IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MROSO,J,A. NSEKELA,J,A. AND KAJI,J,A.)

CIVIL APPEAL NO 85 OF 2005

PAUL YUSTUS NCHIA ..... APPELLANT

VERSUS

1. NATIONAL EXECUTIVE SECRETARY
CHAMA CHA MAPINDUZI
2. CHAIRMAN BOARD OF TRUSTEES
CHAMA CHA MAPINDUZI HEAD QUARTERES } **RESPONDENTS**

(Appeal from the Judgment of the High Court of Tanzania At Mtwara)

(Mr. Justice S.B Lukelelwa)

dated the 15th day of December, 2004
in
Misc. Civil Appeal No. 9 of 2004
.....
JUDGMENT OF THE COURT

2 & 12 October 2006

NSEKELA, J.A.:

The appellant, Paul Yustus Nchia, was an employee of the respondents from the 1.7.75 until the 24.4.97 when his employment came to an end. At the time of the termination of his employment, he was at Lindi. The respondents, rather belatedly, paid to the appellant terminal benefits which he considered insufficient. As a result, in terms of section 132 of the Employment Ordinance, Cap. 366, this matter was instituted by a Labour Officer as a report to a

Magistrate. The essence of the claim is perhaps best captured in paragraph 4:0 of the Labour Officer's Report which provides-

> "4:0 That the Claimant/Employee claims against the employer a sum of TShs. 10,000,000/= being subsistence allowance for a period from the date of termination of employment by the employer i.e. 24.4.1997 to the date of part-payment of terminal benefits i.e. 15.6.1998"

The trial court dismissed the claim, but on appeal, the High Court (Lukelelwa, J.) held that the appellant was entitled to be paid subsistence allowance amounting to Shs. 183,480/= being monthly salary from the 30.4.97 to 3.11.97. Aggrieved by this decision, the appellant has now come to this Court on appeal. The appellant appeared in person and unrepresented, while the respondents were represented by one O. Msewa, a Legal Officer.

The appellant preferred three grounds of appeal essentially challenging the basis of the computation of subsistence allowance payable to him and the refusal by the High Court to hold that Shs.

500,000/= advanced to the appellant was a loan and not part - payment of terminal benefits. On their part, the respondents lodged a cross – appeal. First, they disputed that any subsistence allowance was payable to the appellant, and secondly, they disputed that the domicile of the appellant was at Songambele Village, Nachingwea.

The appellant submitted that he was employed by the respondents with effect from the 1.7.75 and the place of his engagement was Dodoma. His last duty station was at Lindi where his employment was terminated on the 24.4.97. Upon termination of his employment, the appellant claimed that he was not immediately paid his terminal benefits and repatriated to Nachingwea District. As a result, he was forced to stay at Lindi for 417 days, i.e. from the 24.4.97 to 15.6.98 when there was part – payment of his terminal benefits. The appellant however admitted that on the 3.11.97 the respondents had paid him Shs. 550,000/= but he contended that this was a loan to him and was used for settling other pressing financial problems that he was facing.

Mr. Msewa, submitting on behalf of the respondents, contended that according to exhibit D2, the appellant's domicile was Lindi and not Nachingwea. He admitted that the employment was terminated on the 24.4.97 while at Lindi. As such, the appellant was not entitled to payment of any subsistence allowance. He was resident at Lindi and could not therefore be repatriated to Nachingwea. In his opinion, section 103 of the Employment Ordinance, Cap. 366 was not applicable to the appellant.

The main issue in this appeal and cross – appeal as we see it, is whether or not the appellant was entitled to be repatriated to Nachingwea. If the answer is in the affirmative, were the respondents obligated to pay him subsistence allowance upon termination of his employment on the 24.4.97. Our starting point is a consideration of section 53 of the then Employment Ordinance, Cap. 366 (now section 59, Employment Act, Cap. 366 RE 2002). It provides as follows:-

> "53 (1) Every employee who is a party to a contract and who has been brought to the place of employment by the employer or by

any person acting on behalf of the employer shall have the right to be repatriated at the expense of the employer to his place of engagement in the following cases:

(a) – (e) omitted

(2) Where the family of the employee has been brought to the place of employment by the employer or by any person acting on behalf of the employer the family shall be repatriated at the expense of the employer whenever the employee is repatriated or in the event of his death.

(3) The expenses of repatriation shall include –

(a) .....

(b) subsistence expenses or rations during the period, if any between the date of termination of the contract and the date of repatriation.

(4) The employer shall not be liable for subsistence expenses or rations in respect of any period during which the repatriation of the employee has been delayed –

(a) by the employee's own choice; or

It is evident from exhibit P2 that there was a contract of employment between the appellant and the respondents. The place of engagement was Dodoma. However, when the contract was terminated, the appellant's place of employment was Lindi. Therefore in terms of section 53 (1) of Cap. 366 above, the respondents were enjoined to repatriate the appellant to the place of engagement, Dodoma. The word "repatriation" has not been defined in Cap. 366, but we can get its gist in subsection (3) of Section 53 quoted above. It includes payment of "subsistence expenses". Therefore subsistence allowance is payable to an employee upon repatriation, following termination of employment to the former employee's place of engagement. (see: Civil Appeal No. 62 of 2000 between **Nicholaus Hamisi and 1013 Others** and **(i) Tanzania Shoe Company Ltd.** and **(ii) Tanzania Leather Associated Industries** (unreported)).

The appellant was in Lindi when he was terminated. He claimed that he be paid subsistence allowance to Nachingwea. This was not his place of engagement to bring into play section 103 of Cap 366 (section 112, Cap 366 RE 2002) which provides as under-

"103 (1) Whenever an employee shall have been brought to the place of employment by the employer or by any person acting on his behalf the employer shall at the termination of the contract of service pay expenses of repatriating the employee by reasonable means **to the place from which he was brought, if the employee so desires** (emphasis added)

(Proviso omitted)

(2) .....

(3) The expenses of repatriation shall include-

(a) the cost of traveling and subsistence expenses or rations to the place of engagement.

(b) subsistence expenses during the period, if any, between the date of termination of the contract and the date of repatriation."

Under section 103 (3) (b)of the Ordinance, the respondents were obligated to pay the appellant subsistence expenses between the date of termination of employment and the date of repatriation.

DW 1 tendered in evidence exhibit D3, a letter from the appellant to his employer, the respondents. In the said letter, the appellant wanted to be repatriated to Songambele Village, Nachingwea District. This letter reads in part as under:

> **"YAH: MADAI YA MAFAO BAADA YA KUSTAAFISHWA KAZI.**
>
> Pia kama nilivyojieleza kwenye barua hiyo kifungu (i) na (ii) kukurahisishia kukisia malipo ya kufunga mizigo na kusafirisha kutoka kwenye kituo cha kazi nilichokuwapo hadi nyumbani kwangu pamoja na barua hii hapa naambatanisha **pro-forma invoice ya gharama ya usafiri Lindi mpaka kijiji cha Songambele Wilaya ya Nachingwea** kwa hatua za utekelezaji kama ilivyo utaratibu wa Utumishi katika Chama Cha Mapinduzi." (emphasis added)

The appellant expressed his desire to be repatriated to Nachingwea in this letter written on the 2.6.97. The respondents in their written statement of defence clearly stated that the appellant **" hailed from Nachingwea District within Lindi Region."** It is correct that in his personal particulars, exhibit D2, the appellant

stated that he was born at Nakadi Village, Lindi District, but the appellant in exhibit D3 had expressed a desire to be repatriated to Nachingwea. Mr. Msewa, DW 1 in his evidence stated:

> "Moreover, we were supposed to ferry him to his district head quarters. He hails not from Nachingwea actually. I pray to tender his copy of application for terminal benefits."

The document he tendered in evidence was exhibit D3 which has been reproduced in part above. Item no. 6 of this exhibit reads -

> **"(6) MADAI YA MAFAO YA UTUMISHI WA CCM.**
>
> (v) Gharama za kusafirisha mizigo kutoka Lindi–Kijijini Songambele - Nachingwea."

