THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(DISTRICT REGISTRY OF MTWARA)

AT MTWARA

LABOUR REVISION NO.01 OF 2021

(Originating from Labour Dispute No.CMA/MTW/LD/143/17)

STELLA MARIS MTWARA UNIVERSITY COLLEGE ..... APPLICANT

VERSUS

MARO MSAMBA .....RESPONDENT

Date of last Order on: 26/10/2021
Date of Judgment on: 30/12/2021

JUDGMENT

MURUKE, J.

Maro Msamba,(respondent) was employed by the applicant as Assistant Lecture in the Department of Mathematics/Economics/Commerce, (as it then was), Faculty of Business Administration, with effect from the 14th November 2011. The Respondent was offered a three years renewable contract, where he served for two terms, and completed his second contract period on the 6th October 2017. He was given a notice of the applicant's decision of non-renewing of his contract on 22nd August 2017. Respondent visited applicant's premises on 6th November 2017, presenting a letter acknowledging acceptance of the applicant's letter and decision,

but also stipulating his claims for Gratuity, accrued salaries, Part-time claims, transport costs in the total Tzs. 28,961,737. Applicant agreed to make payment for the undisputed claims of 17,008,562 being gratuity of 14,111,737 plus arreas of salary to the tune of 2,896,825 and had already started paying the Respondent an initial payment of Tzs.2,000,000/-;

Respondent was advised by applicant to present his luggage and personal effect to the Applicant, for the Applicant's Policy is to provide a paid vehicle for transport in accordance to clause 6(c) of the Respondent's Contract of Employment, but the Respondent, instead wanted cash, that applicant refused to pay. Thereafter, the Respondent lodged this claim against the Applicant on 30th November 2017 to the Commission for Mediation and Arbitration – Mtwara Zone (the "CMA"), claiming to be paid Tzs.45,995,043 in total.

On 11th December 2018, CMA Hon.Kweka as Arbitrator delivered the award in favour of Respondent as follows:

(i) Gratuity TShs.14,111,737/=
(ii) Arrears of Salary August and September 2,896,825/=
(iii) 2017 Annual leave TShs.1,990,000/=
(iv) Costs of reparation for him and his family.
(v) Substance allowance from the day contract enacted to the date of fully payments at the rate of 1,990,000/= months delayed.

In totality, Arbitrator ordered payment of 18,990,562/= to the respondent as of 10th December 2018. Same dissatisfied appellant, thus filed earlier revision that was struck out for incompetence. Then filed present, Revision

application, major complain being: (1) That Arbitrator erred in the award when ordered:

(i) **Subsistence allowance from 6th October 2017 to the date of payments.**
(ii) **Leave allowance for the year 2017 to the tune of 1,990,000/=**
(iii) **Transport costs from Mtwara to Mara to be paid in case to the respondent.**

Upon being served, with present application, respondent filed counter affidavit refuting applicant's claim. On the date set for hearing, applicant was represented by Mr. Msalenge and Kambona learned advocate while Respondent was represented by Steven Lekey learned advocate. By consent, hearing was ordered to be by way of Written submission. Both parties complied hence this ruling.

Having gone through both submission, pleadings and CMA records issue for determination before this court are:-

(i) Whether respondent is entitled to cash payment for transport costs from Mtwara to Mara.
(ii) Whether respondent is entitled to be paid subsistence allowance from 6th October 2017 to the date of fully payments.
(iii) Whether respondent is entitled to leave allowance for the year 2017.

Before answering first issue raised, it is worth noting that, payment of repatriation and subsistence allowances has been provided by Section 43 (1) of the Cap.366 R.E 2019, which reads:

"Section 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 substance 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.

(2) An allowance prescribed under subsection (1) (c) shall be equal to at least a bus fare to the bus station nearest to the place of recruitment. [Emphasis is mine].

This position has been cemented in a number of Court decisions including the case of **Paul Yustus Nchia v. National Executive Secretary CCM & Another,** Civil Appeal No.85 of 2005, CAT Dar es Salaam (unreported) where it was held that:-

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

From the above position of the law, repatriation costs are paid to the employees who were terminated out of a place of recruitment. The law, clearly states that, the employer can either transport the employee and his personal effect to the place of recruitment, or pay for the transportation of the employee to the place of recruitment, or pay the employee an allowance for transportation to the place of recruitment. Thus, subsistence

allowance is paid when the employer delayed to repatriate the employee from the date of termination.

According to employment contract between the parties herein, admitted as exhibit KM-1, clouse 6 (c) read as follows:

> **"Where an employee is travelling on first appointment or on termination of service, with respect to transport and of personal effects, the following limits will be observed:**
>
> **(i) an employee in the salary scale of STEMMUCO 8 and above:3,000kg**
> **(ii) an employee in the salary of STEMMUCO 3-7: 1,500kg.**
> **(iii) all other employee of STEMMUCO 1-2: 1,000kg.**
>
> **However, STEMMUCO reserves the right to provide its own vehicle for transport and transport fee will be paid to railway or transporting company and not directly to the employee once the luggage is weighed at railway station."**

From the wording above, applicant reserve right to provides its own vehicle for transport and transporting fee to be paid to railway or transporting company and not directly to the employee once the luggage is weighed at railway station. The above are terms of the agreement agreed and signed between the parties, same was tendered by respondent .

It is worth noting that, contract may be agreed upon, either orally, or in writings, or both. Where the contract has been reduced to writing, the actual contents of the contract present little difficult for the court, since they are apparent from the document or documents submitted. The role of the court here is to decide issue concerning the interpretation of a particular term or terms within the contractual document. It should be also noted that, every contract is based on a promise or a set of promises made by one or group of person to another and that promise needs to be worked on or

performed in order to make a valid, binding contract. But if one omits to perform that promise without a valid reason, it amounts to a breach of contract and the law provides remedy.

Section 39 of the Law of contract Act Cap 345 R.E 2009 provides.

> *39.* when a party to a contract has refused to perform, or disabled himself performing his promise in its entirety, the promise may put an end the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

Applicant agreed in terms of clouse 6 (c) of employment contract on mode of transporting respondent luggage upon completion of the contract. This is what applicant and respondent agreed. Throught proceedings at the trial tribunal, applicant has not denied such liability. The denial is to give cash to the respondent and not otherwise. There is no evidence adduced by the respondent that, he did in terms of clouse 6 (c) of their contract that appellant refused to head. Issue raised by respondent that there is no Railway service at Mtwara cannot be accepted. The clouse did not only say railway service, Wording of clouse 6 (c) of the contract are so clear, they read that:-:

> "fee will be paid to railways or transporting company, and not directly to the employee."

The words of the contract are very clear, insisting the fee not to paid direct to the employee." From the above clear wording of the contract, applicant, cannot be blamed. Thus, issue number one is answered in the negative that, Respondent is not entitled to cash payment for transport costs from Mtwara to Mara

Equally so, same exhibit KM-1 clouse 6 (c) clearly provides the manner in which respondent belongings can be transported from Mtwara to Mara. Issue number two is clearly answered by the terms of the contract clouse 6 (c) of exhibit KM-1. Legally terms of contract has to be adhered to. These are what parties have agreed to follow. Parties are bound by their agreements, they freely entered into. i.e sancity of a contract. Same was discussed in the case of **Abualy Alibhai Azizi Vs. Bhatia Brothers Ltd [2002] T. L.R. 288** at page 289 where Court held that:-

> ***"The principal of sanctity of contract is consistently reluctant to admit excuses for non performance where there is no incapacity, no fraud actual or constructive or misrepresentation, and no principle of public prohibiting enforcement"***

Insisting on Principal of Sancitity of contract Court of Appeal in recent decision at Mwanza in the case of **Simon Kichele Chacha Vs. Areline M. Kilawe Civil appeal no 106/2018** (unreported) where Court held at page 9 that:-

> ***"With the same spirit of the principle of sanctity of contract and being mindful with the clauses of the Exhibit PI, we are reluctant to accept the appellant's excuse for non-performance of the agreement which he freely entered with sound mind. On our part, we are satisfied that the contract entered between the appellant and the respondent had all attributes of a valid contract. It was not prohibited by the public policy and it is on record that the appellant was not complaining about his consent to the agreement being obtained by coercion, undue influence, fraud or misrepresentation in order to make it voidable in terms of the provisions of section 19 (1) of the Law of Contract Act, Cap. 345 R.E 2002. We therefore wish to emphasis here that since the appellant at the time he concluded Exhibit PI with the respondent was a free agent and he was of sound mind, he must adhere and fulfill the***

terms and conditions of it. But so long as the first appellate court reduced the contractual interest from 30% to 5% per month and the respondent did not appeal against it, we find no good reason to alter the interest of 5% per month awarded by the first appellate court. More so, the respondent submitted, in his oral and written submissions, that he was satisfied with the finding of the first appellate court"

The duty of the court is to ensure that what was written is what should be adhered. Court is not a forum for parties to change terms of contract, but rather, to enforce what parties have agreed. Thus, since there is no evidence on records brought by respondent to prove that he submitted costs of repatriation of his luggage and his family in terms of clouse 6 (c) of employment contract and refused by applicant, then respondent is not entitled for subsistence allowance. Thus issue number two is answered in the negative that respondent is not entitled to subsistence allowance from 6th October, 2017 to the date of fully payments. Thus same is quashed and set aside.

Last issue is on leave allowance. Leave allowance is right of an employee every year. There was no any evidence in the trial tribunal records tendered by the applicant to prove if respondent was paid his leave due in 2017. Thus, is entitled to be paid. Therefore issue number three has been answered in the affirmative, that respondent is entitled to leave pay for the year 2017.

In totality, revision allowed as follows:

1. Order for subsistence allowance from 6th October 2017 to the date of fully payments is quashed and set aside.

2. Costs of repatriation respondent and his family will be in terms of contract of employment clouse 6 (c).
3. Respondent to be paid his annual leave for 2017.
4. Respondent to be paid Gratuity of 14,111,737 not disputed by applicant.
5. Respondent to be paid arrears of salaries to the tune of 2,896,625 not disputed by applicant.
6. Amount of 2,000,000/= already paid and received by respondent to be excluded.
7. Since this claim started way back 2017, to date, the amount ordered above, to be paid within three months from 1st January, 2022.
8. From the nature of thiscase each party to bear own costs.

Z.G. Muruke

Judge

30/12/2021

Judgment delivered in the presence of Alex Msalenge for Applicant and Stephen Lekey for the Respondent.

Z.G. Muruke

Judge

30/12/2021