

**IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA**

(CORAM: JUMA, C.J., MMILLA, J.A. And LEVIRA, J.A.)

CIVIL APPEAL NO. 230 OF 2017

**1. THE PRINCIPAL SECRETARY
MINISTRY OF EDUCATION
2. THE ATTORNEY GENERAL** } **APPELLANTS**

VERSUS

CHARLES MWITA MAGUBO **RESPONDENT**

**(Appeal from the Judgment and Decree of the High Court of Tanzania
at Mwanza)**

(Bukuku, J.)

**dated the 17th day of January, 2017
in
Civil Case No. 01 of 2013
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JUDGMENT OF THE COURT

27th March & 11th May, 2020

LEVIRA, J.A.:

This appeal originates from a civil suit in which the respondent herein, Charles Mwita Magubo had sued the Principal Secretary Ministry of Education and the Attorney General, (the first and second appellants respectively), at the High Court of Tanzania at Mwanza in Civil Case No. 1 of 2013. The respondent was employed by the first appellant as Station Hand/ Office Attendant with effect from 1st January, 1975 and his first work

station was Tarime Secondary School. During his service he received certain promotions and he reached the level of Office Attendant II. He was given salary increments but was not paid salary arrears as it ought to be.

On 16th July, 2004, the respondent attained 60 years compulsory retirement age from the Government service and he officially retired on 17th July, 2007. At the time of retirement, his last duty station was at Bwiru Girls Secondary School in Mwanza. As it turned out, the first appellant did not discharge her duty of repatriating him and his family to his place of domicile till to date. He made several follow ups and indulged in negotiations, but in vein. Aggrieved, the respondent instituted the suit against both the appellants; the first appellant as his employer and the second appellant being the Principal legal advisor of the Government, the first appellant inclusive claiming the following: **First**, payment of Tshs. 45,000/= being subsistence allowance for him and his wife each day from the date of his retirement (17-7-2004) up to the date of repatriation and or Notice dated 31/8/2012 which is equal to 2988 days X Tshs. 45,000/= rate x 2, wife and husband = Tshs. 268,920,000/. **Second**, payment of Tshs. 22,500/=, half rate subsistence allowance per child per day for 4 children from the date of

retirement 17/7/2004 up to the date of repatriation and or Notice 31-8-2012= 2988 days X Tshs. 45,000/= rate x 2, wife and husband = Tshs. 268,920,000/=. **Third**, payment of fare Tshs. 7,000/= from Mwanza to Tarime for wife, husband and 4 children – Tshs. 7,000/= x 6 = 42,000/=. **Fourth**, payment of Tshs. 500,000/= transport cost of 1½ tons of personal luggage from Mwanza to Tarime, place of engagement. **Fifth**, refund of Tshs. 150,000/= being transport costs, he incurred from Mwanza to Dar es Salaam pursuing his repatriation costs. **Sixth**, payment of Tshs. 326,551/50 being unpaid arrears of promotional unrectified salaries. **Seventh**, payment of Tshs. 996,000/= being the rent which he paid pending repatriation costs after he was evicted from Government staff Quarter after retirement. **Eighth**, payment of Tshs. 100,000,000/= general damages for mental anguish, for non-payment of repatriation costs after retirement and the underpayment of his uncertified promotion salaries. **Ninth**, court rate interest from the date of filing the suit till payment in full. **Tenth**, any other reliefs the court could deem fit to grant.

Thus in total, the respondent claimed to be paid Tshs. 638,858,551.50/= excluding the accruing subsistence allowance which

ought to cease on the date of repatriation. After a full trial, the High Court (Bukuku, J.) decided in favour of the respondent and ordered the first appellant to pay him as follows:-

- (i) Subsistence allowances equal to his monthly salary for the entire period from date of his retirement up to the date of repatriation.
- (ii) Tshs. 42,000/= being bus fare from Mwanza to Tarime as prayed.
- (iii) Transport costs for his personal luggage equivalent to 1½ tons, after the same has been calculated according to the letter from TANROADS (Exhibit P3).
- (iv) Tshs. 326,551.50 being unpaid promotion salary arrears.
- (v) Interest at the Court's rate of 7% from the date of filling the suit until the date of Judgment.
- (vi) Costs of the suit.

The appellants, were aggrieved by that decision, hence the current appeal, raising the following three grounds:-

1. That, the trial Judge erred in both law and fact to award the Respondent subsistence allowances equal to his monthly salary for

the entire period from the date of his retirement up to the date of repatriation without evidence of how much was the Respondent's salary.

