IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(ARUSHA DISTRICT REGISTRY)

AT ARUSHA

REVISION APPLICATION NO. 45 OF 2020

(Original CMA/ARS/ARB/211/2018)

MASAI GIRAFFE SAFARIS LTD..... APPLICANT

Versus

CAROLINE WANJIRU MUNGAI ..... RESPONDENT

JUDGMENT

02/09/2021 & 07/10/2021

D. C. KAMUZORA, J;

Before the Commission for Mediation and Arbitration of Arusha (the CMA), **Caroline Wanjiru Mungai** (the respondent herein) filed her labour dispute vide CMA/ARS/ARB/211/2018 against her employer ~~**Masai Giraffe Safaris Ltd** (the applicant herein) claiming that she was~~ unfairly terminated from employment. Having heard the parties and exhibits tendered, the CMA in its award delivered on 26/06/2020 was satisfied that the respondent's termination was fair. The arbitrator however, ordered the applicant to pay the respondent terminal benefits of Tshs 2,000,000/= for notice, Tshs 2,000,000/= for leave, Tshs 426,500 for repatriation and Tshs 20,000,000 for subsistence allowance all culminating at a tune of Tshs 24,426,500/=.

The application is supported by affidavit deponed by Boniface Joseph, the advocate for the Applicant while the respondent opposed the application in a counter affidavit deponed by Shedrack Boniface Mofulu, the respondent's advocate.

Before delving into what was argued by the parties in respect of the revision, it is resourceful to demonstrate the facts of the case leading to this application, albeit briefly. The respondent was employed by the applicant in a position of Operation manager since September 2014. In the year 2018 the respondent incorporated a company in the name of GAMEMO TEMBO TREKS LTD and the respondent was the director of that company and shareholder with 40 shares of the company. It was alleged by the applicant that, the respondent's conduct was a breach of her working permit terms and the immigration laws. The respondent was terminated from her employment and she lodged a claim to the CMA vide CMA/ARS/ARB/211/2018.

In its award, the CMA declared the termination to be fair but awarded terminal benefits to the respondent. Upon being dissatisfied by the award to the respondent, the applicant preferred the present revision application praying for this court to call for record of the CMA at Arusha and examine proceedings and an award so as to satisfy itself on the legality and propriety, logical and rationality of the findings and the whole decision of the Arbitrator. The applicant is basically faulting the CMA award on terminal benefits, subsistence allowance and repatriation costs and CMA failure to consider the issue of loan advanced to the respondent by the applicant which is due for payment. For easy reference the following were put forward as grounds for revision;

1) *That the court be pleased to find that the Arbitrator seriously erred in law and fact in awarding the respondent subsistence allowance and repatriation costs while disregarding the respondent's prayer sought in the complaint form (CMA F1) wherein she sought for restatement.*

2) *That the Court be pleased to find that the Arbitrator seriously erred in law and fact in awarding the respondent terminal benefits (subsistence allowance and repatriation costs) despite finding that the respondent was fairly terminated based on misconduct.*
3) *The court be pleased to find that the arbitrator seriously erred in law and facts in awarding the respondent subsistence allowance of twenty-two disregarding that the respondent held dependant's permit having been married to a Tanzanian.*
4) *That the court be pleased to find the Arbitrator seriously erred in law and fact in failing to address the issue of a loan of Tshs 11,000,000/ granted to the respondent by the applicant which is due for payment.*
5) *That court be pleased to find that the arbitrator seriously erred in awarding the respondent total amount of Tshs 24,426,500/= without evidence on record and legal justification.*

At the hearing of the application, it was the parties' prayer and the Court acceded that hearing of the application be conducted by way of written submissions.

