IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MWANDAMBO, J.A., KITUSI, J.A., And MGONYA, J.A.)

CIVIL APPEAL NO. 126 OF 2019

JOSEPH KHENANI ..... APPELLANT

VERSUS

NKASI DISTRICT COUNCIL ..... RESPONDENT

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

(Mrango, J.)

dated the 26th day of October, 2018

in

Consolidated Labour Revision No. 1 and 2 of 2018

.....

JUDGMENT OF THE COURT

4th & 11th December, 2023.

KITUSI, J.A.:

Most of the matters relevant to this case are not in dispute, except, mainly whether an employee who, on his own volition, terminates an employment contract is entitled to repatriation to his place of recruitment.

The appellant in this case is the said employee mentioned in the above issue. He was employed by Nkasi District Council, the respondent, starting off as a Militia Watchman in 1st July 1990 and winding up as a Ward Executive

Officer (W.E.O) from 1st April 1999 to 11th February 2009 when the employment came to an end. The appellant's place of recruitment was Ulumi within Sumbawanga Rural District.

On 15th September, 2008, the appellant wrote a letter of resignation citing persistent illness as the reason. During this time the appellant was stationed at Ninde Ward in Nkasi District. On 11th February 2009, the respondent accepted the resignation, outlining the appellant's entitlements but pointing out in certain terms that he would not be paid repatriation costs to his place of recruitment because he was the architect of the termination.

On 21st September, 2016 the appellant lodged a complaint to the Commission for Mediation and Arbitration (CMA) claiming payment of terminal benefits including repatriation costs and subsistence allowance. Prior to that, the appellant had unsuccessfully written a letter requesting to withdraw his resignation. He appealed to the Public Sector Service Commission and later to the President's Office but all to no avail. Hence the resort to the CMA.

After the CMA had heard evidence from both sides, it took the view that the appellant was entitled to repatriation costs but that such payment

must be initiated by the employee's request or demand for the same. The learned Chairman was satisfied that the appellant's request for repatriation came on 2/9/2015 and that is the date from when he was entitled to repatriation. He therefore ordered payment of repatriation costs and subsistence allowance from September 2015 to February, 2018 a total of Shs. 12,586,000/=.

Both the appellant and the respondent were aggrieved by that decision so they each preferred revisions to the High Court. The appellant challenged the CMA's finding that it was upon the employee to request for payment of repatriation, and that the error resulted in an erroneous finding that subsistence pay reckoned from 2nd September, 2015. On the other hand, the respondent challenged the CMA for awarding subsistence allowance for 29 months without taking into account that the delay in paying repatriation costs was caused by the employee himself by referring the matter to the CMA causing the employer to stop preparation of payments.

However, the High Court held that since the appellant was the one who resigned, he was not entitled to any repatriation costs and therefore it was an error on the part of the CMA to award payment of repatriation costs in his favour. The High Court revised the CMA's award of repatriation costs

and subsistence allowance, quashed and set it aside. To that extent, the High Court allowed the revision by the respondent.

Still aggrieved, the appellant has preferred this appeal basically raising one ground although they are numerically three. The first ground faults the High Court for concluding that the appellant is not entitled to repatriation costs because he is the one who terminated the employment. The second ground faults the High Court for finding that the appellant is not entitled to subsistence allowance on the ground that he is the one who terminated the employment. In our considered view, the first and second grounds of appeal are two sides of the same coin, so we will only consider them by addressing the issue which we identified earlier; whether or not an employee who chooses to terminate an employment is entitled to payment of repatriation cost. We hold the view that payment of subsistence allowance is consequent upon finding that the employee is entitled to repatriation.

We shall not treat the third complaint as a ground of appeal because the contention that the High Court failed to consider the relevant case laws which had been presented by the appellant, is more of an argument in support of that issue which is for our determination.

Mr. Benedict Elioth Sahwi learned advocate, argued the appeal on behalf of the appellant while three learned State Attorneys resisted the appeal on behalf of the respondent. They were Messrs. Allan Shija, Siyumbwe Shaban Mubanga and Mathew Fuko. Both sides stood by their written submissions earlier filed and had, particularly Mr. Sahwi, nothing to add initially.

