

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(LABOUR DIVISION)**

(MOROGORO DISTRICT REGISTRY)

LABOUR REVISION NO. 19 OF 2021

(Originating from CMA/MOR/75 & 76/2019, Commission for Mediation and Arbitration, at Morogoro)

YONA MSOMI1ST APPLICANT

JOHN CHAGONJA2ND APPLICANT

VERSUS

THE REGISTERED TRUSTEES

OF THE ADVENTIST CHURCH1ST RESPONDENT

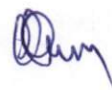
BOARD OF UFUNUO PUBLISHING HOUSE2ND RESPONDENT

RULING

CHABA, J.

This application for revision has been instituted by the applicants under Rules 24 (1) (2) (3) and 28 (1) of **The Labour Court Rules, GN No. 106 of 2007** and sections 91 and 94 (1) (f) of **The Employment and Labour Relations Act [Cap. 366 R. E, 2019]**. It aims to challenge the ruling of the Commission for Mediation and Arbitration (the CMA) dated 15/09/2021. The relief sought by the applicant is to call for and revise the CMA Award in Dispute No. CMA/MOR/75 and 76/2019.


Upon being served with the application for revision, the respondents filed notice of opposition, counter affidavit and notice of representation appointing



advocates Isaac Nassor Tasinga, Eunice Kabamanya and Gladys James Mziray from TAS Attorneys to represent them in court.

The genesis of the dispute is that Yona Msomi was permanently employed by the respondents in 1990 in a position named as Maintenance and later Machine Operator at Morogoro and John Chagonja was employed in the capacity of an Accountant in 2014 in one department called Sales Department, in Morogoro. They served up to March and February, 2019 respectively, before charged with the disciplinary offences including forgery of pay in slips, theft of the lesson books (Lesoni) and proceeds of lessons books sales at Ufunuo Publishing House worth Tshs. 4,645,000/=.

On 21st May, 2019 the first applicant was interdicted for ongoing investigation. Time lapsed without being restored to his job which he apprehended to be a constructive termination, but the second applicant was expressly terminated on 21/05/2019. Both were aggrieved by the employer's decision hence filed separate disputes at the CMA for claim of TZS. 222,491,539 (first applicant) and TZS. 214,205,576.92 (second applicant) respectively being salary in lieu of notice, salary arrears, leave arrears, repatriation costs, compensation equal to 100 months' salary for wrongful termination, subsistence allowance and general damages. These two disputes were consolidated.



At the conclusion of the hearing, the CMA ruled that the applicants' termination was unfair both substantively and procedurally and proceeded to order that: -

- 1) The applicants be reinstated to their original job posts without loss of earning which is TZS. 43,222,995.00 for the first applicant and TZS. 43,947, 000.00 for the second applicant, totaling to TZS. 87,169,995.00
- 2) Should the respondents choose not to reinstate the applicants, they will be required to pay them TZS. 86,120,073.46 and TZS. 80,724,576.92 of which the total amount is TZS. 166,844,650.30, being 12 months compensation, one month salary in lieu of notice, severance pay, repatriation costs and general damages.

However, the applicants were not satisfied with the award only on one aspect; failure by the CMA to award them subsistence allowance on daily basis accrual. Seeking for their rights, the applicants have knocked the door of this court and are inviting the court to intervene and decide whether the CMA was correct in its decision.

When the matter was called on for hearing, the applicants' counsel prayed to address the application by way of written submissions which was conceded by the adverse party. I granted the prayers advanced by the parties and made a scheduling order which was accordingly complied by the parties.

Mr. Mwanri, learned advocate for the applicants prefaced the written submission by pointing out that the application raised only one question: -

Whether the applicants were entitled to be paid subsistence allowance as one among the repatriation package accruing daily.

He went on arguing in line with section 43 (1) & (2) of **the Employment and Labour Relations Act [Cap. 366 R. E, 2019]** along with Regulation 16 (1) of **the Employment and Labour Relations (General) Regulations, GN. No. 47 of 2017** which generally and in total, provides for repatriation costs and subsistence allowance among others. He highlighted that the subsistence allowance as per the laws above is daily basic wage.

To reinforce his contention, he cited a number of cases including the cases of **Abubakar Meral Abbas and 2others vs. Lake Trans Ltd**, Revision No. 836 of 2019 and **General Manager Pangea Minerals Ltd vs. Migumo Mwakalasya**, Labour Revision No. 35 of 2008. He further referred this court to the decisions by the Court of Appeal of Tanzania in **Juma Akida Seuchanga vs. SBC Tanzania Ltd**, Civil Appeal No. 7 of 2019 and **Bahari Oilfield Services vs. Peter Wilson**, Civil Appeal No. 157 of 2020 wherein it was ruled that an employee terminated at a place other than his place of recruitment, will be entitled to subsistence allowance equating daily remuneration for the whole period between the date of termination to the date of repatriating the employee to the place of recruitment.

He pointed out what he called illegalities by the arbitrator, that the arbitrator did not award them subsistence allowance despite the fact that they

prayed for it in CMA F1 and during hearing, each of the applicant testified on aspect of subsistence allowance. He pointed out further that, their place of recruitment is outside Morogoro, that is Mara (Musoma) and Tanga respectively. The learned counsel contended that, the arbitrator ought to have awarded the applicants subsistence allowance, but he failed. This court should revise and award subsistence allowance.

On her party, the respondents through Mr. Isaac Nassor Tasinga, learned advocate replied in brief. He introduced concession of the background of the matter, the law applicable and precedents cited by applicants' counsel, save for the applicability of the precedents.

He countered the submission by the applicants on illegality by the arbitrator that even though they are disputing the whole award of the arbitrator, Mr. Yona Msomi was not terminated from employment, and he did not prove that he deserved to be paid subsistence allowance. Regarding the second applicant, John Chagonja, the learned advocate submitted that after termination he was asked to meet the employer for terminal benefits immediately, but he did not. He added that, at the CMA there was no evidence that he was still in Morogoro to deserve subsistence allowance. According to him, the second applicant moved back to his place of recruitment on the same day. It will be injustice if this court will grant the prayers sought by the applicants in this application.

On the strength of the above submission, Mr. Tasinga rested the case and invited this court to dismiss the application.

As regards to the issue of subsistence allowance, Mr. Tasinga asserted that the CMA was expected to base its verdict on the evidence available before it as it did on repatriation costs. Section 43 of the **Employment and Labour Relations Act** was referred earlier in general, and it provides on rights for repatriation and subsistence allowance altogether as follows: -

"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 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.***



(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.*

(3) *For the purposes of this section, "recruit" means the solicitation of any employee for employment by the employer or the employer's agent."*

From the wording of the above provisions of the law, it is evident that the rights to repatriation costs includes subsistence allowance at the rate stipulated by the law read together with Rule 16 (1) of the **Employment and Labour Relations (General) Regulations, GN No. 47 of 2017** which for convenience, I quote as hereunder: -

"The subsistence expenses provided for under section 43 (1) (c) of the Act shall be quantified to daily basic wage or as may, from time to time, be determined by the relevant wage board."

On reviewing the record, I observed that the contention between the parties on the issue of subsistence allowance has been born from the CMA's failure to award subsistence allowance in awarding other repatriation costs.

The relevant facts to be considered are on place of recruitment of the applicants, which in the case at hand it appears to have no disputes. When the place of recruitment is proved to be other than the place of termination, the law necessitates that repatriation be made on the employer's costs or the

employee be paid all the costs. Where repatriation is not made immediately after termination, of course convenience being taken into consideration, the employer shall pay the employee subsistence allowance for the time awaiting repatriation. The Court of Appeal of Tanzania has had an opportunity to interpret the provision of section 43 of **the Employment and Labour Relations Act** (Supra) in **Juma Akida Seuchanga's** case wherein it observed that: -

"It is beyond certainty that the section contemplated the payment of subsistence allowance to a person awaiting repatriation".

Therefore, it is settled position of law that subsistence allowance shall be payable unless under section 43 of the Act and considering the surrounding circumstances the employee did not qualify. In another case of **Nchia vs. Mapinduzi & Another**, Civil Appeal 85 of 2005, the Apex Court in the same trend held inter-alia that: -

"The word "repatriation" has not been defined in Cap. 366, ... It includes payment of "subsistence expenses". Therefore, subsistence allowance is payable to an employee upon repatriation, following termination of employment to the former employee's place of engagement."

It is on the basis of the above grounds that this court has failed to accept Mr. Tasinga's argument that the second respondent left immediately back to the



place of recruitment. A fair interpretation of the section together with rules, does not mean if the employee will leave to his place at his costs before being paid, then the right extinguishes. The purpose of the law was to assist the employee as a matter of right not to shoulder these costs, but the employer. That is why they are enforceable even when the employee has incurred his own costs as subsistence or repatriated on his own accord and subsisted by his other means. See: **Attorney General and 2 Others vs. Eligi Edward Masawe and 104 Others**, Civil Appeal No. 86 of 2002, CAT at Dsm.

Therefore, if there is evidence to the effect that the employee was terminated at a place other than place of recruitment, in addition to repatriation costs, he is entitled to subsistence allowance of equivalence to daily basic salary.

On reviewing the records at the CMA, it is evident that the CMA accepted the first and second applicant's place of recruitment to be Musoma and Tanga respectively. Then it proceeded to award them repatriation costs without making any specific observation and findings on subsistence allowance. It is my considered view in line with the position of the law, that the applicants deserved to be paid subsistence allowance from termination date to the date of repatriation. The CMA therefore erred in not awarding such remedy.

In the final analysis, and to the extent of my findings backed up by precedents of this Court and the Apex Court, this application has merits and it is hereby allowed. Under section 91 of **the Employment and Labour**

● **Relations Act**, this court revises the CMA Award to the extent of ordering the applicants to be paid subsistence allowance according to the law. In this case, where there were arrears and apprehension of constructive termination for the first applicant, the months for which the CMA Awarded salary arrears (unpaid) should be excluded. **I so order.**

DATED at **MOROGORO** this 12th day of December, 2022.




M. J. CHABA

JUDGE

12/12/2022