Submitting in support of the 1st ground of revision Mr. Nyerembe argued that, from record of the CMA in form No. 1, the respondent prayed only for reinstatement following unfair termination. That, since the form is a pleading then the respondent is bound by it and all the reliefs must come from the said pleading. That, the act of the arbitrator to award the respondent subsistence allowance and repatriation was invalid. To support this argument the counsel for the applicant referred the cases of; **Makori Wassanca V Joshua** [1987] TLR 88, **Bosco Stephen v Ngamba Secondary School,** Revision No. 38 of 2017 (Unreported) **Mantra Tanzania Limited V Joaquim P. Bonaventure**

Consolidated Revision No. 137 and 151 of 2017 HC (Unreported) and **Eckson Mtafya v Maiko Mtafya** Probate Appeal No. 06 of 202 (Unreported).

Submitting for the 2nd ground of Revision, Mr. Nyerembe argued that, since the CMA regarded the respondent's termination as fair termination then, the grant of the terminal benefits by the arbitrator which was not proved and claimed in CMA form No. 1 was wrong. Mr. Nyerembe further stated that, despite the fact that repatriation and subsistence allowance are provided for under Section 43 of the Employment and Labour Relations Act, the same had to be claimed for. To cement that point he cited the case of **Riakdit Barnabas V BP Tanzania Limited** (2014) LCCD 1129 as cited in the case of **Mantra Tanzania Limited**(supra).

Arguing on the 3rd ground of Revision Mr. Nyerembe submitted that, under page 49 of the typed proceedings the respondent stated that she came to Tanzania on year the 2010 and she was married in Tanzania and she did possess a dependant pass. That, on the year 2014 when the respondent was recruited for employment, she came from Arusha and not Nairobi thus, not entitled to repatriation costs and the subsistence allowance as there was no clear evidence from the employment contract about the place of recruitment. That, the CMA award was made without hearing parties concerning the place of recruitment.

Arguing in support of the 4th ground Mr. Nyerembe submitted that, the respondent was given loan by Nickson who is the applicant's director and the owner. That, the amount of loan was Tshs 19,000,000/= as evidenced by exhibit P5. That, after termination the sum of Tshs 7,500,000/= was deducted from the loan as her terminal benefits and the remaining balance of Tshs 11,500,000/= remained unpaid. Mr.

Nyerembe was of the view that, if the Arbitrator made finding on the terminal benefit, it was necessary to order the respondent's terminal benefits to be deducted to pay the loan but the arbitrator did not make finding on such aspect. To cement this, the case of **Salum Mhando v Republic [1993] TLR 170** was cited and the counsel for the applicant urged this court to make a finding on the non-direction and misdirection on evidence.

Submitting on the 5th ground Mr. Nyerembe argued that, the award of Tsh 24,426,500/= by the arbitrator to the respondent was with no any justification since the respondent did not prove if she was entitled to the said awards. The case of **Sangija Joseph Masaaga V Ultimate Security Ltd**, Revision NO. 566 of 2016 HC (Unreported) was cited to buttress his submission on part of grant of annual leave.

Regarding payment of one month in lieu of a notice of termination, the counsel for the applicant submitted that, the respondent was not entitled to such amount since payment was made by way of deduction from the loan she took. In concluding the submission, the applicant's counsel prayed that the revision be allowed and the award by the CMA be set aside.

Responding to the 1st ground based on the disregard of the respondent's prayer sought in the complaint form (CMA F1) Mr Mofulu submitted that, the arbitration stage is guided by part III of the Labour Institution (mediation and Arbitration Guidelines) G. N No. 67 of 2007 together with the Employment and Labour relations Act Cap 366 R. E 2019. That, the above laws and the Labour institutions (mediation and Arbitration Guidelines) GN No. 67, Rule 32(5) empowers an arbitrator to make an award of appropriate compensation based on the circumstance of each case.

On the 2nd ground Mr. Mofulu submitted that, the applicant proved that the termination was fair but failed to prove that the procedure for termination was also fair hence led to the payment of compensation. He pointed out that, the payments on termination of employment are provided for under section 44 of the Employment and Labour Relations Act [CAP 366 R.E 2019]. That, it was the duty of the applicant to prove that the payments were made and it was not the duty of the respondent to prove such fact thus, the award by the arbitrator was valid since the applicant prior to the termination of the respondent's employment was obligated to issue the respondent with notice of termination or in lieu one month salary but the same was not done.

For the 3rd ground Mr. Mofulu submitted that, the respondent obtained dependant pass upon being unfairly terminated form employment and her working permit being cancelled by the applicant. The respondents counsel added that, the fact that the respondent is married to a Tanzanian does not deprive her the right to the payment of the subsistence allowance and neither does section 44(1)(f) of CAP 366 deprive the foreigner of the right to repatriation costs.

Mr. Mofulu further submitted that, admitting that she came to Tanzania for the first time on 2010 does not mean that she came for employment or that she was married in Tanzania on 2010. He insisted that, award was just because the respondent was recruited from Nairobi-Kenya and brought to Tanzania by the applicant only to work as applicant's employee. That, the respondent was issued with work permit by the applicant and that justifies that the respondent is not a Tanzanian. The counsel maintained that, the fact that the respondent was recruited from Nairobi justify repatriation costs back to her main land.

Regarding payment of subsistence allowance the counsel for the respondent submitted that, the award was reasonable bearing in mind that after termination of her employment the respondent was not repatriated to the place of recruitment thus incurred daily expenses for survival pending her repatriation. That, the award for subsistence allowance was reasonable counted from the date of termination. He contended that, the claim that the respondent was married to a Tanzanian is an afterthought and cannot justify denial of subsistence allowance. To flatter his submission the counsel for the respondent cited the cases of **Security Group (T) Ltd V Mashaka Setebe** Revision No 54 of 2917 HC (Unreported) and **Paul Yustus Nchia V National Executive Secretary CCM and another** Civil Appeal No. 85 of 2005 CAT (Unreported)

Submitting on the 4th ground Mr. Mofulu argued that, the issue of loan had never been an issue before the CMA and further that, the issue of the said loan was a private arrangement between the respondent and the Director of the applicant who was not joined as part of this dispute and the said director was not summoned as a witness to justify the said claim. He thus stated that, the Arbitrator was correct not to deal with the issue of loan since it was not part of the dispute.

On the 5th ground Mr. Mofulu reiterated his submission on ground 2 and added that, the fact that the procedure for termination were not followed the arbitrator was correct to grant of the award.

In concluding, the respondent's counsel prayed for this court to find that the applicant has failed to justify his fairness in ending the employment relationship with the respondent thus prayed for the application to be dismissed with costs.

In his rejoinder the applicant's counsel, Mr Nyerembe reiterated his submission in chief and added that, what was prayed for by the

respondent was reinstatement and not subsistence allowance and repatriation costs. That, there was no clear evidence of the respondent's place of recruitment.

On the issue of loan, the counsel for the applicant submitted that, before the CMA it was not disputed by the respondent and it ought to be kept under consideration in regarding the reliefs entitled to the respondents since the loan was advanced to the respondent by the director of the applicant. Mr. Nyerembe also re-joined that, under section 39 of The Employment and Labour Relations Act Cap 33 R. E 2019 the employer is required to prove that the termination was fair while on the side of reliefs such as subsistence allowance repatriation costs and annual leave are to be proved by the part who claims them. The counsel insisted that, the arbitrator was wrong to shift the burden to the applicant. He thus prayed for the application to be allowed and the award by the CMA be quashed and set aside.

I have gone through the CMA records, the affidavits for and against the application as well as the submissions by the counsel for the parties. The main issue calling for this Court's determination is whether the award by the CMA was valid and in dealing with this issue, I will deliberate on the grounds listed in the chamber application.

The first ground entirely touches the validity of the Arbitrator's award of subsistence allowance and repatriation costs to the respondent while the same were not pleaded under the CMA form No. 1. The main concern here is to determine whether the respondent was entitled to be repatriated to Nairobi and if the answer is in affirmative then whether the respondent was entitled to be paid subsistence allowance upon termination of her employment.

Section 43 of the Employment and Labour Relations Act CAP 366 R.E 2019 provides as follows: -

"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 effects 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

According to the evidence by the respondent (DW1) before the CMA, the respondent is a Kenyan who came in Tanzania to work with the applicant and started working on 1st September 2014. Exhibits R3 shows that, the respondent was issued with a resident permit as she was a Kenyan by Nationality and under Exhibit R1 the respondent was issued with a working permit to work with the applicant as Operation Manager. This suffice to hold that, the respondent was recruited from Kenya to work with the applicant at Arusha thus upon termination, the respondent was entitled to be repatriated to Kenya and not Arusha which is her working station with the applicant.

Having determined that the respondent was entitled to be repatriated to her recruited domicile then in my considered view, the respondent was also entitled to be paid subsistence allowance from the date of termination to the date of payment of repatriation allowance. This court was once faced with the similar situation in the case of **National Microfinance Bank V Ediltruda Nemes Lyimo**

(Administrator of the estate of late Eliarnga Ngowi) Revision No. 705 of 2017 (Unreported) where this court (Muruke J.) held that,

> *"It is true that the claims before CMA are initiated by the CMA Fl, where the complainant has to state the reliefs sought. It is also undisputed that the relief of subsistence allowance was not pleaded by the respondent in his CMA Fl, while initiating his complaint. However, it is a requirement of the law under Section 43(1) of CAP 366 RE 2019 that, after termination regardless of the reason the employer has to repatriate the employee who has been terminated in a place other than the place of recruitment. The employee to be repatriated, is entitled to subsistence allowance to the day when the employer will pay his repatriation costs. Therefore, subsistence allowance is a statutory right to the employee. "*

In the present matter, having concluded that the termination was fair, the employer was still responsible to repatriate the employee who was terminated from the employment. Thus, despite the fact that the CMA Form No 1 did not provide claims for repatriation and subsistence allowance, the respondent was still entitled to be paid the same since it is a statutory right and the evidence on record proves that the respondent was recruited from Kenya to Arusha to work with the applicant.

The cited cases by the applicant in this aspect are distinguishable because, despite the fact that all claims and reliefs must come from the pleadings, statutory rights like repatriation and subsistence allowance are entitled to be paid to the employee even if not expressly pleaded for. This is because the employer is under duty to properly terminate the contract of employment by paying all entitlements prescribed under the

law. As it was not proved by the applicant if the terminal benefits were paid to the respondent at the time of terminating the employment, it is my considered view that, the arbitrator had mandate to order payment of subsistence allowance even if it was not pleaded in CMA Form No. 1.

In answering the 2nd ground, the pertinent matter to regard here is whether payment of terminal benefits (subsistence allowance and repatriation costs) is to be paid even when the termination of employment was done for a fair reason based on misconduct by the respondent. Section 43(1)(c) of Cap 366 is clear and requires that, after termination of employment regardless of the reason for termination, the employer has to pay terminal benefits to the employee. The fact that the respondent had a valid employment contract with the applicant, and the fact that the contract itself shows that she was recruited from Kenya, surface to entitle her to repatriation costs. This is also the position in the case of **Paul Yustus Nchia V. National Executive secretary CCM and another**(supra) at page 6 where the Court of Appeal held that,

> *"It is evident from exhibit P2 that there was a contract of employment between the appellant and the respondents. The place of engagement was Dodoma. However, when the contract was terminated, the appellants place of employment was Lindi. Therefore, in terms of section 53 (1) of Cap 366 above, the respondents were enjoined to repatriate the appellant to the place of engagement, Dodoma."*

I therefore subscribe to the above finding and conclude that, since the place of engagement by the respondent was in Kenya then upon termination of her employment by the applicant she was entitled to be repatriated to the place of engagement and failure to do so, the

respondent was entitled as well to the payment of subsistence allowance.