Both counsel relied on the provisions of section 43(1) of the Employment and Labour Relations Act, No. 4 of 2004 (ELRA), but had opposing views on its applicability to an employee who resigns on his own free will. The said section provides:-

> *"43(1) where an employee's contract of employment is terminated at a place other than where the employee was recruited, the employer shall either:-*
>
> *(a) Transport the employee and his personal effects to the place of recruitment or;*
>
> *(b) Pay for the transportation of the employee to the place of recruitment; or*
>
> *(c) Pay the employee allowance for transportation to the place of recruitment in accordance with subsection (2) and daily subsistence expenses during the period, if any, between the date of*

termination of the contract and the date of transporting the employee and his family to the place of recruitment."

Mr. Sahwi faulted the learned judge's interpretation of the above provision, citing rule 3 (1) and (2) of the Employment and Labour Relations (Code of Good Practice) Rules GN. No. 42 of 2007 (the Code) to demonstrate the correct interpretation. He submitted in writing that under rule 3 (1) of the Code, termination of employment includes *"a lawful termination under the common law."* Then he referred to rule 3 (2) of the Code which provides:

"3(2)(c) A lawful termination of employment under the common law shall be as follows:-

(a) NA

(b) NA

(c) Termination of employment by the employee."

Further the learned counsel cited section 99 (3) of the ELRA which guides persons interpreting the provision of that Act. It provides: -

"(3) Any person interpreting or applying this Act shall take into account any code of good practice or guidelines published under this section, and where that person departs from the code or guideline, he shall justify the grounds for departure."

Lastly, the learned counsel drew our attention to our decision in **Elidhiaha Fadhili v. The Executive Director Mbeya District Council**, Civil Appeal No. 24 of 2014 (unreported) in which we awarded subsistence allowance to the appellant a teacher who had, like in this case, resigned on medical ground.

On the other hand, Mr. Shija was insistent that ordering payment of repatriation in favour of an employee who terminates an employment on his own free will, defeats both logic and reason. The relevant part in the respondent's written submissions goes as follows:-

> *"When we try to step in the shoes of the legislature, it is in our mind that the intention of the legislature in this provision is to make both parties benefit from the employment contract. Since the appellant terminated the employment services, he cannot benefit from his voluntary act which left injuries to the second party of the contract. Therefore, in the eye of the law the judgment of the Honourable Judge of the High court is proper and just."*

We probed Mr. Shija on why the legislature in its wisdom did not expressly create an exception to section 43(1) of the ELRA to cover for the

situation suggested in the above excerpt, but he did not come out quite clearly. That is not surprising in our view, because statutory interpretation is a common territory in judicial proceedings. It leaves no room to personal whims, when the letter of the law is unambiguous. If we must justify our statement, it has been made by the Court in more occasions than one. In **Chiriko Haruna David v. Kangi Alphaxard Lugora & Two Others**, Civil Appeal No. 36 of 2012 cited in **National Bank of Commerce v. Commissioner General Tanzania Revenue Authority**, Civil Appeal No 52 of 2018 (both unreported), the Court stated the following regarding statutory interpretation: -

> *" We wish to observe here by way of emphasis, even if it is at the expense of repeating ourselves, that one of the cardinal rules of construction is that courts should give legislation its plain meaning".*

In the instant case, section 99 (3) of the ELRA cited to us by the appellant's counsel requires any one engaged in interpreting the provisions of the Act to be guided by the Code but the learned Judge of the High Court did not do so. With respect, had he considered the Code, especially rule 3 (2), the learned Judge would have appreciated that termination of

employment by an employee is an instance of lawful termination attracting statutory payments, including repatriation to the place of recruitment and subsistence allowance in case of delayed repatriation.

We decline Mr. Shija's suggestion that we should be guided by logic instead of the Code. We wish to go by what we stated in **Mrs. Kamiz Abudaliah M.D. Kermal v. The Registrar of Buildings and Miss Hawa Bayona** [1988] T.L.R. 199 cited in **Export Trading Company Limited v. Mzartc Trading Company Limited** Civil Application No. 10 of 2014 (unreported), that "*logic must be applied within the context of the law.*" It is also necessary to add that a statute should not be interpreted in a way that deprives a person some accrued rights. See **Yusuf Hamisi Mushi & Another v. Abubakari Khalid Hajj & 3 Others,** Civil Appeal No. 55 of 2020 (unreported).

