

**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION NO. 608 OF 2019**

**BETWEEN**

**JEROME TESHA..... APPLICANT**

**VERSUS**

**UNIVERSITY OF DAR ES SALAAM..... RESPONDENT**

**JUDGEMENT**

Date of Last Order: 25/08/2020

Date of Judgment: 11/12/2020

**About, J.**

The Applicant, **JEROME TESHA** filed the present application seeking revision of the decision of the Commission for Mediation and Arbitration (herein CMA) in labour dispute No. CMA/DSM/KIN/R.911/17/888 delivered on 31/05/2019 by Hon. Masaua, A Arbitrator. The application was made under the provision of section 91(1) (a) (b) 91 (2) (a) (b), 94 (1) (b) (i) of the Employment and Labour Relations Act, [CAP 366 R.E. 2019] (herein referred as the Act) Rule 24 (1), 24 (2) (a) (b) (c) (d) (e) and (f), 24

(3) (a) (b) (c) (d), 24 (11) (c), 28 (1) (c) (d) (e) of the Labour Court Rules, GN. No. 106 of 2007 (herein referred as Labour Court Rules).

The respondent the UNIVERSITY OF DAR ES SALAAM filed a counter affidavit challenging the application.

The application was argued by way of written submissions where both parties were represented. Mr. Davis Matimo, Personal Representative, appeared for the applicant while Mr. Otilia Rutashobya, learned Counsel was for the respondent.

The dispute emanates from the following background. The applicant was employed on 22/05/2007 by the respondent as a Security Guard II. On 22/06/2012 the applicant was terminated from work after the Staff Disciplinary Committee has found him guilty of assault and working under the influence of alcohol. Aggrieved by the employer's decision the applicant referred the matter at the CMA where it was decided on his favour and the respondent was ordered to pay him and his fellow compensation of twelve (12) months' remuneration and severance pay. Again, being dissatisfied by the CMA's decision the applicant and his fellow filed revision application before this Court praying for the Arbitrator's award to be revised and

the respondent be ordered to pay them compensation of 12 months' remuneration and other benefits as the law provides. In her decision the Learned Judge upheld the CMA's decision. Later on, the applicant filed another dispute at the CMA claiming for transport and subsistence allowance. It was alleged that when the respondent became aware of such dispute, he decided to pay the respondent transport allowance on 13/07/2017.

The applicant further decided to claim for his right to be paid subsistence allowance and, he filed another dispute at the CMA where the matter was dismissed for lack of merit.

Being resentful by the Arbitrator's decision the applicant filed the present application on the following grounds: -

- i. The Honourable Court may be pleased to revise and set aside the award of the Commission for Mediation and Arbitration at Dar es Salaam zone in Labour Dispute No. CMA/DSM/KIN/R.911/17/888 dated 31/05/2019 by Hon. Masaua, A. Arbitrator.
- ii. There was improper evaluation of the evidence on records by the Arbitrator.



- iii. That the Arbitrator erred in law for basing in decision on termination while the dispute was on subsistence allowances.

Arguing in support of the first ground Mr. Davis Matimo submitted that the CMA's award did not consider the entitlement of the applicant to be paid the statutory remedy of subsistence allowances as per Section 43(1) (c) of the Act. He stated that since the applicant was transferred from the place of recruitment to the working place therefore the same is entitled to be paid after termination.

As to the second ground it was submitted that the arbitrator erred in law by citing Section 38(1) of Act, which is irrelevant in relation to applicant's claim regarding subsistence allowance, therefore on that error justify improper evaluation of evidence at CMA. To support his argument, he cited the case of **Chama Cha Walimu Tanzania vs. Ag**, Civil Application No.152/2008 DSM (unreported).

Turning to the last ground Mr. Davis Matimo submitted that the applicant was employed by the respondent from Kilimanjaro to

Dar es Salaam and for the whole time from the date of termination he was not paid transportation allowance, till the payment 900 days passed waiting for the same. He stated that on such delay the applicant is entitled Tsh 1012500 in relation to his current salary. In strengthening his submission, he cited the case of **John Mwananjela (Administrator of the Estate of Ignatus John Mwanajela v. Kimis Security System Co. Ltd. and William A. Kiwango** (2013) LCCD.

