IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: NDIKA, J.A., RUMANYIKA, J.A. And MURUKE, J.A.)

CONSOLIDATED CIVIL APPEAL NO. 386 OF 2020 & 50 OF 2021

SECURITY GROUP (T) LIMITED ..... APPELLANT/RESPONDENT

VERSUS

STEVEN GERSON KIZINGA (As an administrator of the estate of the late **MASHAKA A. SETEBE) ..... RESPONDENT/APPELLANT**

(Appeal from the Judgment and Decree of the High Court of Tanzania

Labour Division, at Mbeya)

(Mongella, J.)

dated the 7th day of May, 2020

in

Labour Revision No. 54 of 2017

.....

JUDGMENT OF THE COURT

6th & 23rd February, 2024

MURUKE, J.A.:

On 17th April, 2015 the respondent's employment was terminated following being found guilty of gross misconduct by the disciplinary committee of the appellant on three misconducts namely; conflict of interest, misuse of the company resources and breach of trust. Dissatisfied, the respondent lodged a labour complaint before the Commission for Mediation and Arbitration (the CMA) claiming that the termination was

substantively and procedurally unfair. After hearing, the CMA held that while the termination was substantively unfair it was procedurally fair. On terminal dues, the CMA held that in view of section 44 of the Employment and Labour Relations Act (the ELRA), the appellant was not required to impose conditions for the respondent to be paid his final due. For that reason, among others, the CMA awarded the respondent subsistence allowances at the rate of TZS 337,200.00 per day for 206 days, making total of TZS 69,483,594.00, and TZS 4,041,400.00 being repatriation costs.

Aggrieved with the award, the appellant filed a labour revision before the High Court which was partly successful, in which the respondent's termination was with fair reasons, thus he was not entitled to the compensations for unfair termination. More so, the High Court set aside the repatriation costs and ordered the appellant to otherwise repatriate the respondent. The subsistence allowance was reduced to TZS 36,666.00 per day which is proportional to the respondent's daily salary. The respondent was also awarded payment in lieu of notice, annual leave payment and payments for the unpaid days worked.

Both parties were aggrieved by the High Court's decision. While the appellant, Security Group (T) Ltd, lodged Civil Appeal No. 386 of 2020, the respondent, Steven Gerson Kizinga acting as the administrator of the estate

of the late Mashaka A. Setebe, filed Civil Appeal No. 5 of 2021. At the hearing, we consolidated the appeals in terms of rule 110 of the Tanzania Court of Appeal Rules, 2009 with the consent of the parties. Thus, the parties herein are cited as the appellant and respondent only for convenience.

The appellant attacks the High Court's decision on five grounds, namely: -

1. *The High Court grossly erred in law in ordering the appellant to repatriate the respondent while there is ample evidence that the respondent refused to be repatriated.*
2. *The High Court grossly erred in law in awarding the respondent subsistence allowance while there is ample evidence that the respondent refused to be repatriated.*
3. *The High Court grossly erred in law in awarding the respondent severance pay having found that the termination was fair on grounds of misconduct.*
4. *The High Court grossly erred in law in not finding that the respondent was not entitled to subsistence allowance from the date he refused transport provided by the appellant*

5. *The High Court grossly erred in law and fact in holding that the respondent was entitled to one month salary in lieu of notice to the tune of TZS. 1,950,399.99 while there was ample evidence that his basic salary was TZS 1,100,000.00.*

On the other hand, the respondent has raised four grounds namely:

1. *That the High Court erred in law and fact for holding that the appellant proved two misconducts out of three hence the termination was substantively fair.*
2. *That the High Court erred in law for holding that the termination was fair and the respondent's testimony was not convincing on the second misconduct of "misuse of company resources" despite the appellant's failure to prove on the existence of the misconduct on the balance of probabilities.*
3. *That the High Court erred in law for holding that the termination was fair thus the third misconduct of breach of trust was proved by the appellant while (Bank Balance request slip-exhibit SGT 10) & (Bank report exhibit SGT 11) were objected by the appellant.*
4. *That the High Court erred in law for misinterpretation of regulation 16 (1) of the Employment and Labour Relations*

(General) Regulations, GN47 of 2017 for reduction of the daily basic salary of the appellant to 36,666/=.

Before commencement of the hearing, Mr. Emmanuel Safari, who was representing the appellant prayed to raise additional ground of appeal. The respondent's counsel Mr. Daniel Muya did not object to the prayer, thus the registered the additional ground by the appellant, namely; the arbitrator failed to append signature at the end of each witness's testimony in the proceedings of CMA.

This Court having gone through all grounds raised by the appellant and the respondent they all boil down to three issues:

1. Whether, the Arbitrator's failure to append signature at the end of the testimony of each witness vitiates proceedings of the CMA.
2. Whether, it was proper to order subsistence allowance while the respondent refused to be repatriated.
3. Whether, regulation 16(1) of the employment and Labour Relations (General) Regulations GN. No. 47 of 2007 was properly interpreted by the High Court Judge.

