IN THE COURT OF APPEAL OF TANZANIA
AT MTWARA

(CORAM: LILA, J.A., LEVIRA, J.A. And KITUSI, J.A.)

CIVIL APPEAL NO. 157 OF 2020

BAHARI OILFIELD SERVICES FPZ LTD..... APPELLANT

VERSUS

PETER WILSON..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania (Labour Division) at Mtwara)

(Dyansobera, J.)

dated 20th day of August, 2019
in
Labour Revision No. 2 of 2018

JUDGMENT OF THE COURT

8th & 11th June, 2021.

KITUSI, J.A.:

The respondent went to the Commission for Mediation and Arbitration (CMA) to complain against unfair termination of his employment by the appellant. He sought the following reliefs: **One**, payment of basic salary for the remaining period of the contract (4 months) at USD 10,000 per month; **two**, payment of USD 120,000 being salaries for 12 months as compensation for unfair termination; **three**, payment of USD 72,000 being refund of deducted salaries; **four**, payment of subsistence allowance at the rate of USD 150 per day

from the date of unfair termination to the date of final determination of the matter and; **five**, payment of repatriation costs.

After hearing evidence from both sides, the CMA was satisfied that the respondent's employment was unfairly terminated, so it proceeded to award the following reliefs to him; one, a total of USD 40,000 being salary for the remaining period of four months, subsistence allowance at the rate of USD 150 per day from the date of termination to the date of either determination of the matter or of honouring the award, which came to 204 days x 150, equals to USD 30,600 and; lastly deducted salary of USD 3,000 per month for two months, which came to USD 6,000.

At the trial, the respondent testified in proof of his claim by stating that he started working for the appellant on 15th January 2015 under an employment contract which specified that the total monthly pay he was going to be receiving would be USD 10,000. He further stated that from October 2015, the appellant began to pay him USD 3,000 less on the ground that there was no enough income. Later in July 2017, the respondent received a letter of termination of employment which cited curtailed business operation as the reason.

The respondent disputed the alleged reason for his termination because, he said, he had worked out business ventures that were

bringing income to the appellant and that in any event, the appellant employed another person who took over his position. He therefore prayed for payment of salary for the remaining period of the contract and compensation for unfair termination. During cross-examination the respondent denied being a party to any negotiations through email, let alone accepting, any proposed rates for reduced salary.

Mr. Ashock Hiran, the only witness for the appellant testified that he was the superintendent and in charge of the office of the appellant and custodian of office records. He cited the reason for termination of the respondent's employment as being Government's policy that affected operations of the Oil and Gas business. He said that according to records, the respondent's monthly pay was USD 10,000 and that there were only bank statements to prove the revised remuneration. Earlier, an attempt by Mr. Hiran to tender an email correspondence establishing the existence of an agreement for revised remuneration failed because the CMA ruled the document to be inadmissible for it being a copy.

The appellant was aggrieved by that award and preferred a revision to the High Court as per the law, presenting five grounds, paraphrased as follows: -

6.1 The Arbitrator erred in concluding that the termination was unfair simply because it wrongly believed that the person who took up the job of "Supply Manager" had replaced the appellant's position as General Manager.

6.2 The Arbitrator erred in awarding the respondent more than what he had asked for.

6.3 The Arbitrator erred in granting subsistence allowance by disregarding the appellant's letter dated 28th September, 2017 which sought the respondent to confirm the date of his departure to the United Kingdom.

6.4 The Arbitrator erred in not admitting email correspondence dated 27th August, 2015 in which the respondent accepted salary revision.

6.5 The Arbitrator erred in granting four months' pay and disregarding the terms of the contract that provided no such relief.

The learned High Court Judge found no merit in all grounds except in ground 6.2 where he faulted the CMA for awarding the respondent payment of USD 6,000 which had earlier been ruled to be time barred. But he found merit in point 6.1 regarding unfair termination because, he observed, Mr. Hiran conceded that the

appellant employed another person to take over the respondent's position, certainly showing that the alleged financial constraints leading to the termination, was but, a mere excuse.

That decision of the High Court has stirred animated arguments, as we shall see.

On point 6.3 which attacked the award of subsistence allowance, the learned Judge observed that on 26 January 2018 the CMA recorded the following: -

> *"Both parties have agreed that the claim of repatriation is not in dispute as the respondent will pay the repatriation cost as per law."*

The learned Judge resolved the issue under point 6.3 by holding that the appellant having undertaken to pay repatriation cost as per law, it was estopped from arguing otherwise. He accordingly, dismissed the grievance under point 6.3.

