

TANZANIA / JUDGMENT

LABOUR REVISION NO

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THE JUDICIARY OF TANZANIA IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION AT ARUSHA LABOUR REVISION NO. 64 OF 2022 HARRISON GLADSTONE
NJIRO..... COMPLAINANT I APPELLANT I APPLICANT I PLAINTIFF VERSUS
MWIBA HOLDING LIMITED..... RESPONDENT I DEFENDANT

JUDGMENT

A. Z. BADE, J, This Application is made under section 91(1) (a) (2) (b) (c) and 94(1) (b) (i) of the Employment and Labour Relations Act, (CAP 366 R.E 2019) and Rule 24(1), (2), (a),(b), (c), (d), (e), (f), (3) (a), (b), (c), (d), and Rule 28 (c), (d). (e), of the Labour Court Rules . G.N. No. 106 of 2007 and any other enabling provision of the Law. The Applicants arc praying for the following orders: I. That, this Honorable Court be pleased to call for records of the Commission for Mediation and Arbitration for Arusha at Arusha dated 5th November, 2022 in an Employment Dispute No. CMA/ARS/356/20/203/2020 and revise, quash and set aside the decision thereon.

- Any other reliefs and further order that this Honorable Court may deem fit and just to grant. The Application is supported by an affidavit sworn by Seleman Godfrey Saudi, the Applicants' advocate. The Applicants were represented by Elibariki H. Maeda, learned advocate whereas Mr. Asubuhi John Yoyo, learned advocate appears for the Respondent. A brief background to this Application is that the Applicants were employed by the Respondent on different period of time ranging from 2013 to 2019 on various positions. Their contracts were terminated on 25/06/2020 on reason of the operational requirements. Aggrieved by the termination of their employment the Applicants lodged complaint for unfair termination at the Commission for Mediation and Arbitration (Henceforth CLCMA"). The Arbitrator heard the evidence of both sides and raised three issues, to wit whether there was valid reason for termination, whether the procedures for termination were followed and what reliefs parties are entitled to. He answered these issues to the effect that the termination was based on a fair reason because of the Respondent's financial difficulties caused by CO VID 19, where the Respondent entered into an agreement to end the employment contracts. The Arbitrator further held that the procedures for retrenchment were followed, adding that the Applicants arc not entitled to severance payment because they were not members of CHODAWU. He consequently dismissed the Application for lack of merits. Aggrieved by this decision the Applicant lodged this Application for Revision

