IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

(CORAM: SEHEL, J.A., KIHWELO, J.A. And KHAMIS, J.A.)

CIVIL APPEAL NO. 514 OF 2020

JOSEPH FISSOO.....1ST APPELLANT

AHMED ISSA GULLETH.....2ND APPELLANT

TERESIA MATHIAS LYIMO.....3RD APPELLANT

DR. OMBENI M. FOYA.....4TH APPELLANT

BERNARD MNDEME.....5TH APPELLANT

GERTUDE FRENCIS.....6TH APPELLANT

JANE ROSE MSUYA.....7TH APPELLANT

ANNA MARY DALLU.....8TH APPELLANT

ELIPENDO STANSLAUS LEMA.....9TH APPELLANT

EMMANUEL JOHN MAVURA.....10TH APPELLANT

REHEMA SIFAEL NALOMPA .....11TH APPELLANT

HEDWIGA VITALIS SHAYO.....12TH APPELLANT

CALISTER METHEW MUNISI.....13TH APPELLANT

REHEMA SWALEHE.....14TH APPELLANT

ERNESTA PANCRAS MURO.....15TH APPELLANT

PETER MAUKI.....16TH APPELLANT

APENDAELLY PETER HALLO.....17TH APPELLANT

LILIAN CHARLES AKYOO.....18TH APPELLANT

ANGELISTA ISDORY SWAY.....19TH APPELLANT

MARY D. NYAKIRIGA.....20TH APPELLANT

HAMIDA SUFIAN .....21ST APPELLANT

ATHANACIA KISERA.....22ND APPELLANT

BEATRICE KIMARO.....23RD APPELLANT

SEGOLINA E. NGOWI.....24TH APPELLANT

MARY CONSTANTINE ASSENGA.....25TH APPELLANT

ZAKAYO LONGIDU MOLLEL.....26TH APPELLANT

ZAINABU IDDI BAKARI.....27TH APPELLANT

DELIVER ERIC MAANGA.....28TH APPELLANT

FRIDA THOMASI LYIMO.....29TH APPELLANT

ROSE OLIVER MWANGI.....30TH APPELLANT

NICHOLOUS LIKOMBE.....31ST APPELLANT

EFRANCIA AMBROCE MWANGA.....32ND APPELLANT

AMINA S. MAHEWA.....33RD APPELLANT

MARTHA SHADRACK MBISE.....34TH APPELLANT

LIDYA YENGELE KIMARIO.....35TH APPELLANT

ASTERIA MFUNGO MALI.....36TH APPELLANT

HERI DAUDI.....37TH APPELLANT

DONATILA A. MOSHA.....38TH APPELLANT

ELIZABETH SIARA MOSHI.....39TH APPELLANT

AGNESS MUFLISHI MWAKALENGA.....40TH APPELLANT

EDVESTA RICHARD KIMARIO.....41ST APPELLANT

FAUSTINA MUJULIZI.....42ND APPELLANT

MARY AMINIEL.....43RD APPELLANT

STELLA PETER.....44TH APPELLANT

RUTH JACKSON .....45TH APPELLANT

KHALIFA RASHIDI.....46TH APPELLANT

RUTH K. SELEMAN.....47TH APPELLANT

KHALIDI RASHIDI.....48TH APPELLANT

YOLLANDA J. SEMTUNDU.....49TH APPELLANT

MARKO ELIKANA MAYO.....50TH APPELLANT

JOYCE ANTONY MREMA.....51ST APPELLANT

JOYCE KIMWEI KIBANGA.....52ND APPELLANT

EMMNAUEL JUMANNE MANSU.....53RD APPELLANT

ESTER MEUSHI.....54TH APPELLANT

ASHA ALLY KASU.....55TH APPELLANT

MARY MAMUYA.....56TH APPELLANT

MARY NOAH CHANGI.....57TH APPELLANT

DIANA STEVEN MALYA.....58TH APPELLANT

DR. EVANCE ATHAID.....59TH APPELLANT

VERSUS

ITHNA ASHERI CHARITABLE HOSPITAL.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania, Labour Division at Arusha)

