

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT ARUSHA

LABOUR REVISION NO. 117 OF 2021

(Originating from Labour Dispute No. CMA/ARS/619/19/232/19)

SABAS MARTIN KAYOMBO.....APPLICANT

VERSUS

TANZANIA PLANTATION AND AGRICULTURAL WORKERS UNION

(TPAWU).....RESPONDENT

JUDGMENT

19/09/2022 & 21/11/2022

GWAE, J

The applicant, Sabas Martin Kayombo was an employee of the respondent, TPAWU on a permanent contract since 1st January 1998 on the position of a driver. His employment came to an end for the reason of retirement on 30th June 2017. The applicant's claim before the Commission for Mediation and Arbitration (Commission) was on the unfair deductions of his retirement benefits. According to his Referral Form (CMA Form No. 1) the applicant is claiming a total of Tshs. 25,797,580/= being claims of subsistence allowance and arrears of gratuity.

At the Commission, the applicant alleged that according to his retirement letter which was admitted as exhibit P1 he was entitled to be paid Tshs. 49,391, 308/= as retirement benefits however the respondent paid him almost Tshs. 36,000,000/= which were paid in ten instalments. Exhibit P2, a bank statement was tendered by the applicant and according to the said exhibit, the applicant informed the Commission that, the amount unpaid was Tshs. 12,856, 696/=. The applicant also claimed for subsistence allowance from 01/07/2017 to the time of filing his complaint since the same was not paid to him.

The respondent through the evidence of one John Valeye disputed the applicant's claims and testified that, the applicant was paid his retirement benefits through the bank account and that they did not expect the applicant to remain living in Arusha as the amount he was paid included the transport allowance to the place of recruitment. However, the respondent admitted that, the applicant is only entitled to be paid subsistence allowance for 33 days which are the days he stayed in Arusha while waiting for his retirement benefits. With regard to the due amount claimed, the respondent testified that, the amount was deducted by the TRA since the applicant's gratuity payment was subject to such deduction therefore that had nothing to do with the respondent and that if the

applicant had any query, he should have referred the same to the proper authority.

Having considered the parties' evidence, the Commission gave its decision in favour of the respondent and hold that, the applicant was paid the subsistence allowance on 04/08/2017 and therefore he is not entitled to be paid subsistence allowance of 44 months as he claims since his remain in Arusha Region was at his own peril. However, as admitted by the respondent, the Commission ordered for the payment of subsistence allowance of only 35 days which are the days from when the applicant stayed in Arusha waiting for the payment of his retirement benefits to the date when he was fully paid. As to the issue of the amount deducted by the TRA the Commission was of the view that such claims could not be entertained by the Commission as it is not the proper forum to do the same.

Dissatisfied by the award of the CMA, the applicant has filed this application challenging the decision of the Commission on the following grounds;

1. That, the honourable Arbitrator misdirected himself by holding that the Commission for Mediation and Arbitration is not a

proper forum to entertain claims for unlawful deductions of retirement benefits.

2. That, the Honourable Arbitrator was improper by holding that the respondent delayed the payment of retirement dues for only 33 days while the last instalment was affected on October 2018 that is 16 months after retirement.
3. That, the honourable Arbitrator erred in fact by failure to observe that the first instalment was made by the respondent to the applicant was ambiguous.
4. That the honourable arbitrator was improper for failure to consider the testimonies of the respondent's sole witness who admitted that the applicant when retired on 30th June 2017 was not given any statutory benefits until 4th August 2017 when he was given Tshs. 2,533,800/=]
5. That, the honourable arbitrator erred in law by failure to consider the requirement of the law provided under s. 43 (1) (2) of Employment and Labour Relation Act.
6. That, the award does not reflect the proceedings of the case.

At the hearing of this application the applicant was represented by the learned counsel, **Ms. Anna Mnzava**, the respondent on the other hand

was represented by **Mr. John Vahaye** (Deputy General Secretary of TPAWU) respectively. With leave of the court the application was disposed by way of written submissions nevertheless, grounds number 4 and 6 were abandoned. I shall consider the submissions while disposing this application.

As grounds number 2,3 and 5 were argued together I shall also dispose them collectively. In these three grounds, the applicant is claiming that, the respondent failed to observe the requirement of section 43 (1) of the Employment and Labour Relations Act Cap 366 R.E 2019 by not paying him the subsistence allowance for all the period he was waiting for his full payment. The applicant also challenged the holding of the Arbitrator that the respondent delayed payment for only 35 days while his payments were made into instalments. Actually, he also contended that even when he was paid his first instalment the respondent did not inform him if the same was meant for transportation.

In support of this argument the applicant cited the case of **Lucy Edward vs Pastoral Women's Council**, Labour Revision No. 41 of 2021. Therefore, it was his contention that he continued to stay at the working place waiting for his transportation costs and thus the respondent

is duty bound to pay him daily subsistence expenses for all the period he stayed at his working place.

Responding to these grounds, the respondent submitted that the only period the applicant remained unpaid is 35 days. The respondent went further to submit that on 4th August 2017 the applicant was paid his first instalment Tshs. 2, 533, 800/= which was meant to carter for transportation. The respondent also disputed the fact that, the applicant was not informed that the 1st instalment was meant for his transportation as even in his retirement letter the transportation costs were well elaborated.

From the parties' arguments this court is called upon to determine whether the applicant is entitled to be paid subsistence allowance from the date of retirement to the date of transportation. Section 43 (1) (a), (b) & (c) of the ELRA provides as follow;

"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."

Guided by the above provision of the law, this court had time to go through the entire records of this application. The records of the Commission reveal that at the time of retirement the applicant herein was issued with a retirement letter which was admitted as exhibit P1. In this letter among others, the respondent described the retirement benefits that the applicant was entitled and one of them was on transportation to the place of recruitment. For purposes of reference the part of the letter is hereby reproduced;

"Stahili za malipo yako ya kustaafu kwa mujibu wa kanuni za utumishi na mkataba wa hali bora za wafanyakazi TPAWU ni kama ifuatavyo;

- 1. Malipo ya Bakshishi (Gratuity) Tshs. 46,857,508/=*
- 2. Nauli ya kurudi nyumbani kwako Tshs. 286,800/=*
- 3. Nauli ya mizigo Tshs. 2, 247,000/= "*

From this exhibit it is undisputed that the applicant was made aware of his retirement benefits which included transportation to the place of recruitment. The question that follows is whether the transportation costs

were paid to the applicant. Essentially, this is the centre of the dispute between the parties. On one hand the applicant admits to be paid his retirement benefits in instalments but was not informed if the same included the costs of transportation. The respondent on his part alleges that the 1st instalment of the payment was meant to cover also for transportation of the applicant to the place of recruitment. From the outset this court would wish to state that having gone through the "Kanuni za Utumishi Katika Chama Cha Wafanyakazi Mashambani na Kilimo Tanzania (TPAWU)" no mode of payment of the retirement benefit has been described, and since the applicant did not also dispute the mode of payment of his retirement benefit in instalments. This court finds it is prudent to leave the same undisturbed.

Back to the issue at hand, much as there is no prescribed mode of payment of the retirement benefits however in the matter at hand, the applicant does not dispute the fact that he received from the respondent the 1st instalment of his payment on 4/08/2017. The same is also reflected through the bank statements which were admitted as exhibit P2. The only problem here is the issue of notification. The applicant insists that yes, he received the same amount but it was not put to his knowledge that the same ought to have covered his transport to the place of recruitment and

that is why he remained to his place of work until his final instalment was paid. With due respect this argument is so irrational and illogical. It is unbelievable that the applicant was not aware that the payments that would be made to him were to include transportation to the place of recruitment. This court is of the firm view that since the applicant had his letter of retirement which demonstrated his retirement benefits then he was aware that transportation was one of them and as already stated above that the parties herein had no a formal mode of payment of the retirement benefit, the applicant was expected to be reasonable to use the money he was paid for his transportation. And if at all the applicant as he alleges that the 1st instalment was ambiguous, he was duty bound to make inquiry to the respondent for further information.

I have also had time to go through the cited case of **Lucy Edward** (Supra) when this court was faced with similar situation and it was of the same view, the applicant is only entitled to subsistence allowance if, she was not notified however since she was notified and unjustifiably declined to go to the office as required, she could not benefit from subsistence allowance due to her unjustifiable abstinence.

Since the issue of transportation is not in question this court joins hands with the CMA award that, the only period that the applicant is

entitled to be paid his subsistence allowance is the period from the date of his retirement to the date of payment of his 1st instalment (30/06/2017 – 04/08/2017) which is a total of 35 days.

Coming to the 1st ground, the applicant alleges he was entitled to be paid a total of Tshs. 49,391,808/= as his total retirement benefits as reflected in his letter of retirement but surprisingly, he was only paid Tshs. 36, 535,302/= therefore a total of Tshs. 12,856,506/= were unjustifiably deducted from his retirement benefits. He went further to state that even if the said amount was taxed but he was of the view that the same ought to have been deducted from the gratuity and not his transportation costs. The applicant also alleges that exhibit "D1" does not prove that the said amount was deducted as tax.

