

**IN THE HIGH COURT OF TANZANIA**

**AT MWANZA**

**REVISION APPLICATION No. 76 OF 2017**

**ASHA HAMIS MGHANJA ..... 1<sup>st</sup> APPLICANT**

**SAMSON CHACHA ..... 2<sup>nd</sup> APPLICANT**

**VERUS**

**GEITA GOLD MINING LIMITED ..... RESPONDENT**

**JUDGMENT**

Last Order: 31/8/2018

Judgement date: 06/09/2018

**A.Z.MGEYEKWA, J**

This is an application which was brought under Section 91(1)(a)(b)(2)(a)(b) and (c)(4)(a) ND (b) and section 94 (1) (b)(i) and (c) of the employment and Labour Relations Act No. 6/2004 and Rule 24 (1),(2) (a)(b)(c) and (d), 3(a)(b)(c) and 9d) and 28 (1) (c) (d)(e) of the Labour Court Rules, 2007 GN 106 and any other enabling provisions of the law.

Briefly, the background of this dispute is that the applicants were permanent employees of the respondent at the capacity of CCTV operator and electrician from 1999 and 2000 respectively. The applicant continued to work with the respondent until 2005 when they were arrested and charged with the criminal offence, and they were found guilty by the lower court, and on their appeal, they were acquitted. After their acquittal, they reported back to work, and they were not assigned any work until their terminated.

Thereafter, the appellants applied to the Commission for Mediation and Arbitration (CMA) claiming for their entitlements which are salaries arrears, leave savings, house allowances and bonus all being their entitlements during the whole period of their employment. The CMA presided by Hon. Wambali determined the complaint and decided in favor of the respondent.

The applicant was dissatisfied with the Award and Order of the Commission for Mediation and Arbitration for Mwanza with reference No. CMA/MZ/GEITA/431/2014 decided on the 23<sup>rd</sup> day of October 2015.

The applicants have applied to this court for hearing an application for orders in the following terms:-

1. *That the Honourable court is pleased to revise and set aside the Arbitrators' award and Ruling dated 23<sup>rd</sup> day of October 2015 by Vallensi Wambali, Arbitrator made in respect of Employment Cause No. CMA/MZA/GEITA/41 and CMA/MZA/GEITA/413/2014 on the grounds outlined in the annexed affidavit.*
2. *That, this Honourable Court be pleased to order that applicants be awarded accordingly to their entitlements.*
3. *That this Honourable Court is pleased to determine the matter in the manner, it considers appropriate and gives any other reliefs it considers fair to grant.*

The respondent filed a counter affidavit as early as 30<sup>th</sup> day of November 2017, and on the same day, he filed a notice of opposing the application.

The hearing was done by way of written submission whereas, the applicants filed their written submission as early as 25<sup>th</sup> July 2018 and the respondent filed a reply as early as 9<sup>th</sup> August 2018 and a rejoinder was filed on 20<sup>th</sup> August 2018.

In supporting of this application, the applicants submitted that the matter before the Commission for Mediation and Arbitration was regarding the applicants' claims for payment of Tshs. 111,844,130.14 and 115,033,196.78 respectively being salaried arrears, leave savings,

house allowances and bonus from November 2005 up to November 2013.

They further argued that they tendered exhibits P1A and B, P2 and B, P3 A and B, P4, P5, and P6 to substantiate their claims which were admitted by CMA but the Mediator did not accord the exhibits with any weight when composing the award. They further submitted that despite that they had proved their claims, the award of the CMA become in their disfavor thus they pray for this court to revise their claims.

In reply, the counsel for the respondent submitted that the applicants were suspended on the ground that they were facing criminal charges. While they were suspended the respondent was paying them a half salary and when the applicants after being imprisoned the respondent stopped paying them. He argued that two disputes in respect of the unfair termination of employment were fully settled and the certificates of settlements are attached to the counter affidavit.

He further contended that the 1<sup>st</sup> applicant claim for half salaries, salary increment, leave savings, house allowances and bonus from November 2005 to November 2013 was partly settled, and she was paid Tshs. 20,245,127.05 He said the parties agreed that the balance of the

claimed amount Tshs. 91,599,008.02 be resolved in arbitration. He further submitted that the applicants have failed to prove their claims as they failed to give evidence as to the basis of calculations of the claimed amount.

The counsel for the respondent further stated that the CMA was right to order the respondent only to pay each applicant Tshs. 250,000/= being salary increase from 1/7/2013 to 28/11/2013 per the increase imposed by the wage order which came in force on 1/7/2013. He prays for the application for revision to be dismissed with costs.

I have gone through the record of the CMA and the submission made by both parties. The issue for determination is whether the applicants are entitled to the relief claimed.

In regard to the claimed salaries, the applicants' claims that since 2005 to November 2013 they were still duly employees of the respondent and as long as they were acquitted then they are entitled to the entitlements as stipulated in the contract. Thus, they are claiming that they are entitled to payment of remunerations while in jail, since the contract was not terminated. In the record, it shows that the respondent has paid them

½ payment of their salary. The issue now is whether the applicants were entitled to full payments or ½ pay of their salary during the time the criminal case was pending and at the time the appellants were convicted.

In addressing the issue mentioned above I perused the applicant's application and the award which was delivered on 23<sup>rd</sup> day of October 2015 and find that the respondent was paying the applicants half payment after they were charged with a criminal case. The law is stated under R.27 (1) of the Employment, and Labour Relation (Code of Good Practice) Rules GN.42 of 2007 R.27 (1) state that:-

*“Where there are serious allegations of misconduct or incapacity, an employer may suspend an employee on full remuneration while the allegations are investigated and pending further action.”*

Furthermore, the law clearly states the entitlement of an employee when charged with a criminal case. R.27 (1) and (5) The Employment and Labour Relation (Code of Good Practice) Rules GN.42 of 2007 R.27 (5) state that:-

*“Notwithstanding the provision of section 35 of the Act, an employee charged with a criminal offence may be suspended on full*

*remuneration pending a final determination by a court and any appeal thereto on that charge.”*

Guided by the above R.27 (1) and (5) of the Employment and Labour Relation (Code of Good Practice) Rules GN.42 of 2007. The applicants were entitled to full payment the time during the suspension, pending their conviction because facing a criminal charge does not vitiate the applicants' rights. The applicants' ½ payment was lawfully after being convicted to the time they were acquitted. Therefore, the respondent was required by law to pay the appellants full salary from the suspension day until the day of their acquittal.

With regard to the applicants 'claims concern their salary increment. As rightly stated by the counsel for the respondent that the applicants have failed to prove their salary increment claims and the respondent has paid them the salary increase from 01/07/2013 to 28/11/2013 as per the increase imposed by the **Labour Institutions Act (Regulation of Wages and Terms of Employment) Wages Order** of 2007 GN.223. (As amendment by Labour Wages Order of 2013 GN.196. I concur with the respondent that the applicants have failed to demonstrate that they are entitled to that salary increment. It should know that salary increment

is not a must this is among the automatic rights which one is supposed to base when claiming for his entitlements.

Subsequently, one needs to ask herself/himself about his strength and effort dedicated to the employer. In this case at hand, the employee had already paid the applicants their salary increase from the increased salary date which started in July 2013 to November 2013 before their termination.

Concerning the applicant claims concerning leave allowances, they are claiming that they are entitled to leave allowances since they were employees of the respondent. I have found that the period in which the applicants are claiming for unpaid leave allowances is the period which they were in jail and at the time which they were brought back to work. At the time the applicants have suspended means they were not at work. It should be known that leave is a claim for active duty and a break from work.

The rationale for leave is to allow an employee time to rest. That is why every year there is an annual leave as per section 25 of the Employment Act, Cap. 366. However, the logic behind this rationale is that when an



employee has not put any work, he cannot get an off day or leave. In the case of **Security Group (T) Limited v Joseph Kurwa & Another** Civil Appeal No. 9 of 2004 (unreported) it was held that:

*“ The condition precedent for annual leave is rendering of services. If there was no service rendered during that period in question, then I do not see how one could qualify for paid annual leave. Therefore, leave is conditional upon prior input of actual work...”*

In the case at hand, the applicants did not put any work and thus they did not fit or were not eligible for annual leave for the period of suspension. Therefore, as long as the suspension was lawful, the applicants are not entitled to leave allowance to the period of suspension.

In regard to the applicants' claim of house allowance, it is logical that house allowances enable the employee to work in the conducive environment while executing their regular duty smoothly. In the record, it shows that the applicant claimed that they paid house rent fee. The issue for determination is whether after being suspended the applicants were entitled to house allowance.

By virtue of being in active employment, the employee is entitled to allowances which are stipulated under the employment contract, for example, phone allowances, house allowances, responsibility allowances, and entertainment allowance. However, in cases where the employee was inactive, it will highly depend on the terms and conditions stipulated under the employment contract. In this case at hand, the contractual obligation was not established. Furthermore, the applicant claimed for reimbursement of money without tendering any supporting evidence to prove their payment of the said fee.

Concerning the applicants' claim of bonus, it should be known that bonus is an amount given to an employee in addition to his salary with a purpose to encourage an employee to work for the extra mile. I find it is purely discretion of the employer, from the fact that the applicants were in jail. Thus the period during their suspension they were limited for a bonus, and they are not entitled to claim the same.

Basing on what I have stated, I find that the application partially allowed for the applicants to be paid their outstanding salaries (salaries arrears if any) from the day they were suspended pending conviction and after their acquittal until their termination. The application is partially dismissed that means applicants are not entitled to salary increments,

leave allowances, housing allowances and bonus from the suspension day to the period before their employment was terminated.

It's so ordered.

Dated at Mwanza on this 06<sup>th</sup> day of September 2018.

  
A.Z.MGEYEKWA

**JUDGE**

06.09.2018

Delivered in the presence of both parties on this 06<sup>th</sup> day of September 2018.

  
A.Z.MGEYEKWA

**JUDGE**

06.09.2018