In disposing the complaint under point 6.4 the Judge stated that it had been overtaken by the event in view of the position taken in addressing point 6.3. Secondly, he observed that the document referred to in that complaint, was inadmissible for it being a copy therefore it could not form a basis for deciding the issue in favour of the appellant.

Addressing the last point, that is point 6.5, the learned Judge referred to section 44 (1) of the Employment and Labour Relations Act No. 6 of 2004 hereafter, the Act, which provides for an employee's entitlements upon termination. He went on to say that payment of salary for the remaining period of contract and repatriation allowance are among the statutory entitlements which override any contractual terms. He dismissed the complaint under point 6.5.

The appellant was still aggrieved by that decision and has demonstrated that by presenting four grounds of appeal to the Court. At the hearing, Mr. Alex Mgongolwa, learned advocate representing the appellant, dropped the second ground of appeal. However, because of the nature of our deliberations in this matter, we shall reproduce all grounds of appeal, including ground 2.

1. *The Honourable Judge erred in law and fact by granting subsistence allowance while disregarding the Appellant's letter dated 28th September, 2017 seeking confirmation from the Respondent on the date of departure to New Castle, United Kingdom.*
2. *The Honourable Judge erred in law and fact by not considering the admission of an email correspondence dated 27th August,*

2015 on the acceptance of salary revision by the appellant which was legally admissible.

3. *The Honourable Judge erred in law and fact by granting four months' pay while disregarding 'The Termination of Contract' terms as agreed in the Contract of Employment.*
4. *That the Honourable Judge erred in law and fact by arriving at a flawed decision as he misunderstood the Tanzanian appointed as "Supply Base Manager" treating it at par with the General Manager position of the Respondent and misconstrued grounds for termination.*

While Mr. Mgongoiwa submitted in support of the appellant's case, Mr. Salim Mushi, learned advocate, appeared for the respondent and argued in opposition. After abandoning the second ground of appeal, the learned counsel for the appellant decided to argue ground one separately and grounds three and four jointly. Both advocates had earlier filed written submissions which they prayed to adopt.

First of all, Mr. Mgongoiwa submitted on the first ground of appeal, that both the CMA and the High Court had no jurisdiction to entertain the issue of repatriation because the parties were not at issue about it. The learned counsel referring to the proceedings of 26th

January 2018, the relevant part of which we have earlier reproduced, submitted that since repatriation was not an issue, no evidence was led on it, therefore no court would determine it without any such evidence. The learned counsel raised a rhetoric that, in the absence of evidence, how can the court determine when the counting of days for purposes of subsistence allowance should begin, and when it should stop? He referred us to the case of **Paul Yustus Nchia vs. National Executive Secretary Chama cha Mapinduzi and Another**, Civil Appeal No. 85 of 2005 (unreported). The learned counsel wondered if a person would be entitled to payment of subsistence allowance even after being paid repatriation costs.

On this ground, Mr. Mushi for the respondent started his submissions by stating that the first ground of appeal as it appears in the memorandum of appeal, does not address any issue of the jurisdiction of the CMA and the High Court, and insisted that parties should be bound by what they have pleaded. Further he submitted that, while in the first ground of appeal the appellant complains about the respondent's alleged failure to reply to the appellant's letter, the oral submissions did not address that aspect at all. Neither did the submissions address the point whether repatriation costs were paid to the respondent or not. Notwithstanding that, he submitted, the issue of

subsistence allowance was one of the prayers at the CMA and it is also a statutory entitlement under section 43 (1) (c) of the Act. He pointed out that the case of **Gasper Peter vs. Mtwara Urban Water Supply Authority (Mtuwasa)**, Civil Appeal No. 35 of 2017 (Unreported) provides for the mode of calculating payment of subsistence allowance, that is, the period from termination of employment to the date of payment of transportation costs. The learned counsel concluded his argument on this ground by submitting that section 43 of the Act provides for options from which an employer may choose in transporting the employee whose employment has been terminated, but the appellant did not exercise any of them.

Turning to grounds 3 and 4, Mr. Mgongolwa attacked the decision of the learned High Court Judge for proceeding to calculate and even determine on the salary deductions when he had earlier agreed with the appellant's counsel that that was a non-issue. He added that if the Judge had to determine that issue, then he ought to have applied the rate of USD 2000, which was the reviewed monthly salary.

