

THE UNITED REPUBLIC OF TANZANIA
JUDICIARY
IN THE HIGH COURT OF TANZANIA
(LABOUR DIVISION)
AT MBEYA
REVISION NO. 64 OF 2017

(Originating from the Complaint Ref. CMA/MBY/107/2015 of the
Commission for Mediation and Arbitration for Mbeya at Mbeya)

ADVANS BANK TANZANIA LIMITED.....APPLICANT

VERSUS

YOHANESS (sic) NDIBALEMA.....RESPONDENT

JUDGEMENT

Date of Last Order: 16/04/2020
Date of Judgment: 10/06/2020

MONGELLA, J.

The Applicant is calling upon this Court to call for, examine and revise the proceedings, and award of the Commission for Mediation and Arbitration in Labour dispute no. CMA/MBY/107/2015. The application is brought under section 91(1)(a), 91(2)(b), 91(2)(c) and 94 (1) (b) (i) of the Employment and Labour Relations Act, Act No. 6 of 2004; and Rule 24(1), 24(2)(a), (b), (c), (d), (e), (f), Rule 24(3)(a), (b), (c), (d) and Rule 28(1)(a) (b), (c), (d), (c), (d), (e) and Rule 55 (2) of the Labour Court Rules, 2007 GN No. 106 of 2007. It is supported by the affidavit of one Thadeus Massawe,

a legal officer of the applicant, which was adopted to form part of the Applicant's submissions.

Both parties were represented whereby the Applicant was represented by Mr. G. Mrina and the Respondent was represented by Ms. Juliana Marunda, both learned advocates. The application was argued by written submissions which were timely filed in this Court by both parties.

In the written submission Mr. Mrina advanced two main issues for determination by this Court to wit:

- 1. That the learned Arbitrator erred in law and fact by disregarding the tendered evidence showing and stating the respondent's place of recruitment and work station.*
- 2. The learned Arbitrator erred in law and in fact by awarding/ordering the applicant to pay the respondent T.shs. 6,750,000/- for subsistence expenses for 15 months from September 2015 to August 2017 and the costs/expenses to continue to accrue until the respondent is repatriated to Dar es Salaam from Mbeya, whilst disregarding the evidence and fact that the respondent was recruited and work station was in Mbeya.*

Submitting on the first issue, Mr. Mrina argued that the respondent is not entitled to be paid transportation allowance in terms of section 43 (1) (c) of the Employment and Labour Relations Act, No. 6 of 2004 (ELRA). He argued so saying that as per exhibit P2 which was tendered in evidence in

the CMA, the respondent's place of engagement was Mbeya and the contract was terminated for poor performance. Mr. Mrina argued that the contract of employment between the applicant and the respondent evidences that the respondent's place of employment was in Mbeya. He referred specifically to item (2) of the said contract which states that "*the employee agrees and acknowledges his/her place of recruitment is Mbeya Region and job station will be in Mbeya.*" He referred the Court to the case of **Vedastus Ntalunyeka & 6 Others v. Mohamed Transport Ltd.**, Revision No. 4 of 2014 (HC Lab Div. at Shinyanga) in which it was held that an employee is not entitled to repatriation costs unless he can prove that he was recruited at a different place other than the place of employment. On these bases he concluded on this issue arguing that it was unfair for the Hon. Arbitrator not to consider the evidence adduced.

In reply to the first issue, Ms. Marunda argued that the record of the CMA shows that the respondent testified to have done and passed the job interview in Dar es Salaam, where he also started working on 2nd June 2014. She said that the respondent worked in Dar es Salaam until 28th August 2014 whereby he was transferred to Mbeya following the applicant's opening of a new branch in Mbeya. That the respondent tendered the letter of transfer, exhibit C1, which was not disputed by the applicant. She added that the applicant did not dispute the testimony of the respondent to the effect that he was recruited in Dar es Salaam and later transferred to Mbeya, something which was also noted by the Hon. Arbitrator in her award. She concluded that the record indicates that the Hon. Arbitrator considered the evidence from both parties and reached a conclusion that the respondent was recruited in Dar es Salaam and

proceeded to award repatriation and subsistence allowance in accordance with the law.

On the second issue, Mr. Mrina argued that it is trite law that the court cannot grant something which is not proved by the parties to the case. He contended that the Hon. Arbitrator granted the respondent subsistence allowance which he was not entitled as he was recruited in Mbeya where the termination occurred. He argued that the respondent failed to prove that he was recruited at another place other than Mbeya because he failed to tender transport fair receipts from the place of recruitment to Mbeya. In support of his argument he again referred to the case of **Vedastus Ntalunyeka** (supra) where the court observed:

"I would have example expected from the appellant to produce such evidence as transport charges from Tarime to Mwanza for him and his family paid by the respondent soon after he has been employed. There was no such evidence even if for the sake of argument, the appellant had used his own money from Tarime to Mwanza, one would have expected him to seek for refund from the employer. Again such evidence was forth coming, this being the position, the trial magistrate was entitled to find that the appellant was recruited from Mwanza."

Basing on the above cited decision, he concluded that the respondent is not entitled to be paid repatriation and subsistence allowance as he has failed to prove that he was recruited in Dar es Salaam.

Responding to this second issue, Ms. Marunda argued that the respondent started working for the applicant on 2nd June 2014 in Dar es

Salaam and was terminated in Mbeya on 3rd September 2015. She argued that in accordance with section 43 (1) of the ELRA the respondent is entitled to subsistence allowance from the date of termination to the date he shall be repatriated back to Dar es Salaam, the place of recruitment.

In rejoinder Mr. Mrina almost reiterated what he submitted in his submission in chief so I am not going to summarise his arguments on that. However, he responded also to Ms. Marunda's contention that the respondent testified to have been recruited in Dar es Salaam and later transferred to Mbeya as per exhibit C1. He argued that even though the applicant did not dispute the tendered exhibit C1, the Hon. Arbitrator erred for failing to understand that during the work time at Dar es Salaam the respondent had not fully started working under his employment contract. He argued that the respondent spent time working in Dar es Salaam while waiting for the branch in Mbeya to be opened for him to work there as stipulated in the employment contract. He argued further that what happened was just a good assistance of the applicant to the respondent because the applicant saw that it was unfair for the respondent to wait for the branch to be opened in Mbeya without doing anything. That is why the applicant decided to put the respondent under probation while waiting for an official opening of the branch in Mbeya. (This argument however came from the Bar as none of the appellant's witnesses testified to this effect. I shall therefore not consider it.)

Considering the rival submissions of both counsels, it is obvious that the contention lies with the award of repatriation and subsistence allowance.

While the applicant insists that the respondent was recruited in Mbeya where he was also terminated, the respondent maintains that he was recruited in Dar es Salaam and then transferred to Mbeya where the termination of the employment occurred. On one hand, Mr. Mrina referred to exhibit P2, the employment contract, which stipulates that the place of recruitment is Mbeya Region. On the other hand, Ms. Marunda referred to exhibit C1 and argued that the said exhibit contains a letter of transfer from Dar es Salaam where the respondent was recruited to Mbeya Region where he was working after a new branch was opened.

Section 43 (1) of the ELRA provides for payment of subsistence allowance pending an employee being transported to the place of recruitment where he is entitled to this benefit. It specifically states:

"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 effect to the place of recruitment,
- b) Pay for the transportation of the employee to the place of recruitment, or
- c) **Pay the employee** an 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.**"

In ***Yustus Nchia v. National Executive Secretary CCM & Another***, Civil Appeal No. 85 of 2005 (CAT-DSM, unreported) the Court of Appeal held that:

"An employee is entitled to repatriation cost, and subsistence allowance only if he was terminated on the place other than place of domicile, and the employee remained on the place of recruitment, entitled with subsistence allowance for the period of remain."

The same position was settled by the Court of Appeal in the case of **Attorney General & 3 Others v. Eligi Edward Massawe & 104 Others**, Civil Appeal No. 86 of 2002 (CAT-DSM, unreported). This Court, in the case of **Ibrahim Kamundi Shayo v. Tanzania Fertilizer Company Ltd (TFC)**, Labour Dispute No. 01 of 2014 underscored the position set by the Court of appeal in the above mentioned cases. It held that:

"My understanding of the Court of Appeal decision is that the employee is only entitled to be paid subsistence allowance once the employer failed to repatriate such an employee to his place of domicile and such employee continued to stay in the working place."

Considering the position of the law as elaborated above, I can therefore settle my mind that the employee has to show that he was recruited from a place other than the one he was working at the time of termination and that the employer has not transported him/her to the place of recruitment. See also: **Kenya Kazi Security (T) Ltd. v. Nambeke Skawa**, Revision No. 37 of 2016; **Mantrac Tanzania Limited v. Joaquim P. Bonaventure**, Consolidated Revision No. 137 and 151 of 2017 and **Mvomero District Council v. Thobias Liwongwe & 6 Others**, Revision No. 26 of 2019 (all unreported).

In resolving the issue in the matter at hand, I have taken trouble to keenly go through the exhibits referred to by both parties. Exhibit C1 as it appears in the Court file contains also the employment contract similar to that in exhibit P2 and other documents including letters extending the probation period. It does not contain the letter of transfer as claimed by Ms. Marunda. Since the claimed letter of transfer was also crucial in determining the matter, I had to postpone the pronouncement of the judgment that was scheduled on 3rd June 2020 to accord parties the opportunity avail the Court the said letter. Unfortunately the said letter could not be provided. Under the circumstances, the only evidence that I had to scrutinize in reaching my verdict was the employment contract as exhibited in exhibit P2 and C1. The part that introduces the parties to the employment contract reads as follows:

"This Contract is made this 27th Day of August, 2014

BETWEEN

Advans Bank Tanzania Ltd, existing and operating under the laws of the United Republic of Tanzania and having its registered office at Manzese Darajani, Dar es Salaam Tanzania (hereinafter referred to as "the Employer") of the one Part

AND

***Mr. Johanes Ndibalema of Mbeya** (Hereinafter referred to as "the Employee") of the other Part."*

From the above quotation, it is evident that the respondent, Johanes Ndibalema was from Mbeya Region. Further, item 2 of the said employment contract reads:

"2. PLACE OF RECRUITMENT

The Employee agrees and acknowledges his/her place of recruitment is Mbeya Region and job station will be in Mbeya."

From the proceedings of the CMA the respondent testified that the applicant advertised the job position through Zoom Tanzania whereby he applied for the position and was called for interview. Then he was called via telephone and informed that he had passed the job interview and was required to report at the appellant's headquarters in Dar es Salaam. He said that he started work on 2nd June 2014 whereby he signed a three months contract and on 28th August 2014 he was shifted to Mbeya after the appellant opened a new branch in Mbeya. However, I have searched for the said three months contract and I did not find it in the court record to assist me ascertain the status of the respondent's employment in those three months and the place of recruitment as well. It is unfortunate also that the respondent in his testimony did not state his place of domicile when he was called to report at the appellant's headquarters in Dar es Salaam. He just stated that he was called to report at the headquarters in Dar es Salaam, but did not state from which region he came from.

Therefore, the valid contract so far presented at the CMA and in this Court is the one signed on 27th August 2014 which indicates that the respondent is from Mbeya and the place of recruitment and work station is in Mbeya Region. The Hon. Arbitrator awarded subsistence allowance basing on exhibit C1 which was supposedly a transfer letter. I however, fail to understand how she could rely on such document by merely believing

what was stated by the respondent without scrutinizing it thoroughly. Like I said no transfer letter was contained in Exhibit C1, the exhibit contains only the contract of employment dated 27th August 2014 and letters extending the probation period. The respondent also failed to provide the said letter when ordered by the Court to do so. The fact that he was called to report at the headquarters in Dar es Salaam and stayed there for three months does not conclusively evidence that he was recruited in Dar es Salaam.

Having said all, it is my finding that as per the employment contract, that is, exhibit P2 and C1 respectively, the respondent was recruited in Mbeya where the termination of employment took place. He is therefore not entitled to payment of subsistence allowance as provided under section 43 (1) (c) of the Employment and Labour Relations Act. The CMA award of T.shs. 6,750,000/- as subsistence allowance is therefore set aside.

Dated at Mbeya on this 10th day of June 2020.


L. M. MONGELLA

JUDGE

Court: Judgment delivered in Mbeya in Chambers on this 10th day of June 2020 in the presence of Mr. Emily Mwamboneke for the applicant and Ms. Juliana Marunda for the respondent.




L. M. MONGELLA

JUDGE