on the application of issue estoppel. Applicant was estopped by the said doctrine from turning around and revoking what he had agreed and in fact, has accepted as full payment. The overt act of the applicant i.e., acceptance of retrenchment package was a bar for him to go back at CMA and challenge validity of reason and fairness of procedures used by the respondent in terminating his employment. 9 It was submitted by counsel for the applicant that, arbitrator erred to consider a document not tendered and or admitted as exhibit. With due respect to counsel for the applicant, that submission is not valid. Counsel for the applicant just quoted what he thought is on the side of his client and left other sentences that shows that the arbitrator did not consider a document that was not tendered. In his written submission, counsel for the applicant quoted the following paragraph from the award to show that the arbitrator considered a document neither tendered nor admitted in evidence:- “Pande zote tarehe 28/11/2018 walikubaliana kumaliza ajira kwa kupunguzwa kazi mlalamikaji kwa mkataba waliousaini siku hiyo. Na mlalamikaji kulipwa stahiki ambazo walijadiliana pande zote na kukubaliana. Ingawa pande zote hawajaleta ushahidi wa maandishi walileta nyaraka watakazotumia katika ushahidi wao ikiwa ni pamoja na makubaliano hayo ya pande zote lakini pande zote hawakuyatoa kama ushahidi.” I have read the award and find that the arbitrator stated:- “Pande zote tarehe 28/11/2018 walikubaliana kumaliza ajira kwa kupunguzwa kazi mlalamikaji kwa mkataba waliousaini siku hiyo. Na mlalamikaji kulipwa stahiki ambazo walijadiliana pande zote na kukubaliana. Ingawa pande zote hawajaleta ushahidi wa maandishi walileta nyaraka watakazotumia katika ushahidi wao ikiwa ni

pamoja na makubaliano hayo ya pande zote lakini pande zote hawakuyatoa kama ushahidi wao wa maandishi lakini kwa ushahidi wa pande zote ushahidi wao wa mdomo kupitia DW1 pamoja na PW2 wote wanakubali walifanya makubaliano hayo.” (emphasis is mine). 10 The bolded words are the ones that were left out by counsel for the applicant in his written submissions. It is clear that, the arbitrator concluded that oral evidence of the parties proved that the parties entered agreement. There is no reference to any document that the arbitrator referred to in the award for this court to travel in the same journey with counsel for the applicant that the arbitrator considered a document not tendered or admitted in evidence. I therefore, find that the complaint by the applicant that arbitrator considered a document not tendered and admitted in evidence is devoid of merit. I also find that all cases cited by counsel for the applicant to bolster his submissions are not applicable in the circumstances of this application. As pointed out hereinabove, applicant was estopped to file the dispute challenging fairness of his termination. In other words, applicant filed the dispute at CMA in contravention of the law. Therefore, even if the allegation that arbitrator considered the document that was not tendered or admitted in evidence would have been true, of which it is not, that would have also not helped him because, he was barred by the doctrine of issue estoppel to file the dispute. Submissions by counsel for the applicant that the later was notified via email presence of the meeting, is also not supported by evidence on 11 record. Those are submissions from the bar which is not evidence. Again, that submission is inconsequential in the application at hand because, applicant was estopped to deny what he discussed and agreed with the respondent and finally was paid retrenchment package. With solid evidence of the applicant on what happened, I answer all issues in favour of the respondent and hold that the application is devoid of merit. For the foregoing, but on different reason, I hereby uphold CMA award and dismiss this application for want of merit. Dated at Dar es Salaam on this 29th November 2023. B. E. K. Mganga JUDGE Judgment delivered on this 29th November 2023 in chambers in the presence of David Muganga Chillo, Advocate for the Applicant but in the absence of the Respondent. B. E. K. Mganga JUDGE 12

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Prepared on 14 October 2026 · Esheria