Once again, Mr. Mushi drew our attention to the fact that the complaint in grounds 3 and 4 is not related to salary deduction as argued by Mr. Mgongolwa. Rather, ground 3 raises issue with the award of four months salary which was granted by CMA as

compensation for breach of contract. He elaborated by submitting that this award arose from the respondent's prayer for payment of salaries for 12 months for breach of contract, but the CMA concluded that the employee could not be paid salaries for 12 months while there remained only 4 months to conclude the contract.

In rejoinder, Mr. Mgongolwa insisted that what he had just raised when arguing ground 1 is a jurisdictional issue that can be raised at any time. He submitted further that repatriation and subsistence allowance are intertwined, and that what determines whether or not one is entitled to payment of subsistence allowance is whether or not he has been paid repatriation costs. However, he cautioned, that the issue of repatriation is evidential, and since the parties are not at issue about it as observed on 26th January 2018, they cannot bring evidence to prove or disprove it. Lastly responding on salary compensation, the learned counsel submitted that the rate to be used in calculation ought to have been USD 2000 not USD 10,000.

That is about all, from the learned counsel for the parties. At the very outset we think we have two preliminary matters to deal with in this appeal. The first is the issue of jurisdiction. We are aware that jurisdiction of courts is conferred by statute. See some of our decisions, like **The Commissioner General (TRA) vs. Mohamed Al – Salim**

and Another, Civil Appeal No. 80 of 2018 and; **National Bank of Commerce Limited vs. National Chicks Corporation Limited and 4 Others**, Civil Appeal No. 129 of 2015 (both unreported). In similar vein, we know that ouster of jurisdiction cannot be inferred but must be express. Here we wish to reproduce a paragraph from Halsbury's Laws of England, Vol 10 at paragraph 314, which the Court reproduced, in the case of **Tanzania Revenue Authority vs. Tango Transport Company Ltd,** Civil Appeal No. 84 of 2009 (unreported). The paragraph defines jurisdiction as: -

> *"the authority which Court has to decide matters that are litigated before it or to take cognizance of matters prescribed in a formal way for its decision.* ***The limits of this authority are imposed by the statute; charter or commission under which the court is constituted, and may be extended or restrained by similar means.*** *A limitation may be either as to the kind and nature of the claim, or as to the area which jurisdiction extended, or it may partake of both these characteristics."*
>
> *[emphasis ours].*

So, the issue for our immediate determination is whether what was recorded on 26th January 2018 had the effect of ousting the jurisdiction of the CMA and that of the High Court as contended by Mr. Mgongolwa. In the proceedings of that date, it is on record that the parties were not at issue on the repatriation because the appellant had undertaken to pay for the same. As we shall see later, the learned Judge took that undertaking as no more than a duty on the appellant to be discharged. With respect, we cannot let our imaginations run that far as to suggest that the record referred to above amounted to barring the CMA and the High Court from deciding on the issue. Jurisdiction cannot be taken away but through the very instrument that conferred it, as per the cited case above.

If assuming, Mr. Mgongolwa's intention was to argue that the court could not decide on issues that were not before it, that does not mean that the court had no jurisdiction on the issues if they had been properly raised. We are aware that courts are enjoined to determine matters even on issues that were not raised at the commencement of trial, provided the parties testify on them. In the case of **Stella Temu vs. Tanzania Revenue Authority,** [2005] T.L.R 178 the Court held at page 186: -

> *"Surely the learned judge could not pretend that the question of defamation was not before him just because no issue was framed on defamation...a court must decide a matter which it has allowed to be argued before it even if the matter is not contained in the pleadings".*

The Court took a similar position in other cases such as **Strabag International (GMBH) vs. Adinani Sabuni,** Civil Appeal No. 241 of 2018 and **Salhina Mfaume & 7 Others vs. Tanzania Breweries Co. Ltd**, Civil Appeal No. 111 of 2017 (both unreported).

In this case, the CMA had allowed the parties to testify on repatriation and there was evidence on it from both parties although scanty. The appellant's witness was asked a question at page 159 of the record if he was aware of any terminal benefits that had been paid to the respondent, and he said he was not. Then on the respondent's side, he testified at page 164 of the record that he was praying to be paid subsistence allowance, salary for the remaining period of the contract and compensation for unfair termination. These testimonies were received by the CMA subsequent to 26th January 2018, the date on which, the parties had allegedly agreed not to pursue that course. In fine, it is our finding that the parties were still at issue on the subsistence allowance which, as rightly submitted by Mr. Mgongoiwa

himself, is intertwined with payment of repatriation costs. The High Court could not have turned a blind eye to that issue by pretending it was not there for determination. The issue of jurisdiction does not arise in this case.

The second preliminary matter is whether the appellant who presents written submissions in terms of Rule 106 of the Tanzania Court of Appeal Rules, 2019 (the Rules) may, in the oral submissions raise issues that are different from the grounds of appeal. On this, Mr. Mushi submitted that parties are bound by their grounds of appeal and criticized Mr. Mgongolwa for smuggling into the case arguments that were not in harmony with the grounds of appeal. On the other hand, Mr. Mgongolwa submitted that the issue he raised was jurisdictional which could be raised at any time.

It is true that issues of jurisdiction may be raised at any time, but we have just concluded above that the argument by the appellant's learned counsel did not raise a jurisdictional issue. Therefore, we still have to address the question, whether the appellant can address issues not raised in the memorandum of appeal. Our starting point is Rule 93 (1) of the Rules which provides: -

> *"93. -(1) 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."

Then Rule 106 (1) and 106 (10) (a) provide: -

"106. -(1) An appellant or applicant shall, within sixty days after lodging the record of appeal or filing the notice of motion, file in the appropriate registry written submissions in support of the appeal or application as the case may be."

"106. -(10) At the hearing, the parties or their advocates shall appear and, where-

(a) Written submissions have been filed, present oral arguments to clarify their written submissions; or"

The meaning of the above quoted provisions is plain in our view, that for one to access this Court on appeal he must present specific grounds of objection to the decision appealed against. Thereafter he may, under Rule 106 (1) of the Rules, file written submission in support of the appeal and any oral submissions at the hearing shall aim at clarifying the written submission. There is an obvious rationale for such requirements. One, this Court is not a court of first instance so the

grounds for faulting a decision of a lower court must be specific lest we cross the line. Two, the other party has the right to know before hand the nature of the grounds upon which determination of the appeal may be based. That is an aspect of fair hearing, so as not to take the other party by surprise.

We therefore agree with Mr. Mushi that the principle that requires parties to be bound by their pleadings extends to grounds of appeal in an appeal. On that basis our conclusion is that an appellant's written and/or oral submission must be in consonance with the grounds of appeal.

We now go back to the grounds of appeal. We shall first take note that in terms of section 57 of the Labour Institutions Act Cap. 300 R.E. 2019 (hereafter Cap 300) appeals to this Court have to be on points of law only. Therefore, prima facie, we have no authority to determine all those grounds that do not raise points of law.

We shall begin with ground one. The complaint here is that the High Court erred in granting subsistence allowance to the respondent in total disregard of the respondent's failure to reply to the appellant's letter dated 28th September, 2017. The relevant part of the appellant's written submissions runs thus at page 5: -

"Repatriation is a right of the employee which has to be exercised by the employer, but the same is preceded with obligation to show cooperation in ensuring a successful departure of the employee to his place of recruitment. The employee (Respondent) had a duty to reply the letter which required confirmation so as enable the employer to proceed with the repatriation finalization."

Diametrically in his oral submissions, supposedly to clarify on the written submissions, counsel for the appellant raised the issue of jurisdiction. We have already dealt with that argument and ruled against the appellant. If we decide to go by counsel's oral submissions, then we cannot help concluding that the submissions did not address the grounds of appeal. But since counsel adopted their written submissions, and they are part of the record, we cannot ignore them.

In fairness therefore, we shall proceed to consider the written argument to resolve the question, first, whether payment of repatriation costs under section 43 (1) (c) of the Act is conditional upon the employer confirming the date of his departure.

In the written submissions, counsel for the respondent argued two points in the alternative. First, he submitted that ground 1 raises

an evidential issue contrary to section 57 of Cap 300. He also cited the case of **Severo Mutegeki and Another vs. Mamlaka ya Maji safi na Usafi wa Mazingira Mjini Dodoma (Duwasa)**, Civil Appeal No. 343 of 2019 (unreported). In the alternative, he submitted that even if the CMA was supposed to take the appellant's letter into account, the same could not be done because the letter was held to be inadmissible for being a copy.

Our determination of the first ground of appeal will be threefold. **First,** we agree with the respondent that, the ground offends S. 57 of Cap. 300 for raising factual issues. Section 57 of Cap 300 provides: -

> *"57. Any party to the proceedings in the Labour Court may appeal against the decision of that Court to the Court of Appeal of Tanzania on a point of law only."*

Secondly, there is nothing in section 43 of the Act that suggests that payment of repatriation costs is conditional upon the employee indicating the date of departure. At the CMA the appellant did not demonstrate that there were efforts to repatriate the respondent, because all that the appellant's witness stated, was that he was not aware of any terminal benefits having been paid to the respondent.

Lastly, the said letter, though not relevant in our view on the ground that there was no pre condition for repatriation, it was not admitted in evidence. For those reasons, this ground has no merit, it is dismissed.

We turn to ground 3 and 4 which, during the hearing, Mr. Mgongolwa sought to argue together. However, in his oral submission, the learned counsel only argued ground 3 related to payment of four months salary against the agreed terms of the contract. First, the learned counsel mistook this complaint for that of deduction of salaries, which was not an issue in this appeal. Later, in rejoinder he submitted that the respondent was not entitled to it. If anything, he submitted, payment should have been at the rate of USD 2000 not USD 10,000.

In the written submissions, the appellant's position was that clause 17 of the contract provided for payment of two months salaries in lieu of notice and no more. On that basis, the Judge's order granting the respondent payment of salaries for the remaining period was erroneous, it was submitted.

In respect of ground 4, the appellant submitted in writing that the High Court's conclusion that the termination was unfair because the respondent's position was taken by somebody else is wrong because

the two positions are not similar. The same argument had earlier been made before the High Court.

In response to ground 3, the respondent's counsel submitted that the point is factual and therefore untenable, but even then, he further submitted, no term of contract can override an Act of Parliament. As regards the 4th ground of appeal, he submitted that it also offends section 57 of Cap. 300.

We shall determine ground 4 first, by first appreciating that in his judgment the learned Judge's conclusion that the termination was unfair was based on Mr. Hiran's admission at page 158 that: - *"Aziza took over Peter's position as General Manager."* This ground calls upon us to re-evaluate that piece of evidence which, mindful of section 57 of Cap. 300, we cannot do. On that basis, ground 4 has no merit, we accordingly dismiss it.

We turn to ground 3, whether payment of salaries for the remaining period of the contract was justified while the contract provided for no such thing. Again, we cannot fault the learned Judge's conclusion that a term of contract cannot invalidate law. Having held the termination to have been unfair, compensation for breach of

contract was a natural consequence. This ground is also dismissed for want of merit.

Mr. Mgongolwa submitted that if payment of salaries for the remaining period of the contract had to be ordered, it should have been at the rate of USD 2000, instead of USD 10,000. With respect, the appellant cannot be heard on this having abandoned ground 2 of appeal. Only in ground 2 of appeal would the issue of salary revision be resolved one way or the other. However, as the matters now stand, the decision of the High Court that there was no salary revision remains undisturbed. For clarity, this is the reason we earlier reproduced ground 2 of appeal along with others.

Lastly, we agree with Mr. Mgongolwa on his written submissions at page 6 regarding the connection between repatriation and payment of subsistence allowance. After, quoting section 43 of the Act, the submission goes thus: -

> *"It is clear from the above quoted provision that subsistence allowance is only granted upon failure of the employer to timely repatriate the employee to their place of recruitment."*

However, we shall leave the matter there because, having demonstrated that the grounds of appeal lack merits, we need not say more.

For the foregoing reasons, this appeal is accordingly dismissed in its entirety, and since this appeal originates from a labour matter, we make no order for costs.

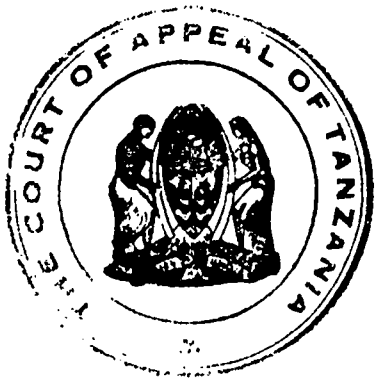
DATED at **MTWARA** this 11th day of June, 2021.

S. A. LILA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

This Judgment delivered this 11th day of June, 2021 in the absence of the Appellant and Ms. Teckla Kimati, learned advocate holding brief for Mr. Salim Mushi, learned counsel for the Respondent, is hereby certified as a true copy of the original.



D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL