THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT MBEYA

REVISION NO. 54 OF 2017

(Originating from the Complaint Ref. CMA/MBY/68/2015 of the Commission for Mediation and Arbitration for Mbeya at Mbeya)

SECURITY GROUP (T) LTD.....APPLICANT

VERSUS

MASHAKA SETEBE.....RESPONDENT

JUDGEMENT

Date of Last Order: 20/02/2020
Date of Judgment: 07/05/2020

MONGELLA, J.

The Applicant has brought this application under section 91(1)(a) and 91(2)(b) of the Employment and Labour Relations Act, Act No. 6 of 2004 (ELRA) and Rule 24(1), 24(2)(a), (b), (c), (d), (e), (f), Rule 24(3)(a), (b), (c), (d) and Rule 28(1)(b), (c), (d), (c), (d), (e) of the Labour Court Rules, 2007 GN No. 106 of 2007. He is seeking for this Court to revise the decision of the Commission for Mediation and Arbitration (CMA) in Complaint with ref. No. CMA/MBY/68/2015. The brief facts of the case are as follows:

The respondent was employed as the branch manager of the applicant's branch in Mbeya until 17th April, 2015 when his employment was terminated on grounds of misconduct. The alleged misconduct contained three offences to wit: conflict of interest, mismanagement of company properties and loss of trust. The respondent then lodged a complaint at the CMA claiming for unfair termination. The matter was first mediated and upon failure of the mediation it was referred to arbitration. The CMA finally ruled that the respondent was substantively unfairly terminated and thus awarded him compensation for unfair termination to the tune of T.shs. 110,705,000/-. Aggrieved by this decision the applicant through the services of Mr. Nazario Michael Buxay, learned advocate filed this revision on the following issues for determination:

1. *Whether it was proper for the arbitrator to find the respondent's termination substantively unfair.*

2. *Whether it was proper for the arbitrator to discredit exhibit SGT 9 on the basis of competency of witness who tendered while the said exhibit was already cleared for admission.*

3. *Whether it was proper for the arbitrator to doubt the respondent's directorship in Karibu Security on the basis of the contents of exhibit SGT 9.*

4. *Whether the arbitrator properly considered and analysed the evidence.*

5. *Whether it was proper for the arbitrator to award payment of T.shs. 1,950,366/- as leave days in absence of evidence of number of days of untaken leave*

6. *Whether it was proper for the arbitrator to award severance pay while there was ample evidence that the respondent's termination was on ground of misconduct.*

7. *Whether it was proper for the arbitrator to award payment for twelve months compensation as if termination was both substantively and procedurally unfair.*

8. *Whether it was proper for the arbitrator to award payment of T.shs. 5,000,000/- as compensation for unfair termination while he had already awarded twelve months compensation.*

9. *Whether it was proper for the arbitrator to award repatriation costs in a lump sum amount without indicating the line of entitlement.*

10. *Whether it was proper for the arbitrator to award payment of subsistence allowance which is higher than the respondent's monthly salary.*

The application was argued by written submissions which were timely filed in this Court by the parties.

Submitting on the 1st issue, Mr. Buxay argued that the respondent was terminated on grounds of misconduct being conflict of interest, misuse of

company's fuel and breach of trust. He argued that the respondent was terminated as per rule 12 (1) of the Code of Good Practice, G.N. No. 42 of 2007 which provides for reasons for termination including employee's contravention of a rule or standard regulating conduct relating to employment. He was of the view that the respondent did a serious misconduct which justifies his termination.

Mr. Buxay challenged the finding of the Hon. Arbitrator rejecting the misconduct on conflict of interest on ground that the memorandum of association containing objectives of the company was not tendered and thus it was not established if the business of the respondent's company is the same as the one conducted by the applicant. He also challenged the Hon. Arbitrator's finding to the effect that it was doubtful if the respondent was still a shareholder and director of Karibu Security Ltd. because there were some changes submitted to the registrar of companies. He argued that the Hon. Arbitrator's findings are highly misconceived and without merits for being inconsistent with the evidence given by the respondent himself at the disciplinary hearing as seen in Exhibit "SGT 13" whereby the respondent admitted to have been involved with Karibu Security Services Ltd, which is a security company, as a shareholder and director since 2009. He added that Exhibit "SGT 9" a search report from BRELA, dated 1st April 2015, revealed that the company name was "Karibu Security Company Ltd" incorporated on 31st July 2008 with certificate of incorporation No. 66802 and the respondent is the director and majority shareholder owning 80% of all the shares of the company.

Mr. Buxay argued further that in commission of the above stated misconduct, the respondent also breached trust as provided under Rule 9 (5) of the Schedule to the Employment and Labour Relations (Code of Good Practice) GN No. 42 of 2007. He further submitted that the respondent committed another misconduct of misuse of company fuel, but the Hon. Arbitrator rejected that despite evidence from Exhibit "SGT 13" in which the respondent stated that he was aware that each vehicle has to use its own card with the objective of controlling fuel resources. That the respondent admitted using fuel cards for grounded vehicles to fill other vehicles without being authorised. He argued that this misconduct was well established and is contrary to Rule 9 (8) of the Schedule to GN No. 42 of 2007, which lists "causing loss of employer's property" as among offences constituting serious misconduct and leading to termination of an employee.

The third misconduct committed by the respondent as submitted by Mr. Buxay was loss of trust as provided under Rule 9 (5) of the Schedule to GN No. 42 of 2007, which lists "dishonest or any other major breach of trust" as among offences constituting serious misconduct leading to termination of an employee. He argued that there was ample evidence that the respondent was closely related to the supplier named Chaudele Company to the extent of operating bank transactions for him. He said that such relationship compromised the interests of the applicant as an employer through overcharging as seen in Exhibit "SGT 10"

Concluding on this issue he argued that in CMA F1 and in his opening statement the respondent did not dispute the evidence or admissions he

made during the disciplinary hearing but surprisingly he denied everything during the hearing at CMA which was an afterthought and unacceptable. In support thereof he cited the case of ***Makori Wassanga v. Joshua Mwaikambo & Another*** [1987] TLR 88 in which it was ruled that parties are bound by their pleadings and can only succeed according to what has been averred in the pleadings and proved in evidence, they cannot be permitted to set up a new case. He also cited section 123 of the Evidence Act, Cap 6 R.E. 2019 which prohibits "a person who by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon that belief" from denying the truth of that thing.

Responding to this issue, Mr. Daniel Muya who represented the respondent argued that as per section 39 of the ELRA, the applicant was burdened to prove on fairness of the termination both substantively and procedurally. He contended that the Hon. Arbitrator made a correct finding to the effect that the misconduct on conflict of interest was not proved and thus termination was unfair. He said that in no part of the proceedings did the respondent make any admission that he had set up a similar business as that of the applicant. He argued that Exhibit "SGT 9" which is a letter from BRELA cannot be used as an inference that the respondent set up a similar business as that of the employer merely for reasons that the name ends with "security services." He argued that as per Rule 12 (a) and (b) (i) & (ii) of GN 42 of 2007, for reason of termination to be fair, the standard or rule contravened must be reasonable, clear and unambiguous.

Mr. Muya argued further that the Hon. Arbitrator made correct findings on the misconduct of misuse of company resources because the applicant failed to prove which code of ethics of her company was violated. He said that as per Exhibit "SGT 13" the respondent was able to prove that the use of the fuel cards on grounded vehicles was used to fuel other company vehicles for smooth running of the company's business and had permission to do so from the company's head office. That there was no evidence that the fuel was used in other vehicles other than the applicant's vehicles. He as well argued that the third misconduct on breach of trust was as well not proved. He supported the Hon. Arbitrator's rejection of the Exhibit "SGT 10" and "SGT 11" as the same failed to provide connection to the misconduct purported to be committed by the respondent.

On the second issue, Mr. Buxay submitted that the applicant's first witness one Advocate Emmanuel Akyoo tendered a search report from BRELA which after being cleared for admission was admitted as Exhibit "SGT 9." However, the Hon. Arbitrator discredited the exhibit on ground of suspected genuineness of the report saying that it was tendered by the applicant's advocate who was not the maker and there was no reason as to why the same was not tendered by the maker. He argued that the Hon. Arbitrator misdirected himself on the law as to who is capable of tendering documentary evidence in a court of law. He cited the case of ***The DPP v. Mirzai Pirkabashi @ Hadji & 3 Others***, Criminal Application No. 493 of 2016 in which the CAT held:

> *"the test for tendering the exhibit therefore is whether the witness has the knowledge and he possessed the thing in question at some point in time, albeit shortly. So, a possessor or a custodian or an actual owner or alike are legally capable of tendering the intended exhibits in question provided he has the knowledge of the thing in question."*

Basing on the above decision, Mr. Buxay argued that the said Emmanuel Akyoo requested the report from BRELA and was in custody of the said letter thus competent witness to tender the said document.

Responding to this issue, Mr. Muya argued that the applicant's argument is totally misconceived as the CMA admitted exhibit "SGT 9" but in the award the Hon. Arbitrator considered it and doubted other information testified by the said Emmanuel Akyoo. He said that the Hon. Arbitrator disregarded exhibit "SGT 9" because the same did not disclose the name of the company as Oblige Security Services Limited as testified by Mr. Akyoo and also did not disclose the company's objectives.

On the third issue, Mr. Buxay argued that the Hon. Arbitrator seriously misdirected himself by doubting the respondent's directorship at Karibu Security. He argued that it is clear from Exhibit "SGT 9" that the respondent was an active director and majority shareholder owning 80% of the shares. He cited section 89 (1) of the Evidence Act which provides for presumption on the genuineness of the document. He said that the provision empowers the court to presume to be genuine every document purporting to be a certificate or other document which *inter alia* purports to be duly certified by a public officer in the United Republic. He also cited section 89 (2) which empowers the court to presume that any officer

by whom any such document purports to be signed or certified held, when he signed it, the official capacity which he claims in such paper. He argued that Exhibit "SGT 9" is self-speaking and can only be challenged by production of another document.

Responding to this issue, Mr. Muya argued that exhibit "SGT 9" was considered and finally the Hon. Arbitrator arrived at a justifiable award. He argued that the Hon. Arbitrator only doubted the new facts that were not reflected in the BRELA report inclusive of changing company names to Oblige Security Services.

On the fourth issue, Mr. Buxay argued that the Hon. Arbitrator did not properly analyse the evidence in reaching his decision. He argued that the Hon. Arbitrator ought to have objectively considered the evidence given orally and the exhibits tendered. He said for example the respondent admitted to have misused the company's fuel by using fuel cards for grounded vehicles to fill unknown vehicles as per Exhibit "SGT 13." However, despite this admission, the Hon. Arbitrator ruled that the said misconduct has not been proved as the applicant failed to categorically identify those unknown cars. Thus he failed to properly analyse the evidence thereby reaching into unfair decision.

Mr. Muya responded that the Commission addressed well the misconduct on misuse of company resources as the exhibits tendered did not mention whose cars were re fuelled. He said the applicant ought to have proved that the owners of the "unknown cars" belonged to other persons and were not registered in the name of the applicant.

On the fifth issue, Mr. Buxay argued that the respondent was terminated on 17th April 2015 which was only three and a half months since the year started. He added that the respondent's salary was T.shs. 1,100,000/- thus in calculating leave payment the Hon. Arbitrator ought to have resorted to section 31 (8) of the ELRA which under the circumstances provides for pro rata payment calculated at the rate of one day's salary basic wage for every 13 days the employee worked. He was of the view that the amount of T.shs. awarded by the Hon. Arbitrator was not proper and contrary to what the law provides.

Mr. Muya responded on this issue submitting that the applicant is the custodian of employment records as stipulated under section 15 (1) and (6) of the ELRA and he was supposed to furnish the particulars of employment to the respondent including leave taken or not taken.

On the sixth issue, Mr. Buxay challenged the award of severance pay to the respondent to the tune of T.shs. 6,826,190/-. He argued that the respondent was terminated on grounds of misconduct which were proven on the required standard under the law. He referred to section 42 (3) (a) of the ELRA which provides that severance pay shall not be paid where the termination is fair on grounds of misconduct. To cement his position he also referred the Court to the case of ***Vedestus S. Ntulanyenka & 6 Others v. Mohamed Trans Ltd.***, Revision No. 04 of 2014 (HC, Lab. Div. at Shinyanga, unreported) in which the provision of section 42 (3) (a) of the ELRA was reiterated.

Responding to this issue, Mr. Muya argued that the applicant failed to prove that the termination was fair in terms of reasons and procedures; hence the case of ***Vedastus Ntulanyeka*** (supra) is not relevant to the case at hand.

On the seventh issue, Mr. Buxay challenged the award of T.shs. 23,404,392/- to the respondent as twelve months salary compensation for unfair termination. He argued that as ruled by the Hon. Arbitrator the termination was procedurally fair but substantively unfair thus it was wrong for him to award the said amount as compensation as if the termination was both substantively and procedurally unfair. He cited section 37 (2) of the ELRA providing for fair termination and argued that for termination to be unfair all the ingredients being, unfair reason and unfair procedure must be present. He was of the view that since the termination procedure was ruled to be fair then the Hon. Arbitrator ought to have awarded a lesser amount. In support of his argument he cited the case of ***USAID Wajibika Project v. Joseph Mandago & Edwin Nkwanga,*** [2015] LCCD 107.

Mr. Muya responded that the arbitrator was correct in awarding the twelve months' salary compensation as the termination was unfair. He cited a number of cases including the case of ***Arusha Urban Water Supply and Sewage Authority v. Ally H. Kimu***, Revision Case No. 101 of 2015, (HC Lab Div. at Arusha, unreported) in which it was ruled that the arbitrator has powers to grant reliefs including damages and even more than twelve months' salary compensation.

On the eighth ground, Mr. Buxay challenged the award of T.shs. 5,000,000/- as general damages. He argued that this amount was awarded contrary to the law because section 40 of the ELRA which provides for terminal benefits does not include such payment. He argued that since the Hon. Arbitrator had already awarded twelve months salary compensation it was wrong to award the general damages as the same is imposing double punishment. He cited the case of ***KMM (2006) Entrepreneurs Ltd. v. Emmanuel Kimetule***, Revision No. 19 of 2014 (unreported) in which the Court ruled that the loss suffered in form of earning was already covered in the award of twelve months salary thus there was no need of awarding general damages.

Mr. Muya responded that the award of compensation cannot bar the Commission from giving other legal remedies existing under the law, which include general damages. Referring to section 40 (2) of the ELRA which states that "an order for compensation made under this section shall be in addition to, and not substitute for, any other amount to which the employee may be entitled in terms of any law or agreement" he argued that the Hon. Arbitrator correctly awarded the general damages. He cited the case of ***Vodacom Tanzania v. Zawadi Bahenge & 6 Others*** [2014] LCCD 1 and that of ***Dr. Abraham Israel Shuma Maro v. National Institute for Medical Research (NIMR)*** [2015] LCCD 161 whereby in both cases general damages were awarded in addition to compensation.

On the ninth issue, Mr. Buxay challenged the award of repatriation costs to the tune of T.shs. 4,041,400/-. He argued that the Hon. Arbitrator awarded the repatriation costs in a lump sum without indicating the lines

of entitlement or the bases of awarding such amount. He cited section 43 of the ELRA which provides for repatriation and argued that the said provision provides for transporting the employee back to the place of recruitment and in doing so the employer may pay for transportation which may include a bus fare.

Responding to this issue, Mr. Muya argued that the applicant's counsel has not disputed that the respondent is entitled to repatriation costs. He contended that the repatriation costs are statutory in absence of clear evidence that the employee has been repatriated after his termination, thus properly awarded. He cited the case of ***Eddy Martin Nyinyoo v. Real Security Group & Marine*** [2013] LCCD 7 in which the court ruled that repatriation costs is part of statutory rights of an employee upon termination of the employment contract.

On the tenth issue, Mr. Buxay also challenged the award of T.shs. 337,299/- per day as subsistence allowance. He argued that the amount awarded was higher than the monthly salary of the respondent which was T.shs. 1,100,000/- as per Exhibit "SGT 16." He argued that if the said amount per day is multiplied by 30 days then it will amount to T.shs. 10,116,870/- which is far beyond the monthly basic wage of the respondent. He cited the case of ***TWIGA Bancorp Limited v. Zuhura Zidadu & Mwajuma Ally*** [2015] LCCD 18 in which it was held that "*...the daily subsistence allowance should be taken to be the daily wage calculated on the basis of monthly salary.*" He cited also ***World Vision Tanzania v. Emiliana John Mwakajonga***, Revision No. 04 of 2015 (unreported) in which it was held that "*the applicant is entitled to the subsistence allowance of her basic monthly*

salary only and not otherwise when waiting for the employer to repatriate him." He as well cited the case of ***AG & Others v. Eliji Edward Massawe***, Civil Appeal No. 86 of 2002 in which the Court of Appeal held that "*the employee is entitled to monthly salaries to cover subsistence allowance.*" He concluded that on the basis of the cited cases, the amount of T.shs. 337,299/- per day awarded by the Hon. Arbitrator was incorrect. He prayed for the CMA award to be set aside.

Mr. Muya responded that the applicant's advocate in his submission has not disputed that the respondent is entitled to subsistence allowance, but only disputed the manner of calculation. He argued that subsistence allowance is paid on daily basic wage of the employee from the date of termination to the date of repatriation. He cited the case of ***The General Manager Pangea Minerals Ltd. v. Migumo Mwakalasya***, Revision No. 35 of 2008 (HC at DSM, unreported) in which it was held that "*where employment is terminated at a place other than where the employee was recruited, the law requires payment of daily subsistence expenses during the period, if any, between the date of termination and the date of transporting the employee to the place of recruitment.*" He also cited Regulation 16 (1) of the Employment and Labour Relations (General) Regulation, GN No. 47 of 2017 which provides that "*subsistence expenses provided for under section 43 (1) (c) shall be quantified into daily basic wage or as may be determined from time to time by the relevant wage board.*"

After considering the submissions from both counsels, I find that there are two issues to be determined. The first is whether the applicant unfairly

terminated the respondent; and the second is whether the reliefs granted by the Hon. Arbitrator are justifiable.

Starting with the first issue, the law under section 37 of the ELRA clearly provides that for a termination to be fair, it has to be fair both substantive and procedural. The CMA ruled, which I find correct, that procedurally the termination was fair. It however, ruled that substantively the procedure was unfair and in fact this is where the contention between the parties lies. The CMA ruled that the applicant as an employer failed to prove that the termination was substantively fair.

Basing on the submission by Mr. Buxay, I find that the main evidence that the applicant relied on in proving substantive fairness on the misconducts allegedly done by the respondent are the proceedings/minutes of the disciplinary hearing and the report from BRELA, exhibit "SGT 13" and "SGT 9" respectively. Mr. Buxay argued that in exhibit "SGT 13" the respondent admitted the charges of misconduct. The CMA record however, shows that exhibit "SGT 13" was admitted with caution. The record also indicates that the respondent disputed its contents claiming that the minutes were tempered with as he never admitted committing any misconduct as claimed by the applicant.

Considering the record I also find that the applicant failed to prove the misconduct of conflict of interest. Exhibit "SGT 9" as it stands does not prove that the respondent was involved in the same kind of business as that of the applicant. It simply shows the name of the company, the directors and shareholders and the percentage of the shares owned.

Under these circumstances, I agree with the reasoning of the Hon. Arbitrator that the memorandum of association of the claimed respondent's company and that of the applicant ought to have been tendered for the Commission to make comparison of the objects. I also find that it is unsafe to rely on exhibit "SGT 13" which is claimed by the respondent to have been tempered with in the absence of any other corroborating evidence. The records also indicate that the applicant did not give a copy of the disciplinary hearing form "SGT 13" to the respondent. The fact that this copy was not availed to the respondent as per the requirements of **Rule 4 (9) of the Schedule to the Employment and Labour Relations (Code of Good Practice) GN No. 42 of 2007** makes it difficult to refute the respondent's claim that the document was tempered with.

Regarding the misconduct on misuse of company resources to wit, fuel, the Hon. Arbitrator ruled that it was not proved because the applicant failed to identify which and whose vehicles were filled using fuel cards of grounded vehicles and that he did not tender the code of ethics claimed to be breached. In my considered view however, as much as the code of ethics would have provided easy reference in determining the breached rules, courts have to consider the evidence provided in its totality. The applicant tendered exhibit "SGT 3" which was the fleet status for Mbeya, exhibit "SGT 4" which was fuel report for March 2015, and exhibit "SGT 7" which was the fueling system list. Exhibit "SGT 3" shows that the grounded vehicles were those with registration numbers T 958 AGH, T 459 AGC and T 563 BVF. Exhibit "SGT 4" and "SGT 7" shows that vehicles with registration numbers T 958 AGH, T 459 AGC and T 563 BVF which happened to be

grounded as per exhibit "SGT 3" were filled with fuel on diverse dates at Mbeya Service Station. The respondent in his testimony, as seen in the CMA proceedings, stated that he reported to the headquarters in Dar es Salaam and was allowed to use the said fuel cards to make sure that the operation does not stop. In my considered view therefore, if he really asked for permission from the headquarters as he purports, then he must have known that it was prohibited to use a card of one vehicle on another. I as well find his testimony not convincing as to whether he was really permitted to use the fuel cards of the grounded vehicles as he purports. This is because he failed to provide proof of the communication with the headquarters by even mentioning the person who exactly authorised him to use the fuel cards of grounded vehicles. In my settled opinion, this misconduct was proved by the applicant.

Regarding the third misconduct, the applicant claimed that the respondent had close relations with the company supplier one named Chaudele to the extent of him dealing with Chaudele's bank transfers. There were allegations that he also fired the former supplier and engaged the said Chaudele without complying with the company's procedures of engaging a supplier. It was the applicant's contention that under the circumstances, the respondent's independence of judgment in making decisions for the company's interests was jeopardized, hence loss of trust. The Hon. Arbitrator ruled that this misconduct was not proved. I am however, of a different view. These allegations were testified in the CMA by Witness II one Ebenezer John Kaale. I have gone through the proceeding, particularly the testimony of this witness II and found that the respondent never cross examined on these allegations. The settled legal

position is to the effect that if the allegations testified by a witness are not cross examined, then the same are taken to be true requiring no further proof. See: ***Damian Ruhele v. Republic***, Criminal Appeal No. 501 of 2007 (unreported); ***Nyerere Nyague v. Republic***, Criminal Appeal No. 67 of 2010 (unreported); ***George Maili Kemboge v. Republic***, Criminal Appeal No. 327 of 2013 (unreported) and ***Bakari Abdallah Masudi v. The Republic***, Criminal Appeal No. 126 of 2017.

To this point I now turn to the second issue as to whether the reliefs granted by the CMA were justified. The CMA awarded the respondent T.shs. 4,875,915/- as severance pay; T.shs. 1, 950, 366/- as one month salary in lieu of notice; T.shs. 1,950,366/- for leave not taken; T.shs. 5,000,000/- as general damages; T.shs. 23,404,392/- as twelve months salary compensation for unfair termination; T.shs. 4,041,400 as repatriation costs from Mbeya to Tanga region; T.shs. 69,483,594/- as subsistence allowance for 206 days and certificate of service. All totaling to T.shs. 110,706,033/-.

Since my findings on the misconduct are to the effect that the one on misuse of company fuel and that of loss of trust were proved. It is my finding that the termination was fair both substantively and procedurally. The CMA awarded T.shs. 4,875,915 as severance pay. Section 42 (3) (a) of the ELRA provides that severance pay is not payable when termination is found to be fair on grounds of misconduct. Thus the respondent is not entitled to severance pay as the misconduct on misuse of company fuel and loss of trust were proved. The CMA also awarded 5, 000,000/- as general damages. My finding is that the respondent is also not entitled to this relief as the termination is found to be fair. On the same reasons the

respondent is also not entitled to compensation for unfair termination. Section 40 (1) (c) of the ELRA provides for a minimum of twelve months' compensation where termination is found to be unfair either substantively, procedurally or both, which is not the case in this matter.

However, there are entitlements deserving to an employee regardless of whether the termination was fair or unfair under the ELRA. On these bases the respondent is entitled to the following terminal benefits: Payment in lieu of notice which as per section 41 (5) and section 44 (1) (d) of the ELRA is supposed to be one month remuneration. The provision states that *"instead of giving an employee notice of termination, an employer may pay the employee the remuneration that the employee would have received if the employee had worked during the notice period."* Therefore the respondent is entitled to one month remuneration to the tune of **T.shs. 1,950,399.99/-** being his last remuneration and because the termination letter indicates that he was terminated on the date of the letter, that is, on 17th April 2015. Under section 44 (1) of the ELRA the respondent is also entitled to remuneration for work done before termination whereby, as per the termination letter, amounts to 17 days. Thus given his monthly remuneration he is to be paid **T.shs. 1,105,266.66/-**. Exhibit "SGT 1" indicates that the last time the respondent took leave was March 2013 whereby exhibit "SGT 12 indicates that he was terminated on 17th April 2014. Therefore in accordance with section 44 (1) (b) and section 31 (4) (a) of the ELRA he is entitled to one month remuneration for annual leave not taken. Thus he is to be paid **T.shs. 1,950,399.99/-**.

Mr. Buxay challenged the calculation of salary to the tune of T.shs. 1,950,366/- saying that the respondent's basic salary was 1,100,000/-. In my view, calculations are done basing on the monthly remuneration which includes allowances. Exhibit "SGT 16" reveals that the total monthly earnings/remuneration of the respondent was T.shs. 1,950,399.99/- subject to taxation and other deductions as seen in exhibit "SGT 16."

Under section 43 (1) (c), the respondent is also entitled to subsistence allowance on daily basis calculated basing on the month's basic salary from the date of termination to the date of repatriation. There is no evidence showing that the applicant repatriated the respondent in terms of section 43 of the ELRA. The subsistence allowance however is paid in terms of monthly salaries. See: ***AG & Others v. Eliji Edward Massawe***, Civil Appeal No. 86 of 2002 in which the Court of Appeal held that "*the employee is entitled to monthly salaries to cover subsistence allowance*." The exact amount to be paid however is calculated in terms of daily wage as per Regulation 16 (1) of the Employment and Labour Relations (General) Regulation, GN No. 47 of 2017. See also: ***The General Manager Pangea Minerals Ltd. v. Migumo Mwakalasya*** (supra).

The CMA record indicates that the respondent was recruited in Tanga region and was transferred to Mbeya region. Thus he is to be repatriated back to Tanga region. As submitted by Mr. Buxay and stated by the applicant as seen in CMA record, the respondent's basic monthly salary was 1,100,000/- on the date of termination. This means that the daily subsistence allowance is supposed to be T.shs. 36,666/-. From 17th April 2015 to the date of this judgment it is a total of 1,840 days. Thus multiplying

the daily subsistence allowance and the number of days it makes a total of T.shs. **67,465,440/-**. This amount shall keep on accruing till the date the respondent is repatriated.

As per section 43 (1), the respondent is entitled to be recruited from Mbeya region where he was transferred to Tanga region where he was recruited. I therefore order that the applicant transports the respondent and his family and personal effects to place of recruitment. The respondent is also entitled to a certificate of service as per section 44 (2) of the ELRA.

In the upshot I set aside the CMA award on the reasons stated in this judgment. The applicant is to pay the respondent terminal benefits entitled to him regardless of the fairness of termination as I have enumerated above. In total the applicant shall pay the respondent a sum of **T.shs. 72,471,506.64/-** subject to applicable statutory deductions.

Dated at Mbeya on this 07th day of May 2020.

L. M. MONGELLA
JUDGE

Court: Judgment delivered in Mbeya in Chambers on this 07th day of April 2020 in the presence of both parties.

L. M. MONGELLA
JUDGE