The respondent on his part submitted that, issues of taxation are to be dealt with in accordance to the Income Tax Cap 332, R.E 2019 which has established the bodies to determine disputes arising from income tax, hence the CMA was not a proper forum.

From the above submissions by the parties, this court finds that the issue in controversy is whether the amount of Tshs. 12,856,569/= was justifiably deducted from the applicant's retirement benefits. From the records at the Commission the respondent testified that, the said

amount was deducted by TRA. Exhibit D1 was tendered to justify the deduction however when the respondent's witness was cross examined as to where in the said document it was indicated that the said amount was deducted from the applicant's retirement benefits, he replied to have no knowledge about it and that, if the applicant had any question, he should ask the TRA officials for clarification. He went on stating that, the calculations were made by the TRA and that their duty was to implement what was already calculated by the TRA.

The law governing income tax is the Income Tax Act, Cap 332, Revised Edition, 2019 under section 81 (1) & (2) of the Act provides that, the employer is an agent of the authority in withholding the income tax from the employee's payment. In the matter at hand, the respondent's exhibit D1 tendered by the respondent's witness demonstrates that, the amount of 12,856,569/= was remitted from the account of the respondent but the same does not indicate that it was remitted for which purposes and on what calculations.

Worse enough in this matter a TRA official was not called on to give testimony as to how they arrived at the said amount and if the said amount was deducted the same was deducted as per Income Tax from the applicant's retirement benefits. It is the firm view of this court that, in

this particular case, the TRA official was an important witness or any document establishing to contrary to the respondent's version. I am of that view for an obvious reason that TRA is the one which deals with deductions of the income tax of an employee's payments including terminal benefits.

Moreover, it is worthy noting that, in this case the applicant was not involved in any way in the taxation. This court once faced with similar situation in the case of **Mbeya Cement Co. Ltd vs Philemon Mwalusamba & 9 Others**, Consolidated Labour Revision No. 11 & 16 of 2017 (Reported Tanzlii) and the court held that;

"That tax is calculated from basing on report issued by the employer in relation to the lumpsum payment payable to the employees. It is further the evidence on record that, the TRA having received information from the employer made assessment by the two Authority assessors the same was approved by DW1 who was the Chief Valuer, the approximations were sent to the employer, then TUICO on behalf of the employees lodged a complaint on the assessment which made the Authority to do re-assessment. From this piece of evidence available, it cannot be said that, there was no communication between the applicant (employer) and respondents (employees) and the TRA on the Taxation."

On the basis of the decision, this court finds that, the applicant failed to satisfactorily establish if the deductions of his terminal benefits at the tune of Tshs. **12,856,569/=** were not received by TRA, or that he was not supposed to pay income tax out of his terminal benefits. And or there are clear and express terms between the parties that, the applicant's terminal benefits would not be deducted by TRA (See **Esso Petroleum Company Limited v s. Mardon** (1976) 2 All ER 5

Similarly, the applicant was duty bound to make necessary follow-ups to the Tanzania Revenue Authority for clarifications of the deductions of his terminal benefits since he was informed by the respondent to that effect, the deductions were made by the TRA.

To this end, this court finds that, the claim of Tshs. 12,856,569/= having involved the TRA was prematurely brought up to the CMA as the applicant ought to have made an inquiry to the responsible Authority which would be responsible to his complaints. From that juncture, the applicant would be in a better position to know whether his terminal dues were legally deducted or not before filing a complaint to the Commission. Instead of prematurely filing the complainant. Should the applicant comply with the requirement of making an inquiry to the TRA and a response by the TRA being in his favour, he may re-file and for, the

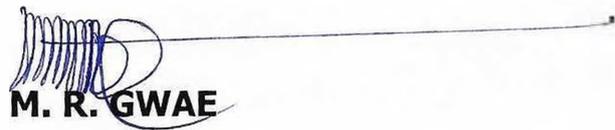
interest of justice, the time will start running against him from the date when he is served with the TRA's response.

In the event, the Commission impugned award is hereby sustained, the applicant is only entitled to be paid subsistence allowance for only 35 days as was rightly ordered by the Commission. Considering this matter is labour one, I shall make no order as to costs.

It is so ordered.

DELIVERED and **DATED** at **ARUSHA** this 21st November 2022




M. R. GWAE
JUDGE