(Gwae, J.)

dated the 9th day of September, 2019

in

Consolidated Revision Applications No. 127 and 145 of 2017

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JUDGMENT OF THE COURT

11th & 18th March, 2024

KIHWELO, J.A.:

The appellants were employees of Ithna Asheri Charitable Hospital, the respondent herein. Each appellant was employed in different capacity and on varying dates according to the respective contracts of service. The respondent is a charitable healthcare organization established and run by The Khoja Shia Ithna- Asheri Jamaat of Arusha. The appellants, seek to

challenge the decision of the High Court of Tanzania, at Arusha (Gwae, J.) dated 9th September, 2019 which varied the decision of the Commission for Mediation and Arbitration (CMA) in Employment Dispute No. CMA/ARS/ARB/111/2015 having found that, there was minor non-compliance with the procedure for termination of the appellants. The High Court, narrowly granted the appellants and the respondent's applications and ordered each of the appellants to be paid four (4) months' salary compensation irrespective of the duration of their service.

The factual background of this matter that are germane to the instant appeal may be recapitulated briefly as follows: The appellants were employed by the respondent on diverse dates, in different positions and with different salary scales. They remained in the respondent's employment until when their employment services were terminated on account of retrenchment which was necessitated by urgent major renovation of the hospital buildings following the directives by the Ministry of Health and Social Welfare (the Ministry) of 2nd October, 2014. Both the appellants and management of the respondent agreed that, it was impossible to carry out renovation while staff and patients are in the premises. Hence, on that account, the respondent on 9th March, 2015

issued a termination letter to all the appellants with effect from 31st March, 2015.

Aggrieved by the termination, the appellants on 15th April, 2015 lodged a complaint before the CMA. They complained that, their termination was unfair since the respondent did not comply with the mandatory procedural requirements for retrenchment. They thus, prayed for an order that, they were wrongfully and unfairly terminated. They further prayed that, they be paid all statutory compensations. Having heard the dispute on merit, the CMA (Hon. Mnzava-Arbitrator) on 8th June, 2016 found that, the reason for termination of the appellants was valid. The basis of his findings was that, the impending retrenchment was very well known to the parties because, the hospital closure was meant to pave way for major rehabilitation of the hospital buildings in compliance with the directives of the Ministry.

However, the CMA found out that, from the evidence on record, there was non-compliance with the mandatory procedural requirements as the retrenchment or termination exercise was conducted before consensus was reached as to payments of terminal benefits. The CMA

further observed that, although the appellants are entitled to compensation but the respondent, a charitable religious organization deserves leniency since it has enormous task of renovating the hospital buildings apart from paying the appellants. The CMA also expressed its realization of the fact that, the appellants deserves monetary compensation and awarded compensation of six months' salary for employees who worked for more than ten years and four months' salary for those who worked less than ten years.

Suffice to say that, both the appellants and the respondent unamused by the award of the CMA challenged that decision before the High Court by way of revision. Whereas, the respondent lodged revision No. 127 of 2017 raising three grounds, essentially challenging the award of payment of compensation for unfair termination, the appellants lodged revision No. 145 of 2017 armed with three grounds as well, but mainly faulting the CMA for awarding compensation below the minimum compensation provided by law.

The two revision applications were consolidated into one, and upon hearing the parties on merit, the High Court (Gwae, J.) found that the

termination to be unfair for minor non-compliance with the procedure because it was done prior to reaching consensus as to terminal benefits payable and there was inadequate formal notice of termination. He also found that the compensation awarded by the CMA to be discriminatory, in that, there was no need to distinguish between those who worked for less than ten years and those who worked for more. Having said so, the judge of the High Court proceeded to narrowly grant the prayers for awarding compensation of four (4) months' salary for each appellant irrespective of the number of years of service. He further, ordered payment of eight (8) days salary in lieu of formal notice of 28 days and certificate of service.

Feeling that justice was not rendered, and in further quest for justice, the appellants seek to impugn the verdict of the High Court, and have presently filed a memorandum of appeal with three grounds which can be crystalized as follows.

> *"1. The judge of the High Court erred in law in awarding four (4) months' salary as compensation.*
>
> *2. The judge of the High Court erred in law and fact*

in confirming and holding that there were sufficient reasons warranting retrenchment or termination of the appellants.

3. *The judge of the High Court erred in law and fact by confirming and holding that the respondent complied with statutory retrenchment procedures against the appellants".*

The appeal was called for hearing on 11th March, 2024 whereas the appellants were represented by Mr. Boniface Joseph who teamed up with Mr. Julius Kessy, both learned counsel, while the respondent enjoyed the services of Mr. Elvaison Maro, learned counsel. Apparently, both parties were also represented by the same counsel in the High Court. The learned counsel lodged written submissions in support and opposition to the appeal which they fully adopted during the hearing.

In support of the first ground of appeal, Mr. Joseph was fairly brief. He faulted, the judge of the High Court for awarding each of the appellants four months' salary as compensation contrary to the mandatory requirements of the law which requires compensation for unfair termination to be not less than twelve months' salary. He cited to us section 40 (1) of the Employment and Labour Relations Act, 2004 ("the

Act"). Elaborating further, the learned counsel submitted that, the provisions of section 40 (1) above, does not give discretion to the Arbitrator or the Labour Court to award compensation less than twelve months. He took the view that, both the CMA and the High Court erred in awarding compensation of less than twelve months' salary for unfair termination. He paid homage to the case of **Bati Services Company Limited v. Shargia Feizi**, Civil Appeal No. 38 of 2021 (unreported) and **Tanzania Cigarette Company Limited v. Lucy Mandara**, Civil Appeal No. 187 of 2021 (both unreported) for the proposition that, compensation of twelve months' salary is a minimum where the termination is found to be unfair. He rounded off by urging us to allow this ground of appeal.

Addressing us on the complaint that, it was erroneous for the judge of the High Court to confirm and hold that there were sufficient reasons warranting retrenchment and termination of the appellant, the learned counsel contended that, the High Court erroneously made findings that the appellants' termination was valid owing to the fact that the main reason was closure of the hospital in order to pave way for major renovation. Illustrating, the learned counsel argued that, the High Court wrongly upheld the CMA's findings that, the appellants were terminated

on operational requirements and that there was sufficient consultation between the appellants and the respondent prior to the termination. He further faulted the High Court decision for ignoring the spirit of the labour laws which emphasizes that, the employer is entitled to terminate the employee where there is a valid reason, fair reason and fair procedure. In this regard, he cited section 37 (2) (a) (b) and (c) of the Act and rule 8 (1) (c) (d) of the Employment and Labour Relations Act, (Code of Good Practice) Rules G.N. No. 42 of 2007 (the Code of Good Practice) to demonstrate his proposition. He was emphatic that, the High Court overlooked the position of the law. For in his view, it was incorrect to hold that, the reason for termination by operational requirements was substantively fair on the simple account that the termination was clearly known by both parties. Accordingly, he entreated us to find that this ground has merit.

Next, we turn to the third ground of appeal whose main complaint is failure by the judge of the High Court to find and hold that, the respondent did not comply with the statutory retrenchment procedures before terminating the appellants. In support of this ground, the learned counsel contended that, while the CMA evidently found that the

procedures for termination were not adhered to, the High Court held that, the termination was unfair in terms of minor non-compliance, in that, termination was effected before reaching consensus as to terminal benefits payable to the appellants and there was inadequate formal notice of termination. The learned counsel further faulted the judge of the High Court for considering the non-compliance by the respondent as minor in total disregard of the mandatory requirements of section 38 (1) (a) (b) (c) and (d) as well as section 40 (1) (b) (ii) of the Act. He took the view that, during what was considered to be initial consultation, there was no consensus on the manner the retrenchment exercise was to be conducted and it was incumbent upon the respondent to follow the letter and spirit of the law as failure to comply with section 38 of the Act is prejudicial. To fortify his argument, the learned counsel referred us to our earlier decisions in the case of **Sharaf Shipping Agency (T) Ltd v. Bacilia Constantine and others**, Civil Appeal No. 56 of 2019 and **Haider Mwinyimvua & Others v. Deposit Insurance Board & Another**, Civil Appeal No. 250 of 2018 (both unreported) in which we discussed at considerable length section 38 of the Act and emphasized the need to follow the prescribed steps prior to effecting the retrenchment.