2. That, the trial Judge erred in law and fact to grant the respondent Tshs. 42,000/= being bus fare without proof.
3. That, the trial learned Judge erred in law and fact to determine the matters against the weight of evidence.

We wish to state at the outset that since the nature of the grounds of appeal requires us to evaluate the entire evidence on record, we shall not give a factual background immediately hereunder; instead, it can be traced as we determine the involved issue(s).

At the hearing of this appeal, the appellants were represented by Ms. Subira Mwandambo, learned State Attorney, whereas the respondent appeared in person, unrepresented.

Ms. Mwandambo commenced her submission by adopting the appellants' written submissions filed in Court on 1st November, 2017. Thereafter, she submitted on the grounds of appeal seriatim. In regard to the first ground of appeal it was her submission that, the learned High Court Judge was wrong to give the appellant subsistence allowance without

proof of his salary and daily expenses. It was her argument that, since it was the respondent who claimed to be paid, he was supposed to prove the claimed amount despite the fact that the employer knew his salary and how much he was supposed to be paid. She added that, the respondent ought to have tendered his monthly salary slip as exhibit during trial to prove his case, but there was no such evidence. However, Ms. Mwandambo referred us to page 63 of the record of appeal where Mr. Karima Magoma Ndosi (DW1), the sole defendants' witness testified to the effect that the respondent was supposed to be paid Tshs. 658,000/= and not Tshs. 3,880,000/= which he claimed as repatriation costs and urged us to find so.

Submitting on the second ground of appeal, Ms. Mwandambo stated that the High Court was wrong to award the respondent Tshs. 42,000/= as bus fare from Mwanza to Tarime because he did not prove that the fare was Tshs. 7,000/= per person as claimed. Instead, the High Court was supposed to use SUMATRA gauge.

Regarding the third ground of appeal, Ms. Mwandambo was very brief in her submission. She only stated that the learned High Court Judge determined the matter against the weight of evidence.

Upon being prompted by the Court on the rights of the respondent, Ms. Mwandambo said, the respondent is entitled to the payment of repatriation expenses. According to her, the payments are statutory but he was supposed to prove what he was claiming. She added, the High Court was not supposed to take judicial notice of the salary of the respondent. However, it was her contention that the respondent has not yet been paid his repatriation expenses, entitled allowances and salary arrears because he supplied two bank accounts to the first appellant. As a result, she said, the first appellant was not certain in which account the payment could be effected. Finally, she urged us to order that the respondent be paid according to appellants' calculations and not as he claimed in his plaint before the High Court.

In reply, the respondent gave a narration of when he was employed, the promotions he undergone and his retirement, together with his place of engagement as indicated above. Regarding his repatriation costs he said, he gave the first respondent his NBC Bank Account Number to pay him, but to-date no payment has been effected into the said account. He referred us to page 59 of the record of appeal where he testified as PW1 saying that, on 7th January, 2013 he instituted a suit against the appellants at the High

Court. Thereafter, the second appellant requested that they should settle the matter out of court, but in vain. However, he contended that while the first appellant was ready to pay him, it was the second appellant who dissuaded the first appellant from paying. The respondent insisted that he gave the first appellant only one bank account number to effect payment, to his surprise, they failed to pay him to-date. He faulted the evidence of DW1 who had blamed the respondent for providing two different banks account numbers, and that is why they failed to pay him. According to him, the only account number he gave was of NBC Bank. He thus urged us to order that he be paid according to the letter from the first appellant of 10th March, 2016 with Reference No. 10216/99 which was admitted as exhibit P6 during trial.

Regarding the second ground of appeal, the respondent said, the bus fare of Tshs. 42,000/= which he claimed was according to the information he received from the bus stand.

Finally, he prayed the Court to order the appellants to pay him his rights because it is sixteen (16) years now since his retirement and he has not yet been repatriated to his place of domicile.

In rejoinder, Ms. Mwandambo prayed the Court to intervene against the reliefs given by the High Court and order the respondent to be paid according to what he was entitled when he retired and remove the 7% interest. She reiterated that the learned High Court Judge gave the decision contrary to the evidence on record and prayed that the appeal be allowed.

We have dispassionately considered the submissions by both sides and the record. It is our observation that, the controversy in this appeal centers on the amount the respondent is supposed to be paid. The appellants argue that, the respondent did not strictly prove his claims. In other words, they do not deny the fact that the respondent was employed by the first appellant and upon his retirement he was entitled to repatriation expenses to his place of domicile and salary arrears which he was not paid during his service. In the circumstances, the main issue to be determined is whether the learned High Court Judge erred in awarding the respondent the reliefs alluded to earlier. For chronological flow of events, we shall start with the third ground followed by first and second grounds respectively.