Perhaps all this would not have been necessary, had the learned Judge considered the respondent's own evidence at the CMA and the arguments of one Mwigane Mwasipu, the solicitor who represented the respondent at the High Court. Before the CMA, one Joseph Chasuka, a human resource officer with the respondent, acknowledged that the appellant was entitled to payment of repatriation costs at the tune of Shs. 4,900,000/= plus. He

tendered exhibit P3 to show that such were the payments prepared. According to this witness, what prevented the respondent from proceeding with preparation of payment was the fact that the appellant had appealed. Come at the High court on revision, Mr. Mwasipu submitted:

> *"The modality of payment of subsistence allowance and time limit after termination the respondent blocked the matter and lodged complaints up to the President and CMA so he delayed himself."*

It was in respect of payment of severance allowance that the learned Solicitor submitted;

> *"There was no need to pay severance allowance as it was the respondent who terminated the employment".*

So, in our consideration, the learned Judge erred in his interpretation of the relevant provisions of the ELRA especially section 43 (1) which was compounded by his failure to take into account the respondent's own evidence and submissions as demonstrated above. For those reasons we quash the judgment of the High Court and set aside its orders regarding payment of repatriation and subsistence allowance.

As to what was the amount payable to the appellant, we cannot fault the CMA for pegging the repatriation and subsistence allowance payment from 15th September, 2015 when the appellant wrote to request such payment. In our view, though not express, the requirement for the employee to initiate is implied in section 43 (1) of the ELRA, because there is more than one mode of repatriation. We take the appellant's letter dated 15th September, 2015 as acknowledging that he needed to write and in our considered view, he is estopped from arguing otherwise. We therefore uphold the finding of the CMA that payment for subsistence allowance was for 29 months.

On the other hand, we do not accept the argument by the respondent that the delay in payment of repatriation was caused by the appellant himself. We do not see how the appeals that the appellant was pursuing had anything to do with the payments for repatriation. We are not losing sight of the respondent's letter dated 11th February, 2009 in which the respondent had intimated that the appellant would not be entitled to repatriation. We therefore dismiss the respondent's appeal challenging the award of 29 months for subsistence allowance.

Having quashed the judgment of the High Court and set aside its consequential orders, we restore the award and decree of the CMA. The appeal is therefore granted in favour of the appellant with no order as to costs, this being an employment matter.

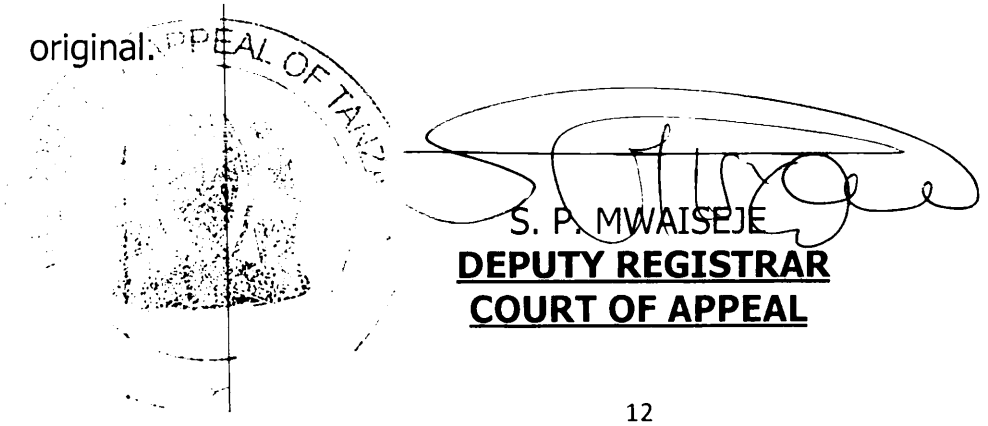
DATED at **MBEYA** this 11th day of December, 2023.

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

L. E. MGONYA
JUSTICE OF APPEAL

The Judgment delivered this 11th day of December, 2023 in the presence of the Mr. Nickson William Kiliwa holding brief for Mr. Benedict Sahwi, learned counsel for the Appellant and Mr. Michael Fyumagwa, learned State Attorney for the Respondent is hereby certified as a true copy of the original.



S. P. MWAISEJE
DEPUTY REGISTRAR
COURT OF APPEAL