IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: KILEO, J.A., MJASIRI, J.A. And MASSATI, J.A.)

CIVIL APPEAL NO 24 OF 2014

ELIDHIAHA FADHILI.....APPELLANT

VERSUS

THE EXCUTIVE DIRECTOR
MBEYA DISTRICT COUNCIL.....RESPONDENT

(Appeal from the judgment of the High Court of Tanzania at Mbeya)

(Lukelelwa, J.)

dated the 27th day of May, 2008
in
In Civil Case No. 3 of 2008

JUDGMENT OF THE COURT

27th & 28th October, 2014

MASSATI, J.A.:

The appellant had sued the respondent to claim the sum of shs 187,920,000/= as repatriation expenses and subsistence allowance for 1566 days at the rate of shs 60,000/= per day (i.e. 30,000/= per day) for him and his wife and half of that amount for his two children) from 1st January, 2004 when he was officially retired as a teacher on medical

grounds, to 19th September, 2008, when he filed the plaint in the High Court, at Mbeya. The High Court decreed that.

> *"The defendant shall pay the plaintiff subsistence allowance equal to the salaries which the plaintiff would have been paid from 1st January, 2004 when he was retired on medical grounds to 13/9/2004, when the defendant had provided the plaintiff with transport".*

The appellant was aggrieved by that decision, and has filed an appeal to this Court. In his six-ground memorandum of appeal, the appellant challenges several findings of fact and law and has filed a written submission in support thereof. The respondent has also filed a "reply to the memorandum of appeal "a creature unknown in the Court of Appeal Rules 2009 (the Rules), and has also filed a written submission in reply. From these memoranda of appeal and written submissions, we think that four main issues have to be determined and decided; namely,

1. *What is the applicable law?*

2. *Whether the appellant was entitled to subsistence allowance? For how long? At what rate?*

3. *Whether the appellant is entitled to any general damages?*

4. *To what reliefs are the parties entitled?*

Before we go into the issues we will briefly state the facts leading to this controversy. The appellant was employed as a teacher by Mbeya District Council and posted in Mbarali ward. On 15th November, 2003 the appellant received a letter from the respondent dated 3rd November,2003 informing him that he was to retire on medical grounds effective 1st January 2004. The respondent undertook to repatriate the appellant together with his luggage to his place of domicile. A motor vehicle was provided to transport him on 13/9/2004. Later he changed his mind and demanded money instead. He was paid Tshs. 821,000/= on 14/8/2008 for transport on the basis of a proforma invoice he had produced. But the appellant did not go because, according to him, the sum was inadequate. At the trial, the respondent testified that it was willing to pay allowance from 1/1/2004 to 13/9/2004 when he was given the vehicle at the rate of 15,000/= per day for himself and his wife and half that amount for his two children. With that background, we now turn to the issues.

On the issue of which law was applicable, the appellant was of the view that the Employment and Labour Relations Act No. 6 of 2004 which came into force on 20th December, 2006 (GN 1 of 2007) was applicable because he filed his suit on 19th September, 2008. Mr. Prosper Msivala, learned counsel, who appeared for the respondent, submitted that it was the repealed Employment Act (Cap 366 –R.E 2002) which was applicable, because the cause of action arose in 2004 when that Act was still in operation. He also referred to section 32 of the interpretation of Laws Act (Cap 1 R.E 2002) because the new Act had no retrospective effect. This view was shared by the trial court which on page 3 of its judgment (p.44 of the record) found that the suit was governed by the provisions of the Employment Act (Cap 366 –R.E 2002).

We think the trial court properly directed itself by relying on the Employment Act Cap 366 –R.E 2002 as the governing law. This is because the Employment and Labour Relations Act No. 6 of 2004 came into operation in 2007, while the appellant's cause of action arose in 2004.The new Act has no retrospective effect, and in fact paragraph 11(1)(2) of the

Third Schedule of the Employment and Labour Relations Act, expressly provides that:

> *"Any claim arising from the repealed laws before the commencement of this Act shall be dealt with as if the repealed laws had not been repealed".*

So, there was nothing wrong when the High Court proceeded to hear the claim under that repealed law. The appellant's grievance on that issue is not justified. It is accordingly dismissed.

With regard to the second issue, the appellant submitted that he was entitled to subsistence allowance as provided under section 43 (1) (c) of the Employment and Labour Relations Act, but not at the rate of his monthly salaries as decreed by the trial court. He was also of the view that the trial court should have ordered those allowances to be paid up to the date of judgment because it was the respondent who delayed his conveyance. But for the respondent, it was submitted that according to paragraph L.2. of the Standing Orders for Public Service, 1994 and section 59 (4) of the Employment Act Cap 366 –R.E 2002 – no subsistence allowance is payable to an employee who has been delayed by his own

choice. This was because, while the employer was ready to transport him on 13.09.2004, the appellant decided to postpone it. It was therefore his fault.

We have already ruled that the applicable law was the Employment Act (Cap. 366 – R.E. 2002). So, Section 43(1) (c) of the Employment and Labour Relations Act No. 6 of 2009, referred to us by the appellant is not applicable. Instead, we agree with Mr. Msivala that the relevant provisions were section 59 (4) of the Employment Act, and paragraph L.2 of the Standing Orders for the Public Service of 1994. According to these, subsistence allowance for public servants is payable in respect of every night for which a servant is away from his duty station, and at such rate as the Permanent Secretary may determine from time to time. It is also provided by statute that no subsistence is payable if the delay is caused by the employee's own choice.

Now, in paragraph 5 of his plaint, the appellant puts the daily rate of shs 30,000/=. He did not say where he got that rate, and did not substantiate it in his evidence. In his memorandum of appeal, the appellant came up with another rate of shs 45,000/=, probably based on

the new law, which as seen is not applicable. He has also claimed that these be paid up to the date of judgment. We reject both rates proposed by the appellant, because they have no basis in law or evidence. We also reject the belated prayer in the appellant's submission that he be paid up to the date of judgment because, this was not pleaded.

In our view, we have no doubt that the appellant was entitled to repatriation and subsistence allowance up to the date of repatriation. From the evidence on record, this appears to be common ground. The burden of proof was then on him to prove what the applicable rate was. Although the appellant denied that his subsistence allowance was shs 15,000/= only due to the status of Mbalizi, he could not justify the claim of 30,000/= per day he put up in his plaint, neither could he effectively challenge DW1 when he testified that since Mbalizi was still a village then, the rate of his allowance was Tshs. 15,000/= per day.

The appellant also admitted that he had received Tshs. 800,000/= earlier on and that the respondent had offered a motor vehicle to transport him and his family back to his domicile, but that he had to postpone it to suit his own convenience. This falls squarely within the purview of section

59 (4) of the Employment Act. We are not persuaded that the money offered to him was inadequate; because it was paid on the basis of a proforma invoice he had taken to the respondent. There was no other proforma invoice to counter the previous one. In the circumstances we hold that the appellant was duty bound to mitigate his damages (See **SOUTHERN HIGHLANDS TOBACCO UNION vs MC QUEEN** (1966) EA 490.

When all those are considered, we conclude that, while the appellant is entitled to subsistence allowance, he is to be paid from 1/1/2004 to 13/9/2004, when he was given a motor vehicle to transport himself and his luggage, which he postponed. Since the rate of 15,000/= per day had not been successfully challenged, we think that the trial judge was not justified to look for a different rate of subsistence allowance; and without giving the parties an opportunity of commenting on it. On the basis of the parties' burden of proof, we think that the appellant failed to prove that he was entitled to the rate of shs 30,000/= per day as pleaded or higher and that on the balance of probability, the respondent had proved that the prevailing rate for him then was 15,000/= per day. On the basis of the above, we have no hesitation in finding that the appellant was entitled to

subsistence allowance from 1/1/2004 to 13/9/2004 which is 257 days at the rate of shs 15,000/= per day for himself and his wife and half that rate for his two children as these were the only ones he had when he retired. This works to shs 45,000/= per day, totaling Tshs 11,565,000/= (shs. Eleven million, five hundred sixty five million only.)

The third issue arises from the memorandum of appeal; in which the appellant prays to this Court, to award him shs 200,000,000/=, by way of general damages. The appellant must have realized that he was wrongly advised, that is why, he never touched on it in his written submission. And so, even the respondent did not think it worthwhile to waste his ink on such a matter.

This Court is a creature of The Constitution of the United Republic of Tanzania, (Cap. 2. R.E. 2002), The Appellate Jurisdiction Act (Cap. 141 R.E. 2002) and is guided by the Court of Appeal Rules, 2009. Its constitutional and statutory duty is to hear appeals, or revisions from the High Court or Courts of resident magistrates with extended jurisdiction. It has no original jurisdiction. That is why Rule 93 (1) of the Rules, provides that:

> *"A memorandum of appeal shall set forth concisely and under distinct heads, without argument or*

narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make."

From the above wording, it is clear that an appeal can only be taken against a decision made by the lower court, and the order or relief that the Court is asked to make must be in relation to the grounds of appeal.

In the present case, the appellant's prayers in the High Court did not include an award of general damages. So the High Court did not decide nor was the respondent heard on the question of damages. Therefore, we find that as general damages were the domain of the trial court, not this Court, it has no place in the present appeal. We disallow that claim.

In fine, we allow the appeal only in part. While the appellant was entitled to subsistence allowance, he was entitled to the same from 1/1/2004 to 13/9/2004 for him and his wife (at the rate of 15,000/= per day; and for only 2 children (at 7,500/= per child). This works out to 257 days only, and at that rate his total entitlement would be Tshs.

11,565,000/= only. The judgment of the High Court is therefore varied to that extent.

Since the other claims and grounds of appeal are based on an inapplicable law and were not substantiated, they cannot be sustained. They are accordingly dismissed.

There shall be no order as to costs.

DATED at **MBEYA** this 28th day of October, 2014.

E. A. KILEO
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL

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

P.W.BAMPIKYA
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL