



**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF BUKOBA
AT BUKOBA**

LABOUR REVISION NO. 12 OF 2019

(Originating from the CMA award in referral No. CMA/BUK/60E/2014)

**TANZANIA ELECTRIC SUPPLY CO. LTDAPPLICANT
VERSUS
PASCALIS BANDIKUBI.....RESPONDENT**

JUDGMENT

17th May & 28th May 2021

Kilekamajenga, J.

The applicant lodged this Labour Revision seeking the following orders:-

- (a) That the Honourable Court be pleased to call for and examine the records and consequent award of CMA of Bukoba dated 27/04/2016 in referral No. CMA/BUK/60E/2014 (D. Mayale Arbitrator) dispatched to the respondent (now the applicant) on 09/05/2016) and revise it accordingly.
- (b) That the Honourable court be pleased to set aside the (a) above stated part of award on payment of subsistence allowance.
- (c) Any other order it deems just to grant.

The applicant moved this Court by way of chamber summons supported with an affidavit deposed by Mr. Norbert Bedder who was the counsel for the applicant.

In this application, the following provisions of the law invited the Court to revise the award of the Commission for Mediation and Arbitration: Section 91(1)(a)(b) and 91(2)(a)(b)(c), 94 (1) (b)(i) of the Employment and Labour Relations Act, No. 6 of 2004, Rules 24(1)(2)(a)(b)(c)(d)(e)(f), 24(3) (a)(b)(c)(d), 28(1) (b)(c) and (d) of the Labour Court Rules 2007). The court finally invited the parties to address the court on the merits or otherwise of the application. The applicant appeared under the legal services of the learned advocate, Ms. Theresia Masangya whereas the respondent was represented by the learned advocate, Mr. Frank Karoli.

During the oral submission, the counsel for the applicant conceded to the award of the commission for mediation and Arbitration save on two issues. First, the commission was not clear on the award; whether the respondent should be reinstated at work or not because despite ordering reinstatement, the commission ordered the applicant to repatriate the respondent from Kyaka-Misenyi to Dar-es-Salaam. Therefore, the decision of the commission had contradictions. Second, the commission's award confused on whether the respondent was entitled to the payment of subsistence allowance and per-diem.

The counsel submitted further that, the applicant does not deny the payment of subsistence allowance. In fact, the applicant wanted to pay subsistence

allowance to the respondent who objected hence this application. The major contention is hinged on the proper calculation of the subsistence allowance. Under the law, the subsistence allowance must be calculated or quantified on daily basis in accordance with the respondent's monthly salary. The counsel supported her argument with the cases of **Tanganyika Instant Coffee Company Ltd V. Jawabu Mtembei, Revision No. 2010 of 2013, High Court, Labour court Dar-es-Salaam; Stanbic Bank V. Joshua Kyelekule, Revision No. 79 of 2013, High Court- Mwanza Mantra Tanzania Ltd V. Joaquim P. Bonaventure, consolidated Revision No. 137 and 151 of 2017, High Court (Labour Division) Dar-es-Salaam.** She finally invited the court to reconsider the award of subsistence allowance.

On the other hand, the counsel for the respondent concurred with the submission of the applicant's counsel and invited the court to make the correct calculation of subsistence allowance.

When rejoining, the counsel for the applicant urged the court to award the payment of subsistence allowance from the date of termination to the date when the respondent declined the offer of payment.

I should first pose at this juncture before tackling issues observed in this matter. I wish to draw a background of the dispute before making the final remarks. The applicant employed the respondent as a System Control Operator in 1995. It is alleged that the respondent was recruited from Dar es salaam but later transferred to Bukoba where this dispute arose. On 10th July 2014, the respondent's employment was terminated. He complained for unfair termination before the CMA at Bukoba. The determination of the complaint finally revealed that the respondent's contract of employment was unfairly terminated. As the respondent constantly insisted reinstatement at work, his prayer was finally granted. For clarity, I wish to reproduce the excerpt from the CMA award thus:

