IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(LABOUR DIVISION)

AT MOROGORO

LABOUR REVISION NO. 11 OF 2021

(Arising from the decision of the Commission for Mediation and Arbitration for Morogoro in Labour Dispute No. CMA/MORO//103/2018)

TOYIS NAFTAL SAYUMWE ..... APPLICANT

VERSUS

1. BARAZA LA WADHAMINI, TAYOMI

2. DR. MEZGER SEC. SCHOOL ..... RESPONDENT

JUDGMENT

Date of Last Order: 10/02/2022 &
Date of Ruling: 11/03/2022

S.M. KALUNDE, J.:

The present application has been lodged under the provisions of Section 91 (1) (a) and (2) (c) of **the Employment and Labour Relation Act, Cap. 366 R.E. 2019** (henceforth "the Act"); and rules 24 (1), 24 (2) (a), (b), (c), (d), (e), and (f); 24 (3) (a), (b), (c) and (d); and rule 28 (1) of **the Labour Court Rules, GN. No.106 of 2007** (henceforth "the Rules"). In accordance with the Chamber

Summons the applicant is seeking the indulgence of this court in calling and examining the records of the proceedings and award of the Commission for Mediation and Arbitration (henceforth "the CMA") in Labour Dispute No. CMA/MORO//103/2018 delivered on 30th June, 2021, revise them and set aside the award; and issue any other order as may be appropriate. The application is supported by an affidavit duly sworn by TOYIS NAFTAL SAYUMWE, the applicant. The application is seriously resisted by the counter affidavit sworn by AGNES MANFRED SALAKA, a principal officer of the 1st and 2nd respondent.

A brief background to the matter is to the following effect: through a letter dated 28th June, 2016 the appellant was offered a job as a teaching staff by the 2nd respondent at their school, that is the 1st respondent. Subsequent to the notification, on 01st October, 2016 an employment contract between the appellant and 1st respondent was executed. In

accordance with the executed contract the appellant was offered employment for a period of two (2) years commencing from 01st October, 2016 to the 30th September, 2018. The available records show that the appellant was assigned with the responsibility of teaching History for Form II students and English for Form I, III and IV. It would appear that Form II students had reportedly failed in their History Form II National Examinations for the year 2017. As a result, on the 23rd March, 2018 the appellant was suspended from work pending an investigation.

On the 17th April, 2018 the appellant was summoned to appear before a Disciplinary Committee on 26th April, 2018 to answer allegations of "Poor and Under Performance" resulting into the failure of the majority of Form II students in their History Form II National Examinations results. The Disciplinary Committee conducted its hearing session and made a finding that the appellant failed to perform his obligations as

expected. The committee recommended that the appellant's employment be terminated. Subsequently, on the 23rd day of May, 2018 the appellant was informed of the decision to terminate his employment contract as from 25th May, 2018. Aggrieved by the decision to terminate his employment contract, the appellant decided to refer the dispute to the CMA. On the 10th September, 2018 mediation at the CMA was marked as failed, the matter proceeded to an arbitration stage.

Upon hearing the parties, the Arbitrator concluded that the respondents had no genuine reasons in terminating the appellant's employment contract. Having made a finding that the appellant was not afforded an opportunity to be heard, the arbitrator resolved that the appellant was unfairly terminated. As for remedies, the appellant was awarded Tshs. 2,480,000.00 to see off the remainder of his four months in his employment contract. Claims for severance pay, repatriation

costs and subsistence allowances pending repatriation were denied.

The above orders infuriated the appellant, who is now before this Court seeking my indulgence in revising the decision of the CMA. The substance of his complaints may be found under paragraph 10 of the supporting affidavit. The paragraph reads:

> *"10. That from the foregoing material facts the following issues requires determination by this Honourable Court.*
>
> *a) Whether the applicant's termination of employment follows under the provisions of 42 (3) (c) of the Employment and Labour Relations Act [CAP 6 R.E. 2019]?*
>
> *b) Whether after the Honourable Arbitrator holdings that the employer terminated the applicant's employment with neither valid reasons nor proper procedures were followed could have proceeded to reject severance payments to the applicant?*
>
> *c) Whether the 1st respondent's calling the applicant for recruitment interview of the applicant from Mulele District Katavi Region to Morogoro*

region is not the evidence that the applicant was brought to Morogoro by the 1st respondent for employment purposes?

d) Whether the respondents transporting the applicant to the place of domicile for annual leave does not amount to acknowledgement by the 1st respondent that the applicant's place to be returned if his contract of employment is terminated was supposed to be Mulele District Katavi Region?"

At the hearing of the application, learned counsel Mr. JOSEPHAT MABULA appeared for the appellant; whereas the respondents were being represented by Mr. BATHLOMEO TARIMO, learned advocate. I thank both counsels for their industrious submissions. Having considered the records and the submissions for and against the application, I think now it is opportune to consider the merits of the application.

However, before I delve deep into determination of the dispute between the parties, I wish to state at the outset that from their pleadings and submissions parties are not disputing

the decision of the CMA in as far as the findings on the substantive claims are concerned. On that account there is no dispute that, as was concluded by the CMA, there was no satisfactory evidence of misconduct on the part of the appellant to warrant termination on the ground **"Poor and Under Performance"** cited by the respondents. The finding by the CMA, that the respondents were guilty of scorning the procedure in terminating the appellant without affording him the right to be heard have also not been disputed by the parties. On my part, having gone through the records before me I find no reason to disturb the findings and decision of the CMA on that end.

It is, however, apparent that parties are at logger heads on the CMA determination as to the remedies or reliefs of the parties. In accordance with the supporting affidavit, the counsel for the appellants believes that having resolved that the termination of the appellants employment contract was

unfair, his client should have been awarded severance pay and costs of repatriation to his place of domicile. These would be the key issues I will be resolving in the course of this judgment.

I propose to start with the question whether, in the present circumstances, the appellant is entitled to severance pay. Before I proceed, I gather it would be useful to expound albeit briefly on the law on severance. As I am aware, and correctly stated by Mr. Mabula, the law on severance is governed by section 42 of the ELRA. Section reads:

> *"42. -(1) For the purposes of this section, "severance pay" means an amount at least equal to 7 days' basic wage for each completed year of continuous service with that employer up to a maximum of ten years.*
>
> *(2) An employer shall pay severance pay on termination of employment if –*
>
> *(a) the employee has completed 12 months continuous service with an employer; and*

(b) subject to the provisions of subsection (3), the employer terminates the employment.

(3) The provisions of subsection (2) shall not apply -

(a) to a fair termination on grounds of misconduct;

(b) to an employee who is terminated on grounds of capacity compatibility or operational requirements of the employer but who unreasonably refuses to accept alternative employment with that employer or any other employer; or

(c) to an employee who attains the age of retirement or an employee whose contract of service has expired or ended by reason of time.

(4) The payment of severance pay under this section shall not affect an employee's right to any other amount payable under this or any other written law.

My understanding of the above section is that an employee is entitled to severance once they have completed twelve (12) months continuous service with an employer; and in addition to that the employer must have terminated their employment. However, an employee would not be entitled to severance pay if, for example, it established that they were

fairly terminated on grounds of misconduct or where an employee is terminated on grounds of capacity compatibility or operational requirements of the employer but unreasonably refuses to accept alternative occupation with that employer or any other employer offered to them. Equally, severance pay would not be payable to an employee who attains the age of retirement or whose contract of service has expired or ended by reason of time.

In the present case, Mr. Mabula was emphatic that the CMA misdirected itself in applying section 42(3) (c) of the ELRA to conclude that the appellants contract ended by reason of time. His view was that the appellant was entitled to severance pay. In support of his position, he argued that having resolved that the respondents had no genuine reasons to terminate the appellants employment contract; and that the appellants was unfairly terminated the Court should have ordered the respondent to pay the appellant severance pay.

He argued that his client had not attained retirement age nor that his contract of service had expired or ended by reason of time. His view was that the appellant fitted squarely within the ambit of section 42(2) (a) and (b) of the ELRA and hence the CMA should have awarded severance payments.

In response, Mr. Tarimo argued that the arbitrator was correct in his finding. He argued that the arbitrator was correct in his decision. He insisted that the decision of the tribunal was based on breach of time-based employment contract. His view was that the appellant was falling correctly within the provisions of section 42(3) (c) of the ELRA. Thus, his service contract had expired by reason of time. The counsel added that the arbitrator was correct in awarding to see off the appellant's contract. In his view awarding severance pay when the CMA had already awarded payment of the remainder of the contract would have been double payment to the

appellant. he concluded that there was no misinterpretation of the law. He thus prayed that the ground be rejected.

In a brief rejoinder Mr. Mabula admitted that indeed the CMA concluded that there was unfair breach of the employment contract. On that understanding he argued that the contract did not come to an end or terminated by reason of time. To him section 42(3) (c) of the ELRA was not applicable. The counsel maintained that having terminated the contract before its expiration the respondents were liable to pay severance pay to the appellant. Otherwise, he reiterated his submission in chief.

The records show that in his opening statement the appellant prayed for, *inter alia,* payment of Tshs. 7,700,400.00 being compensation for unlawful termination; Tshs. 1,346,153.00 AS severance pay. The CMA was convinced that the nature of the dispute was based on "Breach of Contract" and not "Termination of Employment" it went on to apply

section 88(4) (a) of the ELRA. With respect to the arbitrator, the said section does not in any case propose for remedies for unfair termination. Both counsels appear to agree with the views of the arbitrator that that the dispute related to breach of contract and not termination of employment. Mr. Mabula, however, suggested that having resolved that the appellant was unfairly terminated the CMA should have awarded severance pay in addition to compensation for the remainder of the contract. Mr. Lyimo, on the other hand believes that the CMA was proper in not awarding severance pay as it would amount to double payment.

On my part having examined the records I have no doubt that the CMA correct in its finding, and I will illustrate hereunder. There is no dispute that the appellant was employed on fixed term employment contract for a period of two (2) years commencing from 01st October, 2016 to the 30th September, 2018. It is also no disagreement that the dispute

before the CMA was based on termination of contract. That is at least in accordance with **CMA F1** and **Exhibit C12** a letter terminating of the appellants employment contract, titled **"YAH: KUSITISHA MKATABA WA AJIRA"**. The tribunal was also correct in making a finding that the dispute emanated from breach of contract. As I am aware the principles relating to unfair termination do directly apply to unfair terminations arising out breach of fixed term contracts of employment.

In the case of **Mtambua Shamte & 64 Others vs. Care Sanitation and Suppliers,** Rev. No. 154 of 2010 at Dar es Salaam, the Court held that: -

> *"... the principles of unfair termination do not apply to specific tasks or fixed term contracts which come to an end on the specified time of completion of a specific task. Under specific tasks or fixed term, the applicable principles apply under conditions specified under Section36(a)(iii) of the Employment and Labour Relations Act, No. 6/2004 read together with Rule 4(4) of GN42/2007"*

The above cited case was recently quoted with approval in the decision of this Court in the case of **Jordan University College vs Mark Ambrose** (Revision 37 of 2019) [2020] TZHCLD 199 (19 June 2020). In the above quoted case this Court quoted its decision in the case of **Good Samaritan vs. Joseph Robert Savari Munthu**, Rev. No. 165 of 2011, HC Labour Division DSM (unreported) where the Court held that: -

> *"When an employer terminates a fixed term contract, the loss of salary by employee of the remaining period of the unexpired term is a direct foreseeable and reasonable consequence of the employers wrongful action...."*

Relying on the above authorities I am convinced that the CMA was correct in refusing to award severance pay. In the circumstances I agree with Mr. Lyimo that awarding severance payment would have amounted to double payment on the part of the appellant to the disadvantage of the respondents. On that account I find no reason to interfere and revise the decision of the CMA on this issue.

That takes me to the next item for consideration. That is whether the appellant is entitled to repatriation expenses to Katumba, Mulele, Katavi Region. Mr. Mabula submitted that having been solicited by a phone call from his domicile in Katumba, Mulele, Katavi Region to come to work for the respondents, the appellant was recruited from Katumba for purposes of calculation of repatriation costs. He added that if it was not for the phone call from respondents the appellant would be living in Katumba and not Morogoro. In further support of his argument the counsel argued that clause 2.1 of the contract of employment executed between the appellant and the respondent (**Exhibit C7**) was clear that the applicant domicile was Katumba, Mulele, Katavi Region. Referring to **Exhibit C8**, the counsel added that during the pendency of employment the respondents were paying the appellant for vacation or annual leave to Katumba, Mulele, Katavi Region. The counsel submitted that the decision of the tribunal failed

to accord deserved weight on, and was inconsistent with, the provisions of section 43(1), (2) and (3) of the ELRA. Relying in the case of **Attorney General & 2 Others vs. Eligi Edward Massawe and 104 Others,** Civil Appeal No. 86 of 2002, Court of Appeal at Dar es Salaam; and the decision of this Court in **Hamidu Hussein Magoa & 315 Others vs. Strabag International GMBH (T) Branch,** Misc. Labour Appl. No. 323 of 2016 (all unreported) the counsel prayed that the respondents be ordered to repatriate the appellant to his place of domicile.

In reply to the above submissions Mr. Tarimo argued that the place of domicile and place of recruitment were rather different in meaning and context. In his view the place of recruitment is a place where an employee commences his employment. His view was that clause 3.0 of Exh. C7 indicated that the place of recruitment was in Morogoro and not in Katumba, Mulele, Katavi. Having said that the counsel argued

that clause 8.1 required the respondent to repatriate the appellant from the place of recruitment and not the place of domicile. In his view the CMA was correct in not awarding repatriation costs. By way of distinguishing, he argued that in the case of **Hamidu Hussein Magoa & 315 Others vs. Strabag International GMBH (T) Branch** (supra) severance pay was part of the employment contract whereas in the present case severance pay was not included in Exh. C7. He prayed that the application be dismissed.

In rejoining Mr. Mabula argued that by failing to respond to allegations that the respondent transported the appellant to his place of domicile during vacations was an admission that in terms of clause 8.1 of Exh. C7 the respondents were supposed to repatriate the appellant to Katumba, Mulele in Katavi Region.

As correctly submitted by Mr. Mabula, the law on repatriating employees is regulated by the provisions of section 43(1), (2) and (3) of the ELRA. The section reads:

> *"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.*

In the present case parties have no dispute on whether or not the employers, in this case the respondents, were obligated to repatriate the appellant form the place of recruitment. In fact, the clause 8.0 titled **USAFIRI (REPATRIATION COSTS)** was included in employment contract (Exh. C7) to address the issue. Clause 8.1 provides that:

> *"Baada ya kuisha au kusitishwa kwa Mkataba, Mwajiri atagharamia gharanma za safari ya Mtumishi na familia yake na vitu vyake isipokuwa mifugo kutoka Kituo cha kazi hadi mahali alipomwajiri Mtumishi. (The Place of Recruitment)"*

In accordance with the above clause the employer is placed under the obligation to repatriate the employee, his family, and his personal items to the place of recruitment. The dispute between the parties is, in the present circumstances, what or where exactly is the place of recruitment. Mr. Mabula insists that the place of recruitment is articulated under clause 2.0 of Exh. C7. Mr. Tarimo on the other hand believes the

place of recruitment is covered under clause 3.0 of Exh. C7. The respective clauses read as follows:

> *"2.0 SEHEMU ATOKAPO MWAJIRIWA (PLACE OF DOMICILE): KATUMBA, MULELE-KATAVI.*
>
> *3.0 SEHEMU YA KAZI (PLACE OF WORK) DR. MEZGER SEC. SCHOOL-MELELA."*

The issue for my determination is therefore whether the CMA was proper is holding that the appellant place of recruitment was in Morogoro. For purposes of establishing the place of recruitment section 43(3) of the ELRA provides that

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

To understand the above provision, one need to grasp the mean of the term "solicitation". In accordance with Bryan A. Garner in **Black's Law Dictionary**, 8th Edition at page 4351 the term "solicitation" to means:

"SOLICITATION

solicitation, n. ***1. The act or an instance of requesting or seeking to obtain something; a request or petition*** *<a solicitation for volunteers to handle at least one pro bono case per year>.2. The criminal offense of urging, advising, commanding, or otherwise inciting another to commit a crime < convicted of solicitation of murder>. • Solicitation is an inchoate offense distinct from the solicited crime. Under the Model Penal Code, a defendant is guilty of solicitation even if the command or urging was not actually communicated to the solicited person, as long as it was designed to be communicated. Model Penal Code § 5.02(2). — Also termed criminal solicitation; incitement. Cf. ATTEMPT (2). [Cases: Criminal Law 45; Homicide 562. C.J.S. Criminal Law §§ 115, 124–126.] 3. An offer to pay or accept money in exchange for sex <the prostitute was charged with solicitation>. — Also termed soliciting. Cf. PATRONIZING A PROSTITUTE. 4. An attempt or effort to gain business <the attorney's solicitations took the form of radio and television ads>.*

[Emphasis is mine]

On my part, guided by the above authoritative connotation of the word "solicitation" I am convinced that the term *"place of* recruitment*"*, in the context envisaged under 43 of the ELRA and the agreement of the parties in this

arrangement, means a particular city or town where the staff member or employee resided at the time of recruitment. Having that in mind I proceed to the determination of the issue before me on the basis of that understanding.

In his submission the appellant contended that whilst managing his life in Katumba, Mulele, Katavi he was solicited over the phone by **Ndugu Ferdinand**, an administrative officer of respondent, to come to Morogoro and join their teaching staff. They met at TAYOMI then he was taken to where the school was located. Thereafter he was interviewed, and employment procedures followed. Part of the records read:

> *"Nilipigiwa simu na Afisa utumishi nikiwa Katavi Mbanda akaniambia wananihitaji kuna nafasi ya kufundisha Afisa utumishi ndugu Ferdinand ndiye aliyenipigia simu.*
>
> *Nilichukua hatua ya kuja Morogoro kukutana naye ofisi za Tayomi Morogoro mjini kisha akenda kunionyesha shule ilipo maeneo ya kibaoni."*

His cross examination was brief, and to my recollection he was not cross examination in relation telephone conversation with Ndugu Ferdinand or how his recruitment came about. This, therefore, is an uncontradicted evidence on the record which I accept. In **Nchia vs Mapinduzi & Another** (Civil Appeal 85 of 2005) [2006] TZCA 90 (12 October 2006); the Court of Appeal (**Nsekela, J.A.**) quoted the learned authors of **Blackstone's Criminal Practice** (1992) at paragraph F7.4 at page 1871 where it was stated thus -

> *"A party who fails to cross - examine a witness upon a particular matter in respect of which it is proposed to contradict him or impeach his credit by calling other witnesses, tacitly accepts the truth of the witness's evidence in chief on that matter, and will not thereafter be entitled to invite the jury to disbelieve him in that regard. The proper course is to challenge the witness while he is in the witness - box or, at any rate to make it plain to him at that stage that his evidence is not accepted."*

In addition to that clause 9.1 **LIKIZO YA MWAKA (ANNUAL LEAVE)** of Exhibit C7 entitles the appellant to an annual leave of 28 days. With a payment leave every after two years. There was evidence, in the form of **Exhibit C8,** to the effect that the respondent was paying the respondent for annual leave to Katumba, Mulele, Katavi Region. In his testimony the appellant stated:

> *"Nikiwa kazini bado mwajiri alinipeleka likizo Katavi, Mpanda ambako ni nyumbani Ushahidi huo ninao wa barua ya kukabidhiwa nauli ya kwenda likizo napenda Tume ipokee barua ya kuomba likizo na na barua ya kuomba nauli kama vielelezo."*

Following the above testimony, the appellant tendered a copy of request for annual leave and request for fair to Katavi. The respondent neither objected nor cross - examine the appellant on the documents. I equally hold that their failure to cross-examine was in a way an acceptance to the appellants testimony in chief. Having admitted and acknowledged ferrying the appellant to Katumba, Mulele, Katavi, they cannot be

allowed to now change their mind on where the appellant was domiciled.

From the above set of facts, it clear that, at the time of recruitment the appellant was resident of Katumba, Mulele Katavi Region. In the circumstances, whilst I do not agree with Mr. Tarimo that clause 3.0 (PLACE OF WORK) should be interpretated to mean place of recruitment. In my view a place of work is equivalent to a duty station. Conversely, I agree with Mr. Mabula that the appellants solicitation commenced with a telephone conversation from his place of domicile in Katumba, Mulele Katavi region. If it was not for the solicitation by telephone conversation from the employer or the employer's agent, the appellant would be leading his life in Katumba. Katumba, Mulele Katavi Region was therefore a place of recruitment for purposes of calculating the appellants repatriation costs under section 43(1) (c) of the ELRA read together with clause 8.1 of the employment contract. At any

rate if parties intended the place of work to be a place of recruitment, they should not have included the place of domicile in their contract. Otherwise, what would, certainly, be the use of identifying a place of domicile in their contract. For the foregoing reasons I find merit on this ground and hold that the appellant was entitled to repatriation costs to Katumba, Mulele Katavi Region. This ground is therefore meritorious, and I will allow it.

In relation to quantum of the repatriation costs, the appellant claimed to for Tshs. 5,020,000.00 however, there was no explanation on how he came about the said amount. In the circumstances, I order the repatriation costs be paid in accordance with the ordinary established and practiced procedure of the respondent if the same exist. Otherwise, the costs should be payable in accordance with the practice and procedure applicable to public servants, which is greater.

Before I conclude I wish to make a clarification that having resolved that the appellant is entitled to repatriation to his place of domicile it follows that, as natural consequence of the interpretation of section 43(1) (c) of the ELRA, he is entitled to subsistence allowance for the period from the 25th May, 2018 to the date of repatriation to his place of domicile. In **Hassan Twaib Ngonyani vs TAZAMA Pipeline Limited** (Civil Appeal 2011 of 2018) [2022] TZCA 88 (02 March 2022) the Court of Appeal held that:

> *"Since this kind of payment accrues subsequent to the decision and more particularly after the terminated employee is repatriated, it is a matter of common sense that it could not be express in the decision. It being part of the terminal benefits under the law, it was obviously implied in the decision of the Board."*

Further to that in the case of **Felician Rutwaza vs World Vision Tanzania** (Civil Appeal 213 of 2019) [2021] TZCA 2 (02 February 2021) the Court of Appeal held that:

> *"From the cases placed before us particularly;* ***Attorney General v. Ahmed Yakuti &***

2Others *(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."*

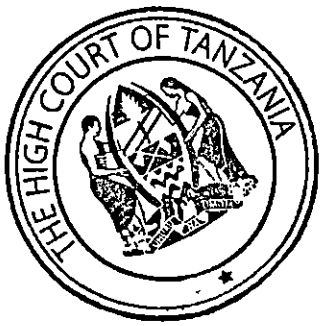
Relying on the above decision the appellant is awarded subsistence allowance calculated at the rate pegged on daily salary payable on monthly basis for the whole period from the date of termination to the date of payment of repatriation expenses.

In the result, the decision of the CMA is revised to the extent explained above. The claims for severance pay are dismissed. The appellant is entitled, and hereby awarded, to be paid repatriation costs and subsistence allowance including

his wife and two children with effect from 25th May, 2018 to the date of payment of repatriation expenses.

Order accordingly.

DATED at **MOROGORO** this 14th day of **MARCH, 2022.**



S.M. KALUNDE

JUDGE