before this Court. In his submission counsel for the Applicant adopted the contents of the affidavit to form part of his submission. In his submission, the Counsel contends that the Arbitrator failed to consider that the Respondent did not follow the statutory retrenchment procedure in terminating the Applicants. That, the entire process was tainted with irregularities. To support his position, he cited section 38 (1) d of the Employment and labour relations Act, Cap 366 R.E 2019 (the “ELRA”) and the case of Lucas Kimaro and 2 Others vs Asilia Lodge and Camps, Revision Application No. 86 of 2021. Mr. Maeda further argues that the Respondent was required to issue a notice of the intended retrenchment to the Applicants, but according to the testimony of DW2, He testified that he placed the retrenchment notice on the notice board and did not serve the Applicants or made it known to them considering the fact that at the time all the Applicants were on leave due to COVID 19. That, the email attached to Exhibit D5 did not cover any of the Applicants. It is Mr. Maeda’s lucid contention that the Applicants were called for a meeting on 23/06/2022, but the meeting were not conducted due to an internet connectivity problem, they managed to conduct a meeting on 24/06/2022 through teleconference whereby the Applicants were informed of retrenchment, concluding that the said meeting was not a consultation meeting, but rather an information meeting and on 25/06/2022 the Applicants were issued with discharge notice. In further argument, Mr. Maeda maintained that there were no discussion or an agreement whatsoever that was reached and signed by parties in accordance with section 38 (1) (c) of the ELRA. To support his position, Mr. Maeda wanted this Court to be persuaded by the decision of this Court in the case of Elizabeth Owen Chigala vs Thinamy Entertainment Limited, Labour Revision No. 13 of 2022. The counsel further contended that it was necessary for the Respondent to tender proof not only of consultation meeting but also termination agreement duly signed by the Applicant after consultation, adding that all the documents which the Respondent tendered at the CMA were only for show as none of those documents were ever seen by the Applicants before. In his reasoning, he offered that if the Applicants were on COVID 19 leave and called on 24/06/2022 only to learn it was retrenchment notice, and that the management had already made its mind to retrench, it is without a doubt unfair. To support his stance, he cited the case of Emmanuel Shio and Others vs Revolution Insurance Limited, Civil Appeal No. 495 of 2020. He further argues that the Arbitrator misdirected himself in holding that the applicants were not entitled to be paid severance allowance in accordance with the existing collective bargaining agreement. In his view the position taken by Arbitrator was wrong and contrary to law. To support his position, he cited section 71 of the ELRA. The counsel further contends that it is a settled position of the law that a collective bargain agreement binds not only members of the trade union party to the agreement but also the non- union members. To cement his position, he cited the case of Wilfred Johanne Lukumay and 3 Others vs Ker and Downey Safaris (T) Ltd, Revision Application No. 10 of 2022. Agoing further, he contends that this being the position of the law, the evidence on record and particularly the Applicants’ employment contracts tendered by the Respondent at CM A as exhibit D7 collectively provides that the existence of a CBA agreement shall bind the Applicants during the retrenchment process. To bolster his argument, he referred this court to the 1st

Applicant's employment contract. He added that a similar position as seen on the 1st Applicant's contract can be viewed on the contracts of all the other Applicants. In his view, if the Arbitrator had properly evaluated the evidence on record, he would have realized that the Applicants' employment contracts clearly stipulate the application of the CBA in case of termination based on operational requirements. In further argument by Mr. Maeda, the oral evidence that the Applicant being non-member of CHODAWU were not covered by CBA was incorrect considering the Applicants had signed an employment contract with the Respondent. This he argues, should bind them, and cannot be negated by an oral evidence, adding that section 101 of Evidence Act forbids adducing of oral evidence for the purposes of contradicting a written contract. Opposing the Revision Application, Mr. Yoyo started with the issue on whether the Applicants were entitled to a severance payment, submitting that no employment contract was ever tendered before the trial commission for clearance and admission in evidence or even listed in the list of documents to be relied upon before commencement of hearing during the trial. In his view, the said contract does not form part of the commission proceedings to be relied upon or looked at by this court. Moreover, the counsel for the Respondents submitted that the Applicants' counsel misdirected himself in interpretation of section 71 (3) (c) of the ELRA as the said section does not freely allow any non-trade union members at workplace to benefit from the collective bargaining agreement made by a trade union. His position is that the said provision envisages a condition where a non-trade union member at the workplace can benefit from the collective bargaining agreement. Mr. Yoyo's contends further that the position of law is well settled that all disputes revolving around applicability and interpretation of organizational right cannot be attended by the CMA as the same is an exclusive domain of the High Court to mean all disputes of over applicability of organization right, and interpretation of the CBA like the one at hand, which is within the domain of the High Court. To support his position, he cited the case of James Kapyata vs MCC Limited, Revision No. 198 of 2019. On the allegation of non-compliance with procedures for retrenchment, Mr. Yoyo argues that the record is intact over the matter and is clearly reflected in the Award. That DW3 explained in testimony on how he communicated the notice and how he physically contacted the Applicants. He referred this court to exhibit D5. He further contends that given the merit of evidence laid before the Commission, the admission made by the Applicants when cross examined and their failure to bring anything tangible to impeach the reality on the record, in his view, it negates all pre-emption made by the Applicants' counsel against the notice, which he thinks is unfounded and misconceived, arguing that the record revealed that the Applicants were fully consulted prior to retrenchment and they were fairly dealt with. He referred this court to Exhibit D6. Rejoining, Mr. Maeda countered the allegation that the Applicants' employment contracts were not tendered before the commission, submitting that the allegation by the Respondent's counsel is misconceived as the said contracts were tendered as exhibit D7 collectively. He referred this court at page 11 of the commission's proceedings. On the allegation that this court lacks jurisdiction on the issue regarding the collective bargain agreement, Mr. Maeda submitted that it would have been so if the Applicants were challenging the interpretation of the CBA agreement, which was not the case as the issue

before the Commission was that the Respondent in determining their terminal benefits did not include the Applicants as part of the group that were benefitting from the CBA agreement. Having perused the lower court record, and hearing the rival arguments of the parties I think the task before me is to determine firstly, whether the procedures for retrenchment based on operational requirement were followed; and secondly, whether the Arbitrator was right in holding that the Applicants were not entitled to severance payment because they were not members of CHODAWU. There is no dispute that the Applicants were terminated based on the reason of operational requirement. Now the question is whether the Respondent followed procedures for retrenchment before retrenching the Applicants. Procedures for retrenchment are provided for under section 38(1) of the ELRA: “38 (1) 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 minimize the intended retrenchment; (Hi) 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 recognized in terms of section 67; (ii) any registered trade union which members in the workplace not represented by a recognised trade union; (Hi) any employees not represented by a recognized or registered trade union ”. For the termination of employment to be fair, the employer must prove that the reason for the termination is valid, it is a fair reason and that the employee was terminated in accordance with a fair procedure. See section 37 (2) of the ELRA. It is on the record that the Respondent issued a notice of intention to retrench. This fact was not denied by the Applicants. PW3 who is the 2nd Applicant confirmed this fact when he stated that he received the notice in his phone through an SMS. It is also on the record that a consultation meeting was conducted and attended by the Applicants. This can be proved by attendance sheet with their names and their signature on the date when the said meeting was conducted. It is also undisputed fact that the Respondent took measures to avoid the retrenchment, like putting his employees on leave and reducing their salaries all of which did not help to retain their employment. It is thus my finding that the argument by Applicant’s counsel that the procedures for retrenchment were not followed is unfounded. Turning to the second issue, the Arbitrator on this issue ruled that the Applicants were not entitled to severance pay on the reason that they were not members of CHODAWU. It is true basing on the record that the Applicants

were not members of the CHODAWU. This fact is proved by the testimonies of the Applicants themselves who denied being members of the said organisation. Now, the question is whether not being a member of CHODAWU disqualify them from the severance pay? In any case, a Collective Bargaining Agreement is a union contract which is a written legal contract between an employer and a union representing employees. This agreement results from an extensive negotiation process covering essential topics such as wages, work hours and employment conditions. It is without a doubt that the Applicants not being members of CHODAWU, were not covered by the terms of the Collective Bargaining Agreement entered between CHODAWU and the Respondent, but that is not to say that they are not covered under the Labour Laws. Section 42 (2) of the ELRLA on the issue relating to severance pay provides: “An employer shall pay severance pay on termination of employment if

1. The employee has completed 12 months continuous service with an employer; and
2. Subject to the provisions of subsection (3), the employer terminated the employment. The above provision did not put the condition that an employee will be entitled to severance pay only if he/she is a member of certain Trade Union. Deductively, it is reasonably logical to expect the Arbitrator to have approached the matter from the general rule and progress to the specific conclusion. It is my conviction that the trial Arbitrator misdirected himself when holding that the Applicants are not entitled to severance pay because they were not members of CHODAWU. Having said so this Application is partly allowed to the extent explained above. Because the Applicants in their evidence at the Commission admitted that they were paid other entitlements except severance pay, the Respondent is only required to pay them their severance pay according to the law. It is so ordered. Dated at ARUSHA ZONE this 27th of September 2024. A. Z. BADE, J JUDGE OF THE HIGH COURT

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