In the third ground of appeal the appellants argued that, the learned High Court Judge determined the suit against the weight of evidence. Therefore, we need to determine whether the respondent proved his claims

on balance of probabilities during the trial. In determining this issue we need to trace the background of this matter and the evidence adduced by both parties *visa vis* the impugned decision.

During the trial, the respondent testified to the effect that he was employed by the first appellant at Tarime Secondary School to the post of Station Hand/Office Attendant on 1st January 1975. He produced the employment letter of 18th March 1975 with Reference No. APS 4657/7 to prove that truly he was employed by the first appellant. The said letter was admitted as exhibit P1 without any objection from the appellants' counsel. DW1 who was sole witness for the appellants, corroborated the respondent's evidence.

The respondent testified further that during his service with the first appellant, he received various promotions and recommendations arising from his proven fitness for the various appointments and impeccable reputation. The photo copies of said letters of promotion were for identification purposes admitted as ID 1 respectively. The letters of promotion were not challenged by DW1, instead, he acknowledged that the respondent was promoted during his service with the first appellant and he was entitled unpaid salary increments. It was the respondent's contention

that despite those promotions, the first appellant neither rectified his salary nor paid him new salary consistent with his promotion. Therefore, he claimed salary increments to the tune of Tshs. 326, 551.50/=. This claim was admitted by DW1 at page 63 of the record when he stated that:

*"He (**respondent**) is also claiming salary arrears due to promotions of Tshs. 326,000/=".*
[Emphasis added].

At page 121 of the record, the learned trial Judge having found that the respondent established his claim against the appellants, she awarded him accordingly.

According to the record, it is apparent that the respondent was transferred by the first appellant from Tarime Secondary School to Bwiru Girls' Secondary School. On 16th July, 2004 he attained the age of 60 years which is also a compulsory retirement age from public service. It was the respondent's evidence at page 59 of the record that, upon attaining that age his salary was Tshs. 54,400/= and that he received a letter informing him about his retirement which he tendered and it was admitted as exhibit P2. There was no contention from DW1 regarding the respondent's retirement and the salary he earned at retirement time during the trial. He

actually acknowledged that the respondent retired and what he testified was correct.

Following his retirement, the respondent claimed from the first appellant for his repatriation entitlements together with his family members; that is his wife and four children. According to him, he made personal follow up of his claims and managed to get a letter with Ref. No. TRD/RM/MZA/T.30/Vol. IV/107 from TANROADS showing the distance from Mwanza to Tarime to be 329 kilometers and the same was admitted as exhibit P3. The aim of bringing that letter, he said, was for facilitation of calculation of his repatriation expenses. However, despite those efforts and follow ups he made for seven years, he has not yet been paid his entitlements to date. In his defence, DW1 made a bare assertion that the first appellant attempted to pay the respondent his entitlements but she failed because the respondent produced two different banks account numbers. When cross-examined by the respondent on that assertion, he only managed to mention one account which is: NBC No. 015201071611.

We are settled that, the trial court weighed the evidence on record fairly in determining whether or not the respondent was entitled to be repatriated to his place of domicile, in Tarime as he claimed. Part of the

decision of the learned High Court Judge while reasoning is reproduced hereunder:

"It is not disputed that, there was a considerable delay in repatriating the plaintiff to his place of domicile. The plaintiff retired in 2004 and made several follow –ups of his claim. Exhibits ID1, Exhibit P3, P4 and P6 are correspondences which clearly show that until 2012, the plaintiff was yet to be paid his claim, hence the institution of the case."

She went on stating that:

"On their part the defendants blame the plaintiff for the delay of payment of his transport entitlements, by providing a wrong bank account and also by providing an invoice with large sum of money contrary to the actual distance between Mwanza and Tarime. With greatest respect, I wish to differ from the submissions by the defendants. First and foremost, according to Exhibit P6, the purported payment voucher addressed to the plaintiff herein with amount of Tshs. 154,275.00/= was prepared on 26.06/2012. This was after 8 years since the plaintiff had retired. Second, according to Exhibit P3, vide letter with reference No. 18/16/2011, TANROADS wrote a letter to the Head Teacher of Bwiru Girls

Secondary School, acknowledging their letter dated 16/06/2011, regarding the distance from Mwanza to Tarime Irienyi village.... The above clearly shows that, the first defendant exactly knew the distance from Mwanza to Tarime way back in 2011 for the purposes of calculating repatriation costs.”

