

IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

REVISION APPLICATION NO. 132 OF 2019

BETWEEN

KENYA KAZI SECURITY APPLICANT

VERSUS

KIROBOTONI RAMADHAN & 71 OTHERS.....RESPONDENTS

JUDGMENT

Date of Last Order: 16/11/2020

Date of Judgment: 30/11/2020

Z.G.Muruke, J.

This application emanates from a labour dispute No. CMA/DSM/KIN/R.101/14/1276 before the Commission of Mediation and Arbitration (herein CMA) which was decided on favour of the respondents on 2nd March, 2016. The applicant KENYA KAZI SECURITY has filed the present application calling upon this court to revise the CMA's award on the following grounds;

- i. Whether the arbitrator was legally justifiable for awarding repatriation and subsistence allowances to 12 respondents while they have refused the applicant's lawful order.
- ii. Whether the arbitrator had prerogative powers to order modality repatriation for the twelve respondent.

- iii. Whether the arbitration had power to determine and order his own rates of daily subsistence allowance to the twelve respondents.

The application was supported by affidavit of Daniel Mwakajila, the applicant's Human Resource Manager. The respondents in challenging the application filed the counter affidavit sworn by Harry Mwakalasya, their advocate.

It is on records that, the respondents were the applicant's employees as Security Guards up to 31st January, 2014 when their contract came to an end. Upon being paid their terminal benefits, the respondents were dissatisfied hence referred the matter to the CMA claiming to have been unfairly terminated and claimed among other things repatriation and subsistence costs. In his determination the arbitrator found that the claim for unfair termination was baseless because the contract came to an end. He thus awarded 12 respondents subsistence and repatriation costs. Unsatisfied with the award, the applicant filed the presence application.

With leave of the court the matter was argued by way of written submission. Both parties were represented by advocates, where Advocates from Arbogast Mseke Advocates namely; Anthony Arbogast, Neema Ndossi and Hassan Mwemba represented the applicant while Mr. Harry Mwakalasya and Juma A. Mwakimatu of Mwaisoba Advocates represented the respondents.

Arguing in support of the application, On the 1st ground the applicant's counsel submitted that, after they have lost the tender with the US Embassy, gave three options to the respondents to wit; i) the

respondents employment to continue in other applicant's security locations, ii) to have the respondents be repatriated back to their respective places of recruitment and iii) to have the respondents get employment to the succeeding security Company at the embassy after negotiation.

Applicant's counsel further submitted that only two respondents opted to be located to the other security locations, and others were employed by the succeeding Company G4S. And neither of the respondent preferred to be repatriated back to the respective places of recruitment as despite of being informed that whoever needs to be repatriated to the recruitment place, shall report the same to the office not later than February, 2014. Since the respondents opted to be employed by the G4S then the arbitrator wrongly awarded them the repatriation and subsistence allowances despite the evidence adduced by the applicant. Referring the case of **Cocacola Kwanza Ltd v Kajeri Misyangi**, Rev. No. 238/2008.

On the 2nd ground the counsel for the applicant submitted that, the law under Section 43 of Employment and Labour Relations Act, Cap 366 RE 2019 is very clear that the mandate of repatriating the employee is on the employer. In this matter the applicant intended to repatriate the respondent's luggage physically and provide for bus fare. The arbitrator misinterpreted the said section and assumed the mandate by ordering the repatriation costs to the respondents contrary to the law, referring the case of *Elizabeth Ng'imariyo v Rungwe District Council*, 2013 LCCD ,171

On regard to the 3rd ground Learned counsel submitted for the applicants that, at page 8-9 of the award the arbitrator awarded the respondents subsistence allowances at his own rates without showing on which evidence he based to arrive to the same. That was contrary to Rule 27 of the Labour Institution (mediation and arbitration Guidelines) Rules, GN. 67/2007. It is a trite law that judgment of any court must be grounded on the evidence properly adduced during trial. On that basis the applicant prayed for revision of the award. With regards to the amount which one is entitled as subsistence allowance, was discussed in the case of **Riakdit Barnabas v BP Tanzania Limited**,2012 LCCD 119

In reply, the respondent's counsel argued that the applicant went contrary to Section 38 of Cap 366 RE 2019 which provides for operation requirement. The termination letter **exhibit P collectively** was itself a notice, instructed the respondents to prepare for collecting final dues namely severance allowance, leave and pay for worked days and to return the applicant's properties which were in their possessions. There were no instructions in regard to repatriation costs. The respondent's efforts to follow up for repatriation was fruitless. They even submit their proforma invoice exhibit P3 but still they were not paid.

