

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

THE DISTRICT REGISTRY OF TANGA

AT TANGA

CIVIL APPEAL NO. 7 OF 2020

*(Originating from Civil Case No 26 of 2004 of The District Court of Tanga
at Tanga)*

MICHAEL CHARLES.....APPELLANT

-VERSUS-

TANGA CITY COUNCIL.....RESPONDENT

JUDGMENT

Date of last order: 09/03/2022

Date of judgment: 16/03/2022

AGATHO, J.:

According to the plaint filed by Mr. Michael Charles, the Appellant in this case on 05th April 2004, in the District Court of Tanga at Tanga, he was an employee of the Respondent which was formerly known as Tanga Municipal Council as a primary school teacher. His employment was terminated with effect from 03rd June 2002 by a letter dated 24th April 2003 on disciplinary grounds, absenteeism to be precise. After having made several attempts to recover his rights after termination from the employer in vain, the Appellant herein resorted to file a civil case.

The reliefs sought by the Appellant in that suit were; fare, transfer and disturbance allowance for being transferred on 02nd July 1999 from Kombezi Primary School to Tongoni Primary School before termination; Paid-up leave allowance which he had undergone before his employment was terminated and lastly subsistence allowance from the date when his employment was terminated to the date when the Respondent repatriates him to his domicile that is Kwamndolwa Village at Korogwe District in Tanga Region at the rate of 30,000/= Tshs per day. He also prayed for 10,000,000/= Tshs as general damages for disturbances and inconveniences he and his family had undergone during the whole period.

The case was heard, decision was made and it reached the High Court, as a Civil Appeal No 14 of 2016 where this Court (Amour J) ordered for a retrial. An amended plaint to reflect the changes of the name of the Respondent's name from Tanga Municipal Council to Tanga City Council was subsequently filed on 03rd March 2019. Three issues were framed to be determined by the Court, which are:

- 1) Whether the plaintiff was entitled to repatriation?

2) Whether the plaintiff was paid his statutory benefits?

3) To what reliefs were the parties entitled to?

At the end of the case, the second issue was replied in the affirmative. However, the Court was of the view that this Appellant was not fit for being paid repatriation costs as he was terminated due to absenteeism. This is what irritated the Appellant and he approached this court with the following grounds of appeal; -

- 1. That the Hon District Court Magistrate erred in law and fact for declaring that the appellant is not entitled to repatriation*
- 2. That the Hon District Court Magistrate erred in law and fact for failure to properly analyze evidence of all parties before reaching her decision*
- 3. That the Hon District Court Magistrate erred in law and fact for holding that the Appellant was paid his statutory benefits*

The Appellant prays for this court to allow the appeal, quash and set aside all orders made by the District Court and lastly grant any other reliefs this court deems fit and just to grant.

In this Court, both parties were represented. Mr. Yona Lucas, learned Advocate stood for the appellant and the Respondent, and Tanga City Council was represented by learned State Attorney Sebastian Danda. The matter was set to be conducted by way of written submissions. I commend both sides for their thorough research which led to determination of this matter. These submissions will be referred to as I adjudicate on this matter without having to repeat what each side submitted.

From the grounds of appeal aforementioned, it is without doubt that this appeal surrounds itself in the claim for repatriation costs as a matter of right. Rights and benefits or entitlement of an employee are either statutory or contractual.

Before getting into deciding the merit of the case, I find it apt to clear out the air on the applicable law in this matter. The cause of action in this matter is termination of employment. The said termination according to Exhibit DI tendered in the trial Court was from 03rd June 2002. In 2002 the applicable law governing disputes between an Employee and Employer was The Employment Ordinance, Cap 366. The Employment Act, Cap 366 R.E. 2002 is part and parcel of laws revised and

printed under the authority of Section 4 of the Laws Revision Act, No. 7 of 1994 which incorporated amendments of Laws up to 31st July 2002. All laws in the Revised Edition 2002 came into force on the 01st day of September 2004. This is by virtue of GN No 312 published on 03/09/2004. In that case, when the cause of action arose on 03rd June 2002, and also when the matter was first filed in court on 05th April 2004, The Employment Act, Cap 366 R.E. 2002 had not yet come into force and hence could not be applicable. In the circumstance, the law Applicable in this case is The Employment Ordinance, Cap 366.

The provision regulating granting of repatriation costs in the Employment Ordinance, Cap 366 is Section 103 which is Section 112 in the Employment Act, Cap 366 R.E. 2002 and it provides as hereunder; -

"112 (1) Whenever an employee shall have been brought to the place of employment by the employer or by any person acting on his behalf the employer shall at the termination of the contract of service pay expenses of repatriating the employee

by reasonable means to the place from which he was brought, if the employee so desires.

Provided that an employer shall not incur liability under this section in respect of any employee who has not completed a period of service of at least three months' duration unless the proper authority shall so order or, in respect of an employee who at the completion of a written contract of service has waived his right to repatriation under Part V of the Act.

Mr. Danda acting for the Respondent in this case, alleges that this right has its exception and that is where termination is a result of a misconduct such as absenteeism as in the Appellant's case. He could not however prove this averment.

Sub section 2 of Section 103 provides;-

*(2) The proper authority **may exempt** the employer from his liability to pay the expenses of repatriation under subsection (1) of this section if the contract of service has been terminated **otherwise than by a reason of the inability of the employee to fulfil the contract owing to***

sickness or accident and the proper authority is satisfied

(a) That in fixing the rate of wages proper allowances has been made for the payment of repatriation expenses by the employee and

(b) that, suitable arrangements have been made by means of a system of deposited wages or otherwise to ensure that the employee has the funds necessary for the payment of such expenses

The case at hand is covered by Section 103 (2) (a) and (b) above. Given the provision of law as quoted above, the subsistence allowance **must be** payable upon repatriation, following termination of employment to the former employee's place of engagement or place of domicile. The same was held in **District Executive Director Tabora District Council v Munawika Msengi J. Shila, H/C Civil Appeal No. 14 of 2000**. Similarly, it was crystal in **CRDB (Sumbawanga Branch) v Regional Labour Officer – Rukwa (DC) Civil Appeal No. 14 of 1994** HC (Mbeya District Registry – Hon. Mwaipopo J (as he then was). The subsistence allowance is thus a statutory right that cannot easily be derogated.

Moreover, exemption to pay repatriation allowance is not automatic. It is incumbent upon being exempted by the proper authority. Proper authority is defined under Section 2 of Cap 366 to mean *the Labour Commissioner or any other person or persons appointed by the President for carrying into effect of the Ordinance or any part or provision or any regulations made under the Ordinance*. Further, for the proper authority to grant such an exemption, two factors must co-exist as shown in sub section 103 (2) (a) and (b) of the Employment Ordinance, Cap 366.

On the other hand, in the record, there is an alleged "*waraka*" tendered in the district court as exhibit D2, given by the Principal Secretary- President's Office Public Service with regard to exception to the repatriation rights for employees who are terminated from employment due to reasons other than sickness and accident. I will disregard this document for two reasons. First of all, its authenticity is questionable. It cites the provisions of the Employment Ordinance as "Articles". Apart from the Constitution and some International laws, provisions in a normal legislation in our jurisdiction are referred to as Sections. The credibility of this document is therefore

shaken. Secondly, this letter or waraka is not an amendment to the law. In this matter, the employer, so as to be safe should have relied on the law encompassed under Section 103 of the Employment Ordinance, Cap 366 as it is.

In the circumstance, what was to be established by the Appellant was **One**, whether he had a contract of service with the Respondent and **Two**, whether he was brought to the place of employment by the employer or by any person acting on behalf of the employer.

From the records available, although the employment contract/letter is not attached or tendered, the Respondent has never disputed that he had entered into a contract of service with the Appellant. This suggests that the Appellant had contractual relationship with the Respondent. In determining as to whether the Appellant was employed from another place apart from that which he was stationed, this fact has never been disputed by the respondent whose letter was readily admitted in evidence as Exhibit P2 at the fourth page where The District Executive Director of Tanga Municipal Council stated; -

*"Nilishatoa taarifa kwako kupitia kwa katibu CWT wa Manispaa ya Tanga kuwa Mkurugenzi wa Manispaa ya Tanga yuko tayari wakati wowote kukupatia usafiri wa gari ili liweze **kukusafirisha wewe na vifaa vyako mpaka Korogwe**. Wewe hukutoa taarifa ni lini utakuwa tayari ili gari la Manispaa liweze kukuchukulia vifaa vyako mpaka Korogwe"*

It is therefore not disputed by both parties that the place of employment and termination was different from that which Mr. Michael Charles was employed at.

Now with regard to what to be paid to the Appellant, there is no specific provision in the Employment Ordinance, Cap 366 prescribing the rate of subsistence allowance to an ex-employee awaiting repatriation. However, The Court of Appeal has in several occasions, provided an interpretation of the subsistence allowance as evident in decided cases such as; **The Attorney General v. Ahmad R. Yakuti & 2 Others**, Civil Appeal No. 49 of 2004, **Paul Yustus Nchia v. National Executive Secretary, Chama Cha Mapinduzi & Another**, Civil Appeal No. 85 of 2005, **The Attorney General & 2**

Others v. Eliud Massawe & 104 Others, Civil Appeal No. 82 of 2002 and **Juma Akida Seuchango v. SBC (Tanzania) Limited**, Civil Appeal No. 7 of 2019 (all unreported).

According to the cases above as well as Section 103 (3) of the Employment Ordinance, Cap 366, the expenses of repatriation shall include:

(a) the cost of traveling and subsistence expenses or rations to the place of engagement.

*(b) subsistence expenses during the period, if any, **between the date of termination of the contract and the date of repatriation.***"

In this particular case, the date of termination of contract is known that is 3rd June 2002. The date of repatriation could be traced back to the date when the Appellant was notified by the employee that his employment had come to an end. The period during which the period of repatriation of the employee is delayed at the employees' own free will is excluded in calculating subsistence allowance. This is provided explicitly under Section 53 (4) (a) of the Employment Ordinance, Cap

366 (now Section 59 (4) (a) of the Employment Act, Cap 366)

which states:

*(4) The employer **shall not be liable** for subsistence expenses or rations in respect of any period during which the repatriation of the employee has been delayed*

(a) by the employee's own choice; or

(b) for reasons of force majeure unless the employer has been able during the said period, to use the services of the employee at the rate of wages stipulated in the contract.

In the written statement of defence to the amended plaint, the Respondent averred that the employer was since 28th April 2003 when the Appellant was terminated ready and willing to repatriate him and any delay in doing so is caused by the employee' s own self. In that matter, the repatriation allowance to be paid to the appellant is to be calculated from the 3rd June 2002 to 28th April 2003.

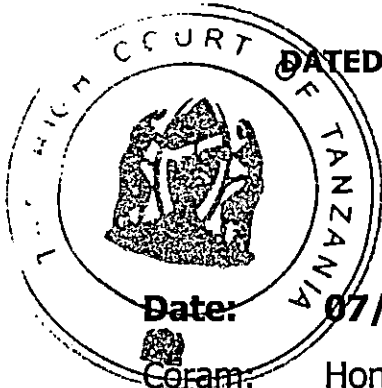
In the case of **FELICIAN RUTWAZA vs WORLD VISION TANZANIA CIVIL APPEAL NO. 213 OF 2019**, the Court of Appeal

sitting at Bukoba in calculating subsistence allowance stated at page 17 that: -

*From the cases placed before us particularly; **Attorney General v. Ahmed Yakuti & 2 Others** (supra), the issue regarding the rate of subsistence allowance pending repatriation has long been settled, that is to say; **it is calculated on the daily salary of a terminated employee paid on a monthly basis.** It evident from our reading of **Juma Akida Seuchago v. SBC (Tanzania) Limited** (supra), that the issue on the rate of subsistence allowance had been settled and the learned Judge was right in quashing the amount awarded by the CMA and substituting it with a rate pegged on daily salary payable on monthly basis for the whole period the appellant awaited payment of repatriation expenses.*

In the result, I allow the appeal to the extent that the Appellant is entitled to be paid his subsistence allowance pending repatriation at the rate calculated in accordance to the Court of Appeal guidance above, with effect from the 3rd June

2002 when he was terminated to 28th April 2003 when the employer was ready to repatriate him. Compensation of TSH. 10,000,000/= is rejected for lacking merits. Each party to bear its own costs.



DATED at TANGA this 16th Day of March 2022.


U. J. AGATHO
JUDGE
16/03/2022

Date: 07/03/2022

Ceram: Hon. Agatho, J

Appellant: Absent

Respondent: Absent

B/C: Zayumba


Court: Judgment delivered on this 16th day of March, 2022 in the presence of the Appellant, his advocate Yona Lucas, and Sebastian Danda, Respondent's State Attorney.




U. J. AGATHO
JUDGE
16/03/2022

Court: Right of Appeal fully explained.




U. J. AGATHO
JUDGE
16/03/2022