'Kwa kuwa ushahidi umeonyesha kwamba mlalamikiwa alimuachisha kazi mlalamikaji pasipo kuwa na sababu yoyote ya msingi na kwa kuwa pia ushahidi umeonyesha mlalamikiwa pia hakufuata utaratibu halali katika kusitisha ajira ya mlalamikaji na kwa kuwa mlalamikaji kwenye CMA F1 aliomba kurudishwa kazini na wakati wa usikilizwaji wa shauri hili amekazia tena kuomba kurudishwa kazini pasipo kukosa ujira wake Tume hii inaona hakuna nafuu nyingine anayostahili mlalamikaji zaidi ya ile iliyopo kwenye kifungu cha 40(1)(a) ELRA 6/2004...Hivyo natoa uamuzi (Tuzo) mlalamikiwa kumrudisha kazini mlalamikaji chini ya kifungu cha 40(1)(a)ELRA 6/2004.'

I am glad that the award was written in the language that the majority of Tanzanians may comprehend without struggles. The further perusal of the award

does not depict nor suggest that the respondent's employment was halted after this award. If there was any arrangement after the decision of the CMA, then the court record is silent. Apart from the order of reinstatement, the Commission further detailed the respondent's entitlements after the reinstatement. To reiterate or rather clarify what the Commission directed, the respondent was entitled to his payments as if his employment was not terminated. In other words, the applicant was obliged to effect payment of all the monthly salaries from the date of termination (i.e. 10th July 2014) to the date when the respondent was reinstated. If this was the position, the respondent was not again entitled to the payment of subsistence allowance and any other costs of repatriation. The subsistence allowance and other terminal benefits could be paid if the award decided otherwise apart from reinstatement. On this point, I subscribe to the argument advanced by the counsel for the applicant that the CMA award was contradictory leading to confusion on what was due for the respondent after reinstatement.

The major contention in the instant application is what amount is the respondent entitled as subsistence allowance. The counsel for the applicant contended that the respondent was entitled to a subsistence allowance and not payment of per diems. I have no reason to be detained on this obvious point. According to the case law supplied by the counsel for the applicant, if the CMA has not ordered

reinstatement, the respondent could be entitled to subsistence allowance from the date of termination to the date of repatriation. Miss Masangya however invited the court to consider the fact that the respondent's contract of employment was terminated on 10th July 2014 and the offer of payment of subsistence allowance was issued on 13th December 2016 but the respondent declined and pressed for the payment of per diems instead. In other words, the counsel for the applicant was willing for the payment of subsistence allowance for 891. When reckoned on the daily pay from the respondent's basic salary, it is evident that the respondent was entitled to the payment of Tshs. 57,196/= per day which is equivalent to Tshs. 50,962,051/=.

However, considering the CMA award, I real find no justification for the payment of subsistence allowance in this case. The applicant cannot reinstate the respondent, pay him the monthly salaries from the date of termination to the date of reinstatement; again pay subsistence allowance and repatriation costs to the place of recruitment. If the applicant ever paid the respondent any penny apart from the payments associated with the respondent's reinstatement, then such payment were not backed up nor justified by the CMA award. In conclusion, according to the CMA award, the respondent is entitled to the payments which may be made to an employee after reinstatement. I am hesitant to believe that the employer may reinstate an employee, pay monthly salaries due and pay

subsistence allowance. If there was any arrangement between the applicant and the respondent after the award, then such arrangements do not feature in the court file. Court records are supposed to speak for themselves. In this case, such arrangement, if any, should be accommodated internally than seeking remedies behind the CMA award which did not provide the same. I hereby allow the application to the extent explained above. Order accordingly.

DATED at **BUKOBA** this 28th May, 2021.



Ntemi N. Kilekamajenga.
JUDGE
28/05/2021



Court:

Judgment delivered this 28th May 2021 in the presence of the counsel for the applicant, Ms. Theresia Masangya and the counsel for the respondent, Mr. Frank John. Right of appeal explained to the parties.



Ntemi N. Kilekamajenga.
JUDGE
28/05/2021