The learned counsel finally wound up his submission by urging us to find that the termination of the appellants was both substantively and procedurally unfair, and hence, the appellants are entitled to statutory compensation of not less than twelve months' remuneration, repatriation costs, one month salary in lieu of notice and annual leave due to each appellant.

Conversely, Mr. Maro in response to the first ground of appeal had an opposing view. He premised his oral submission in highlighting the written submissions by arguing that, the High Court found that the termination was substantively fair but only that there were minor flaws in the procedure for termination. He submitted further that, the High Court correctly and justifiably awarded four months' salary as compensation bearing in mind the peculiar circumstances obtaining in this case. The learned counsel went on to submit that, admittedly section 40 (1) (c) of the Act, provides for minimum compensation to be twelve months, however, the arbitrator or the High Court has discretion to award either less or more depending on the obtaining circumstances. Mr. Maro contended further that, in awarding compensation for unfair termination the arbitrator is not bound by the prescribed minimum alone but rather

has to consider other circumstances and cited section 88 (8) of the Act and rule 32 (5) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007 G.N. No. 67 of 2007. Mr. Maro cited a number of High Court decisions in support of the proposition that, an arbitrator has discretion to award compensation of less than twelve months remuneration where appropriate. He further referred us to our earlier decision in **Felician Rutwaza v. World Vision Tanzania**, Civil Appeal No. 213 of 2019 (unreported) in which we subscribed to the holding in **Sodetra (SPRL) Ltd v. Njelu Mezza & Another**, Labour Revision No. 207 of 2008 (unreported) that, it is not mandatory that in all cases of unfair termination, the arbitrator should order compensation of not less than 12 months' remuneration.

Mr. Maro emphatically argued that, the position in **Felician Rutwaza** (supra) is good law as it was cited in **Bati Services Company Limited** (supra), **Tanzania Cigarette Company Limited** (supra) and **Veneranda Maro and Another v. Arusha International Conference Centre,** Civil Appeal No. 322 of 2020 (unreported). In the former two cases the **Felician Rutwaza** case was referred but distinguished while in the latter case it was cited with approval. In his view, the award of less

than twelve months remuneration was justified given the circumstances of the case. He implored upon us to dismiss this ground.

In response to the second ground of appeal, whose bone of contention is on the findings of the judge of the High Court that there were sufficient and valid reasons for retrenchment, the learned counsel submitted that, the High Court rightly came to that conclusion considering that the operations of the hospital could not proceed while renovation was taking place as that could endanger both staff and patients. He cited the provisions of section 65 of the Occupational Health and Safety Act, No. 5 of 2003 which imposes an obligation upon the employer to ensure safety of the working premises, to fortify his argument.

Arguing further, the learned counsel contended that, the High Court was right to find that the reason for termination was valid and fair since it was impracticable to carry out major renovation while the hospital was in operation and bearing in mind that the renovation was expected to take time as resources for doing so depended upon community members' contributions. To buttress his proposition, he cited to us section 37 (2) (a) and (b) of the Act and rule 8 (1) (d) of the Code of Good Practice as well

as exhibit R1 in which the appellants consented to the closure of the hospital for renovation purposes. He finally, submitted that, this ground too has no merit as such it has to be dismissed.

Mr. Maro, in response to the third ground of appeal which faults the judge of the High Court for his failure to hold that the respondent did not comply with procedural requirements for retrenchment, he adamantly argued that, the respondent dutifully complied with the requirements for notifying the appellants about the impending closure of the hospital. Elaborating, he referred us to the verbal communication made to the appellants on 27th February, 2015 which was followed by a written notice dated 1st March, 2015 which the appellants received on 9th March, 2015. Thus, in his view, this was in conformity with the requirements of section 38 of the Act as the notice clearly covered the intention of the retrenchment and bearing in mind that, the law does not strictly provide for the timeframe within which the notice should be issued.

On our prompting regarding failure to issue a formal notice of retrenchment instead of termination of contract as was the case in this appeal, Mr. Maro submitted that, the respondent followed the procedure

but admittedly he contended that, there were some minor omissions in the notice for retrenchment. But in all, he urged the Court not to allow the appeal.

We have examined the record of appeal and considered the contending oral and written submissions of the learned trained minds as well as the authorities relied upon. In dealing with the points of contention, we propose to deliberate on the second and third grounds of appeal first before we finally determine the first ground.

For a start, we agree with both counsel that, the appellants were terminated from employment on 31st March, 2015 and that, their employment was terminated on account of retrenchment which was necessitated by urgent major renovation of the hospital buildings following the directives by the Ministry. We hasten to state that, the only contentious issue in as far as the second and third grounds is concerned is whether there was a valid and fair reason for the termination and whether the respondent complied with the obtaining procedures.

Our starting point will involve a reflection of the law in relation to termination of employment. For the sake of clarity, we wish to reproduce the provisions of section 37 (2) of the Act which provides thus;

> *"Section 37*
> *(2) A termination of employment by an employer is unfair if the employer fails to prove-*
> *(a) that the reason for the termination is valid;*
> *(b) that the reason is a fair reason-*
> *(i) related to the employee's conduct, capability or compatibility; or*
> *(ii) based on the operational requirements of the employer, and*
> *(c) that the employment was terminated in accordance with a fair procedure.*

Furthermore; rule 8 of the Code of Good Practice provides that:

> *"..Any employer may terminate the employment of an employee if he has a fair reason to do so as defined in section 37 (2) of the Act"*

Clearly, the provisions above underscores the need for employers to ensure that, for any termination of employment to qualify the fairness criteria three conditions must exist. **One**, the reason for termination must

be valid; **two**, that reason must be a fair reason; and **three**, the termination must be in accordance with a fair procedure. The learned counsel for the parties were sharply divided in their respective arguments on the fairness of the termination of the appellants.

Starting with validity and fairness of the termination, it is clear from the evidence on record that, the termination was occasioned by the directives from the Ministry which necessitated an urgent major renovation of the hospital buildings and this was well known to the appellants who agreed that, the renovation cannot go on while staff and patients are in the premises because it was unsafe. Hence, as it can be clearly seen from record, and we think, this should not detain us much, as rightly argued by Mr. Maro, the reason for the termination of the appellants was valid. Equally, that reason was fair because the termination was done in terms of operational requirements of the respondent.

We will next deliberate on the issue of whether the respondent complied with the fair procedure for termination as required under section 37 (2) (c) of the Act. The learned counsel for the parties locked horns in respect of this issue in their respective arguments. Whereas, Mr. Joseph

contended that, the respondent did not observe the procedure in retrenching the appellants, Mr. Maro argued that, there were some minor omissions in the notice for retrenchment but all in all, he submitted that, the respondent complied with the requirements for notifying the appellants about the impending closure of the hospital. The bone of contention in this matter hinges on a very narrow issue on whether the procedure in retrenching the appellants were observed. In deliberating on this issue, we think, for better understanding of the procedure in retrenching employees, it is desirable to reproduce the provisions of section 38 of the Act. It reads:

> *"In any termination for operational requirements (retrenchment), the employer shall comply with the following principles, that is to say, 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 intended retrenchment;*
>
> *(ii) Any measures to avoid or minimize 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) Shall 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 with members in the workplace not represented by a recognized trade union;

(iii) *Any employees not represented by a recognized or registered trade union."*

Speaking of the above provisions, it is perhaps, pertinent to observe that, it clearly spells out the steps to be followed before conducting the retrenchment like the one in this instant appeal. Particularly, the employer is expected to publish a notice of intended retrenchment, containing all vital information including the reasons for the contemplated retrenchment. Furthermore, the employer is expected to convene meetings during which

the reasons for retrenchment, measures to minimize the retrenchment if practical, selection criteria and agreement on the retrenchment package.

Quite unfortunate, the respondent did not heed to any of the above. Indeed, the record of proceedings bears out that, the respondent issued a mere one month notice of termination of contract with effect from 31st March, 2015. Additionally, meetings were held between the respondent and heads of various units within the hospital. However, there was no formal notice of retrenchment which was issued prior to termination of the appellants' services in terms of section 38 of the Act. We therefore, find considerable merit in the submission by the counsel for the appellants that, the respondent did not comply with the fair procedure for termination as required. It is instructive to state that, there is no middle ground when it comes to compliance with the letter and spirit of the law in as far as fair termination of contract is concerned. It follows, therefore, that, grounds two and three are partly allowed.

Finally, we will deliberate on the first ground of appeal whose sticking issue is the award of four months' remuneration to the appellants. The learned counsel for the parties were once again sharply divided in

their respective arguments on this issue too. While Mr. Joseph was emphatic and argued that, the provisions of section 40 (1) of the Act, does not give discretion to the arbitrator or the Labour Court to award compensation less than twelve months, Mr. Maro had an opposing view, he contended that, the arbitrator or the Labour Court has discretion to award either less or more depending on the obtaining circumstances.

We have considered the arguments placed before us which have been ably argued by the learned trained minds. It is illustrative to state that, luckily the issue before us is not novel as the Court has interpreted the applicability of the above provision in the context of the case in which the unfairness of termination was on procedure only. In the case of **Felician Rutwaza** (supra) in which the termination was substantively fair but procedurally unfair, we took the position that, since the law abhors substantive unfairness more than procedural unfairness, the remedy for the former attracts a heavier penalty than the latter and therefore, it is correct in law for the arbitrator or the Labour Court to exercise discretion and order compensation of less than twelve months' remuneration.

Corresponding observations were made in the case of **Pangea Minerals Limited v. Gwandu Manjali**, Civil Appeal No. 504 of 2020 and our recent decision in **Kenya Kazi Security (T) Limited v. Rukia Abdallah Salum**, Civil Appeal No. 53 of 2021 (unreported). With respect, we think there is validity and substance to the submission by the learned counsel for the respondent since the facts in the instant appeal are similar to the one we have shortly demonstrated. As for the cases cited by the counsel for the appellants, with respect, we find them not relevant to the point at issue since they apply where there is unfairness in termination both substantively and procedurally.

For the sake of completeness, and not that it is essential to this judgment, we wish to comment on the prayer by the counsel for the respondent's that, in the event that we find the appellants are entitled to compensation we should order and direct that the compensation be paid only to those who testified at the CMA. We must express more in sorrow than fear that, the counsel's prayer was made at the eleventh hour and through back door since this issue was neither raised at the CMA nor was it raised as a cross appeal.

In the final analysis, we hold that the appeal is unmerited. It is therefore, dismissed. Given the fact that the appeal arose from a labour dispute normally attracting no costs, we make no order as to costs.

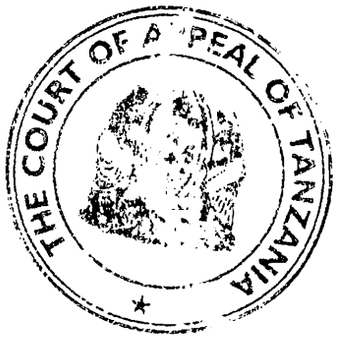
DATED at **ARUSHA** this 18th day of March, 2024.

B. M. A. SEHEL
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The Judgment delivered this 18th day of March, 2024 in the presence of the Mr. Julius Kessy, learned counsel for the appellants and Mr. Thomas Kessy, learned counsel holding brief for Mr. Elvaision Maro, learned counsel for the respondent, is hereby certified as a true copy of the original.



A. S. CHUGULU
DEPUTY REGISTRAR
COURT OF APPEAL