On the issue number one as to whether failure by the arbitrator to sign after each testimony of the witness, the appellant's counsel submitted that

the omission vitiated the proceedings because it is not authenticated whether what witness said is correct reflection of the proceedings. Learned Counsel asked the Court to quash both the CMA and High Court proceedings and set aside the award, then order retrial.

The respondent's counsel, on his part while admitting the omission, was quick to point out that the omission did not occasion any injustice, and argued urged the Court to dismiss the ground.

Before resolving issue number one, it is worth noting that, the Labour Court, and the Commission for Mediation and Arbitration, including the Office of Labour Commissioner are specialized institutions in labour matters. They were established with the aim of putting in place a regulatory structure that is more flexible and conducive to economic efficiency and employment promotion. Thus, the labour laws and its rules are simple and flexible aimed at promoting economic efficiency through productivity and social justice.

Arbitrators in the arbitral proceedings enjoy a lee way of promulgating a procedure that ensures that matters they adjudicate are disposed of quickly and fairly, and with a minimum of legal formalities. This position is predicated on what is provided for under section 88(4) of the ELRA which provides as hereunder:

"The arbitrator]

(a) May conduct the arbitration in a manner that the arbitrator considers appropriate in order to determine the dispute fairly and quickly;

(b) Shall deal with the substantial merits of the dispute with the minimum of legal formalities."

Therefore, ELRA permits the arbitrators to conduct arbitration in a manner that the arbitrator considers appropriate but in doing so arbitrator must be guided at least by three considerations to wit; **first**, they must resolve the dispute between the parties. **Second**, they must do so expeditiously. **Three**, in resolving labour dispute they must act fairly to all the parties. The arbitrators in conducting the proceedings must be guided with minimum of legal formalities which suggests that arbitration proceedings are not adjudicatory proceedings. Thus, the arbitrator has discretion to elect among others an inquisitorial or adversarial approach in conducting arbitration proceedings. Such a choice should be dictated by the nature of the dispute, the parties to the dispute, as well as other factors that might be relevant in order to achieve the goal of dealing with the substantial merits of the dispute fairly, quickly and with minimum legal formalities.

Equally so, Rule 19 of Labour Institutions (Mediation and Arbitration) Guidelines, 2007 [GN. No. 67 of 2007] is what governs the conduct of the proceedings in the CMA. The same provides;

> *"An arbitrator has the power to determine how the arbitration should be conducted"*

Evidently, this procedure is substantially different from what obtains in criminal or civil procedure statutes. In this case, the arbitrator's action would be considered anomalous if his decision in that respect was inconsistent with the procedure mentioned here.

In our recent decision **Mbeya Urban Water & Sewerage Authority vs Lilian Sifael** (Civil Appeal No. 300 of 2022) [2024] TZCA 64 (20 February 2024) the Court recognized the applicability of Rule 19 of GN. No. 67 of 2007 in relation to regulation of conduct of proceedings at CMA, it was noted that;

> *"We are cognizant that in terms of rule 19 (1) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007, Government Notice No. 20 67 of 2007 ("the Mediation and Arbitration Rules"), an arbitrator, in the first place, has the power to determine how the arbitration should be conducted. Nonetheless, the position we have stated above is*

reflected by rule 24 of the Mediation and Arbitration Rules regulating the sequence of opening statements and presentation of cases."

In the same vein the Court in **North Mara Gold Mine Limited v. Isaac Sultan**, Civil Appeal No. 458 of 2020[2021] TZCA755, (16 December, 2021, TANZLII) we stated as follows: -

"Our conclusion on this ground is that this case is distinguishable from the case of ***Iringa International School; Unilever Tea Tanzania Limited and Joseph Elisha v. Tanzania Postal Bank*** *(supra) because in this case the Arbitrator designed his own way of authenticating the evidence, which is within his powers to do in terms of Rule 19(1) of the Rules. We are fully satisfied that the absence of Arbitrator's signature at the end of the testimony of each witness in this case, did not vitiate the proceedings nor prejudice any party because, if anything, any possible suspicion on the authenticity of those proceedings, was cleared by the parties and advocates signing."*

This position was also emphasized by the Court in the case of **Finca Tanzania Limited v. Wildman Masika & 11 Others**, Civil Appeal No. 173 of 2016 (unreported) where it was held that:

"It is apparent from the quoted provisions that the Arbitrator has the power to regulate and determine the practice and procedure of how arbitration should be conducted .... ***Moreover, the Rules do not provide for any resort to the CPC where there is a lacuna in the procedure to be application of the CPC strictly where there is a lacuna in the Mediation and Arbitration Guidelines Rules during arbitration process is, in our view, to defeat the very purpose of the said rules which aim to make the procedure as simple as possible to attain substantive justice to the parties in view of nature of the proceedings.***" [Emphasis is added].

There is no dispute that the Arbitrator did not sign the proceedings after the testimonies of the parties' witnesses. We are aware that the Rules guiding CMA proceedings during arbitration are silent on the requirement of signing at the end of the particular witness's testimony. Indeed, this being a record of the proceedings of the CMA, it cannot be easily impeached as it is presumed to be authentic as to what transpired before it. Besides, in view of the submissions of the counsel for the parties before us, it has not been contended that the substance of the evidence recorded by the CMA does not reflect what the witnesses testified.