On the second ground it was submitted that, the arbitrator have powers to order modality repatriation for the twelve respondents, following the applicant's failure to comply with Section 38 of Cap 366 RE 2019. If the applicant was acting on good faith, could have utilized any of the option provided under Section 43(1) of Cap.366 RE 2019.

In regard to the 3rd ground Counsel for the respondents argued that, the arbitrator's order for daily subsistence allowance were derived from the respondent's salary slip(exhibit P2 collectively. Therefore, the arbitrator was right to order the payment on that regard, referring the case of **Mantra Tanzania Ltd v Joaquim P. Bonaventure**, Consolidated Rev. No 137 and 157 of 2017(unreported). Therefore the award was according to the law and there was no any miscarriage of justice. Counsel for the respondent prayed for dismissal of the application for want of merit. In rejoinder the applicant's counsel reiterated their submission in chief and insisted on the prayer that the application be granted.

After consideration of the parties submissions, CMA's records and the relevant laws, I believe this court is called upon to determine; Whether the respondents are entitled to be paid repatriation costs and subsistence allowances. Payment of repatriation and subsistence allowances has been provided for in Section 43(1) of the Cap.366 RE 2019, which states that:-

"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. In the case of **Ibrahim Kamundi Ibrahim Shayo V. Tanzania Fertilizer Company Ltd (TFC)**, Labour dispute No. 1/2014 at Moshi as cited in the Consolidated Revision No. 137 and 151 of 2017 **Mantrac Tanzania Limited V. Joaquim P. Bonaventure**, (unreported) where it was held that:-

"My understanding of the Court of Appeal's decision is that, the employee is entitled to be paid subsistence allowance once employer failed to repatriate such an employee to his place of domicile and such employee continued to stay in the working place"

Again in the case of **Paul Yustus Nchia v. National Executive Secretary CCM & Another**, Civil Appeal No. 85/2005 CAT DSM (Unreported) the Court of Appeal of Tanzania held that:-

"Employee is entitled to repatriation cost, and subsistence 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 the repatriation costs is paid to the employees who were terminated out of a place of recruitment. The law states clear 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. And the subsistence allowance is paid when the employer delayed to repatriate the employee from the date of termination.

On records it is undisputed that the 12 employees who were awarded the repatriation costs and subsistence allowance were recruited in other places. Also it is undisputed that the respondents after their contract with the applicant came to an end, they were employed by G4S Security who took over the applicant's at the US embassy.

On records there is no proof that respondents' employment with G4S was a result of the applicant's negotiation with G4S, or the G4S had vacancies and the respondent were lucky to obtain the same under that circumstances. This court is of the view that the applicant's allegation that he offered transportation to the respondent but neither of them approached the office is baseless on the reason that, if he was the one who negotiated with G4S for the respondents employment, he was aware that they were employed with G4S Security thus they cannot be repatriated. The applicant used those circumstances not to pay the respondents their statutory entitlement as per Section 43 (1) (supra) as his contract with them came to an end.

Having taken into consideration of the objectives of Cap 366 RE 2019 which is to promote economic development efficiency, productivity and good ends of justice and the conditions under Section 37(d) (i) of Cap. 300 RE 2019. I hereby order the applicant to pay the daily subsistence allowance of 6 months' only from the date of termination, 31st January,2014 and the same is ordered under Rule 55 (2) of the Labour Court Rules, GN.106/2007.

On basis of the above discussion, this court has found that the respondents are entitled to the repatriation costs and the same shall be paid in accordance with the applicable laws as stated above. Also on the daily subsistence allowance, it shall be paid to the respondent on the duration of 6 months from the date of termination.

On basis of the above finding the application is allowed to that extent. It is so ordered.



Z.G. Muruke

JUDGE

30/11/2020

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VERSUS

KIROBOTONI RAMADHAN & 71 OTHERS RESPONDENTS

Date: 30/11/2020

Coram: Hon. S.R. Ding'ohi, DR.

Applicant:

For Applicant:

Ms. Hassani Mwemba, Advocate


Respondent:

For Respondent:

Mr. Harry Mwakalasa, Advocate

CC: Halima

Court: Judgment delivered this 30th day of November, 2020.



S.R. Ding'ohi

DEPUTY REGISTRAR

30/11/2020