This letter materially contradicts what Mr. Msewa had just said before in his evidence. Exhibit D3 speaks for itself. The respondents were therefore under a legal obligation to repatriate the appellant from Lindi to Nachingwea.

The next issue to be resolved is how much should the respondents pay to the appellant as subsistence allowance. The High Court (Lukelelwa, J.) awarded to the appellant Shs. 183,480/= being six months salary. There was evidence that the appellant, after his employment had been terminated, continued to stay in Lindi and did not go to Nachingwea. This is factually true but the response of the appellant is that he was forced to stay at Lindi because of the respondents failure to pay him repatriation expenses. The appellant contended that the respondents should have paid him subsistence allowance soon after the termination of his employment on the 24.4.97. Apparently the appellant was paid his last instalment on the 15.6.98, a delay of 417 days. The appellant had conceded that on the 3.11.97 the respondents had paid him Shs. 550,000/= which he claimed was a loan to assist him in solving financial problems. With due respect to the appellant, there is no scintilla of evidence on the record to establish that this was a loan to him. We are in respectful agreement with Mr. Msewa that this was part-payment of his terminal benefits including repatriation expenses. This fact was admitted in paragraph 9

of the reply to the written statement of defence. In paragraph 8 of the reply, the appellant also admitted that the repatriation expenses to Nachingwea amounted to Shs. 191, 740/=. We are of the settled view that since the respondent as at 3.11.97 had made advance payment of Shs. 550,000/= the appellant had an obligation to mitigate costs by using part of that money to meet the cost of transport to his home village. But if he chose to use all that money to pay for his other commitments, the employer would not be liable for his subsistence for the rest of the days he remained in Lindi.

Now we come to the question of the rate of subsistence allowance. Paragraph 4 of the Labour Officer's Report had put the appellants claim at Shs. 10,000,000/= reckoned from the 24.4.97 to the date of part – payment, the 15.6.98. The learned judge on first appeal awarded to the appellant Shs. 183,480/= as subsistence allowance, being six months salary. It is trite law that he who alleges must prove. The appellant therefore had to establish how much he should be paid. In his evidence, the appellant had this to say-

> "I so ceased working as an officer entitled to Tshs. 15,000/= per day. Inclusive of my wife Lilian Mtoro Kitundu and three Children .....
>
> So my total claim is to the tune of Tshs. 52,500 x 417 days ....."

This was the only evidence before the trial court on subsistence allowance. The first part relates to the rate of Shs. 15,000/= per day. The second part is the inclusion of his wife and children in the calculations and lastly the number of days involved in the calculations. We have already resolved the third aspect. The respondents are liable to pay subsistence allowance from the 25.4.97 to the 3.11.97. As regards the first and second aspects, Mr. Msewa did not cross – examine PW 1 When he testified on those matters. Hence, that is the only uncontradicted evidence on the record which we accept. The learned authors of **Blackstone's Criminal Practice** (1992) have this to say at paragraph F7.4 at page 1871 –

> "A party who fails to cross – examine a witness upon a particular matter in respect of which it is proposed to contradict him or impeach his credit by calling other witnesses, tacitly accepts the truth of the witness's evidence in chief on that matter, and will not thereafter be entitled to invite the jury to disbelieve him in that regard. The proper course is to challenge the witness while he is in the witness – box or, at any rate to make it plain to him at that stage that his evidence is not accepted."

In the result, we allow the appeal with costs to the extent that the appellant is entitled to be paid subsistence allowance at the rate of Shs. 15,000/= per day including his wife and three children with effect from the 25.4.97 to 3.11.97. Any advance payment already made to the appellant should be deducted accordingly. The cross – appeal is dismissed in its entirety.

DATED at DAR ES SALAAM this 12th day of October, 2006.

J.A. MROSO

JUSTICE OF APPEAL

H.R. NSEKELA

JUSTICE OF APPEAL

S.N. KAJI

JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(S.M. RUMANYIKA)

DEPUTY REGISTRAR