Following the introduction of the principle of overriding objective into the Appellate Jurisdiction Act Cap 141 (the AJA), this Court is now obliged to take into account the overriding objective principles before hastening to strike out matters on procedural grounds. In that respect, section 3A of the AJA is instructive that the main role (overriding) of this Court is to facilitate the just, expeditious, proportionate and affordable resolution of all matters governed by the AJA. As alluded earlier, that, procedures at CMA, armed at achieving the goal of dealing with the substantial merit of the dispute fairly, quickly and with minimum legal formalities.

We therefore find that the failure of the arbitrator to append signature at the end of each witnesses' testimony did not, in the circumstances of this case, occasion miscarriage of justice to the parties. Consequently, issue number one has been answered in the negative.

On issue number two as to whether it was proper to order subsistence allowance while respondent refused to be repatriated.

It was the appellant's counsel submission that the respondent refused to be repatriated hence, it was not easy for the appellant to repatriate him, because he refused to hand over some of the respondent's properties. Mr. Muya, counsel for the respondent argued that, there is no evidence to prove

that the appellant intended to repatriate the respondent. The argument by the appellant's counsel is not supported by records. More so, payment of repatriation costs is not subject to any conditions like return of the company's properties.

As rightly argued by respondent's counsel, the complaint on refusal of repatriation is neither supported by the records since it has no bearing to the pleadings (opening statement), the evidence of the five witnesses of the appellant, nor was it submitted before the High Court. Before the CMA the appellant did not suggest that the respondent refused to be repatriated, however it is on record that the appellant withheld the terminal benefits waiting the respondent to do clearance and handover the office as reflected at pages 200, 204, 206 and 216 of the record. While in the High Court, the complaint was on the justification of the amount awarded and not that the respondent was not entitled to be repatriated as seen at pages 247 and 251). Again, like the CMA, the decision of the High Court did not reflect the issue of refusing to be repatriated but focussed on the amount as seen from page 451 to 452 of the record. Thus, issue number two is answered that the appellant was duty bound to repatriate the respondent.

In regard to the third issue relating to the interpretation of Regulation 16(1) of GN. No.47 of 2007. The appellant complained that the basis of

computing the respondent's subsistence allowance was TZS 1,950,399.99 and not TZS 1,100,000.00 the respondent's salary. Going by the records at page 200 the CMA proceedings, DW2 admitted that at the time of termination, the net salary of the respondent was TZS 1,950,339.99.00 but his take home was 1,100,000.00.

The respondent counsel replied that, the respondent's monthly remuneration was TZS.1,950,339.99.00 which was made up by his salary TZS.1,100,000/= and his responsibility allowance, i.e. 850,000/= in terms of exhibit SGT 16 at page 120 of the records. The respondent was entitled to his basic salary and all other entitlements he was receiving in course of his employment, to wit TZS. 1,950,339.99.00.

We have heard both advocates on this ground, the 1st appellate judge at page 462-463 of the records found that the daily basic salary to be 36,666/= since his monthly basic salary was TZS. 1,100,000/=.

The law under Regulation 16 (1) of GN.No.47 of 2007 provides;

> *"The subsistence expenses provided under Section 43(1)(c) of the Act, shall be quantified to the daily basic wage or as may from time to time be determined by the relevant wage board."*

From the cited law, the daily wage is quantified from the basic wage which is the salary that the respondent would have received when he was

working, which is TZS. 1,100,000/=. Therefore, the High Court properly interpreted Regulation 16 (1) (supra) to arrive to the finding that the daily subsistence allowance of TZS. 36,666/= per day. We so hold. Therefore, this ground lacks merit.

In totality, both appeals are dismissed for lack of merit.

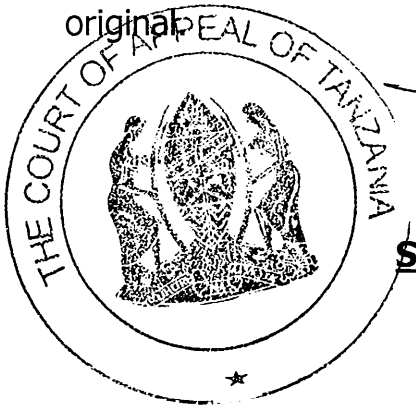
DATED at **MBEYA** this 23rd day of February, 2024.

G. A. M. NDIKA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

Z. G. MURUKE.
JUSTICE OF APPEAL

Judgment delivered this 23rd day of February, 2024 in the presence of Mr. Peter Kiranga, learned counsel, holding brief for Mr. Daniel Muya, learned counsel for the Appellant also holding brief for Mr. Emmanuel Safari, learned counsel for the Respondent, is hereby certified as a true copy of the original.



E. G. MRANGU
SENIOR DEPUTY REGISTRAR
COURT OF APPEAL