It is clear from the excerpt above that, the learned High Court Judge based her decision on the weight of evidence adduced before her and we do not see any justification to fault her. The respondent's claims were justified and whatever delay in payment in our view, was attributed to the first appellant because, apart from the letter from TANROADS referred by the learned trial Judge, the respondent had discharged his burden regarding the distance by producing the pro-forma invoice and the first appellant was disputing that, the burden was on him. Having so observed, we find that the third ground of appeal lacks merit and we dismiss it.

In the first ground of appeal the appellants' main argument is that it was wrong for the trial court to award the respondent subsistence allowance without evidence of how much was his monthly salary. The issue to be determined here is whether it was necessary for the respondent to produce his salary slip to prove a claim of subsistence allowance. According

to Ms. Mwandambo, the respondent was supposed to tender his salary slip as exhibit. With respect, this ground of appeal is forlorn because in the first place, the trial Judge did not dictate how much the respondent is supposed to be paid. She only said he has to be paid allowance equal to his monthly salary for the entire period from the date of his retirement up to the date of repatriation. The first appellant being the employer of the respondent stood in a better position to know how much the respondent was being paid. It is so unbecoming for the appellants to raise such an argument now saying that the respondent did not prove how much he was being paid only by failure to produce a salary slip while the order of the High Court left it for the appellants to make the calculations and pay the respondent accordingly. In his claim the respondent stated how much he earned at the retirement age and there was no objection from DW1 as alluded to earlier. On our part, we do not see what difference could have been brought had it been that the said salary slip was tendered in evidence by the respondent. We say so because the amount of the respondent's salary was not at issue before the trial court. Whether the said salary slip could have been produced by the respondent or not, we are settled that, it could not have affected the decision of the trial court in any way. We agree with what the

respondent stated at page three of his written submission that, his monthly salary was statutorily paid and the first appellant is a custodian of all employment records of the respondent, so he knew the respondent's last monthly salary. After all, the respondent was neither cross examined by the appellant's counsel on the formula for calculating subsistence allowance payment he used nor on the one ordered by the trial Judge which they now claim that it was not right. In **Paul Yustus Nchia v. National Executive Secretary Chama cha Mapinduzi and Another**, Civil Appeal No. 85 of 2005 at page 11 (unreported); while dealing with similar issue, the High Court Judge awarded the appellant Tshs. 183, 480/= as subsistence allowance, being six months' salaries. On appeal the Court stated as follows:

"The respondents are liable to pay subsistence allowance from the 25.4.97 to 3.11.97....Mr. Msewa did not cross-examine PW1 when he testified on those matters. Hence, that is the only uncontradicted evidence on the record which we accept."

In the light of the above decision, we do not find any reason to fault the trial High Court Judge's decision in this aspect in the current matter. We

do not hesitate to hold that, in the circumstances of the current matter, it was not necessary for the respondent to tender his salary slip during trial and therefore, the first ground of appeal is without merit, accordingly, we dismiss it.

Regarding the second ground of appeal, the appellants claim that the respondent did not prove the claim of 42,000/= because he did not show that indeed the fare from Mwanza to Tarime was Tshs. 7,000/= per person. It has to be noted that, the respondent stated in his evidence that he was transferred from Tarime Secondary School to Mwanza, Bwiru Girls' Secondary School on 1/1/1977 and he retired on 17/7/2004. Obviously, the appellants as his employers were required to send him back to Tarime where he was engaged. The respondent presented to the appellants a fare of Tshs. 7,000/= per head, for six people which amounted to Tshs. 42,000/= in total. The issue to be considered is whether it was wrong for the trial Judge to award the respondent Shs. 42,000/= as bus fare. We observe from the record of appeal that, DW1, the sole witness who testified for the appellants stated in his evidence that they attempted to pay the respondent bus fare for six dependants at page 63 of the record, but he never stated how much was planned for each dependent and/or how much

was a fare for each one. In the circumstance, we find that although Ms. Mwandambo is challenging the amount which was awarded by the trial court, it is clear that the said amount was not challenged by DW1 during trial. As it is, we do not see any need of disturbing the amount awarded by the trial court. The second ground of appeal is equally without merit and thus we dismiss it.

All said and done, we dismiss this appeal with costs.

DATED at MWANZA this 15th day of April, 2020.



I. H. JUMA
CHIEF JUSTICE

B. M. MMILLA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The Judgment delivered this 11th May, 2020 in the presence of Ms. Sabina Chogogwe, State Attorney for the Appellants and Mr. Charles Mwita Magubo, appeared in person is hereby certified as a true copy of the original.

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DEPUTY REGISTRAR
COURT OF APPEAL