Regarding the 3rd ground the counsel for the applicant argued that, the award of subsistence allowance was made in disregarding the fact that the respondent held dependant's permit having been married to a Tanzanian. I find this argument wanting because, from the record of the CMA, the subsistence allowance was awarded based on the fact that the applicant employed the respondent who was a non-citizen and she was issued with working permit. Her contract with the respondent was not based on dependent's permit rather to the fact that she was a Kenyan by origin thus, for her to work in Tanzania she needed a working permit. Her work permit which is also part of the records reveal that, she was in Tanzania working with the applicant as Operation Manager. The respondent was properly terminated but not paid her transport costs as required by law under section 43(1)(a) and (b) of the Employment and Labour Relations Act, No. 6 of 2004, as well as daily subsistence expenses during the period between the date of termination of contract and the date of transporting the employee and his family to the place of recruitment as per section 43(1)(c) of the Act. Thus, arbitrator properly awarded subsistence allowance to the respondent pursuant to Regulation 16 of The Employment and Labour Relations General Regulations, GN. No 47 of 2017 where the subsistence allowance is quantified pursuant to the daily basic wage. The subsistence allowance was computed only for ten months irrespective of the fact that the respondent stand unrepatriated to date. But as the same was not challenged by the respondent I do not see any reason to interfere with that award. Since there is an express provision of law stating on how to compute the subsistence allowance and as the respondent before the CMA stated her salary to be Tshs 2,000,000/=

and no any other evidence was adduced by the appellant in contravention of the said salary then, the computation by the CMA was proper and valid.

Regarding the issue of loan as raised at ground 4 it was argued by the applicant that, the arbitrator erred for failure to address the issue of loan advanced to the respondent which was due for payment. In responding to this ground, I will be guided by the evidence on record. Exhibit P5 which is the loan agreement executed on 30th May 2016 indicate that the amount of Tshs 19,000,000/= granted to the respondent as a loan. Basing on exhibit P5 the loan agreement was between Nickson Medvais Moshi (lender) and Caroline Gabriel Mollel (Borrower). Considering the evidence in records I agree with the submission by the counsel for the respondent that the said loan was not issued by the applicant rather it was a private arrangement between the respondent Nickson Medvais Moshi. The Arbitrator was therefore very right not to consider the advancement of the said loan in determination of the entitlements of the respondent and this is due to the fact that, parties to the loan agreement are different to the parties in labour dispute. The wordings of the loan agreement did not specify that the lender extended the loan facility for or on behalf of the applicant herein thus, deduction could not be considered as proper in this matter.

Coming to the 5th ground it was argued that, the award of 24,426,500/= to the respondent was without any legal justification. I find this ground baseless. It must be noted that, it is the duty of the employer to prove that termination was fair in both the reason for termination and the procedure used in termination. This is the requirement of the law under Section 37 and 39 of The Employment and Labour Relations Act Cap 366 R. E 2019. Upon termination of employment the employee is be paid entitlements prescribed by the law.

Based on Exhibit P4 the respondent's termination of employment was fair but no any terminal benefits were paid to the respondent as required by the law. The applicant was unable prove that all the terminal benefits of the respondent as provided for under section 44 of the Employment and Labour relations Act Cap 366 R.E 2019 were fully paid to the respondent upon termination of the employment contract. The arbitrator discovered noncompliance of termination procedures hence awarded the respondent with repatriation costs, subsistence allowance, notice and leave as per the CMA award. I find the conclusion by the Arbitrator to be a proper and a just decision.

From the above arguments and reasons there to, I am in total agreement with the CMA conclusion that termination of the respondent's employment was fair in terms of the reasons of termination but the procedure for termination was not complied with hence the award of terminal benefit was proper. The application is therefore devoid of merits hence dismissed in its entirety. The CMA award remains undisturbed. The application for revision is therefore dismissed. I make no order as to costs.

.....

D.C. KAMUZORA

JUDGE

21/10/2021