In reply the respondent's learned Counsel submitted that, the applicant opted to file several applications before CMA and at this Court instead of pursuing his claim. He stated that in the termination letter dated 22/06/2012 the respondent clearly provided for payment of repatriation cost but the applicant failed to pursue the same as he found fit to remain in Dar es salaam. He cited the case of **Elizabeth Ngimariyo v. Rungwe District Council**, Lab. Div. MBY, Rev. No. 42 of 2013 LLCD.

Mr. Otilia Rutashobya further submitted that upon finalization of the case, on 02/03/2014 the applicant requested from the respondent for payment as ordered by CMA as confirmed by this Court. But the



request was not honored at first on the ground that the applicant wanted all payment including those of the 2<sup>nd</sup> applicant to be deposited on his account. And upon rectification the applicant was paid through a cheque.

It was further submitted that; the claim of subsistence allowances was filed on 02/08/2017 which was out of time as was about five years from the date of termination on 13/06/2012. To cement his argument, he referred this Court in the case of **Movomero District Council v. Tobias Lilongwe and Others**, Rev. No. 26/2019, HC at Morogoro.

On second ground Mr. Otilia Rutashobya submitted that, the award was proper because it dealt with the applicant's claims of subsistence allowance. He stated that, the quoted section is a mere clerical mistake and failure to cite Section 43(1) of ELRA does not entitle the applicant to be paid subsistence allowance.

Lastly, respondent counsel submitted that, the applicant's calculation of 900 days payment of subsistence allowances from the date of termination is ambiguous, because it contradicts his letter dated 14/06/2017. He said the relevant letter claimed for payment of

subsistence allowances from 11/04/2014, the date of his termination. He stated that, basing on applicant's testimony at paragraph 2 page 3 he admitted that, he was staying at respondent's residence therefore his claims cannot stand.

He further argued that, the respondent is exempted from the duty of paying subsistence allowance to the applicant including his family because he had already been paid transport allowance from Dar es Salaam to Moshi.

In rejoinder Mr. Otilia Rutashobya reiterated his submission in chief.

Having carefully examined the parties' submissions, and considering CMA's records, relevant labour laws and case laws, I find the issue for determination before the Court is whether the applicant is entitled to be paid subsistence allowance.

As the payment of repatriation and subsistence allowances are supposed to be paid together in case of any delay in payment of transportation allowance, then the relevant provision is Section 43 (1) of Act is applicable, which state 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.*

From the above cited provision, subsistence allowance and transportation allowance are two things which cannot be separated in



case of delay of paying transportation allowance, this position has been stressed in a range of Court's 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'.*

Also, 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'.*

Basing on above cited cases it is an established principle that, repatriation allowance is paid to an employee who is terminated out of a place of recruitment. Thus, in this case the applicant's place of recruitment was Moshi in Kilimanjaro Region as admitted by the respondent in his submission at page 7.

It is undisputed that, the applicant was terminated on 22/06/2012 and transportation allowance was paid on 13/06/2017, which means there was a delay of paying transportation allowance to the applicant for more than five (5) years and no any evidence was adduced before CMA or at this Court to show the same was honored. Thus, the situation in this matter attracts payment of subsistence allowance to the applicant.

Therefore, the respondent's allegations that the matter is time barred and applicant failed to pursue his claim lacks legal stance as long as he was the one keeping the record of the applicant as an employee. So, the respondent had a duty to make sure the payments of transport and subsistence allowances are honored or complied with, as required in laws discussed above. On such basis I am of the view that, the respondent contravened the provision of Section 43 (1)



of the Act because failure to pay the applicant's subsistence allowances as his statutory entitlement after termination of employment.

In the circumstance of this matter, I am of the view that, the applicant is entitled to be paid subsistence allowance as for the whole time he was waiting for his transportation allowance.

In the result I find the present application has merit. As discussed above, firstly it is undisputed that transportation allowance was paid on delay. Secondly the respondent failed to prove if the subsistence allowance claimed by the applicant and his family was paid during the time, he was waiting for the transportation allowance as required in law. Therefore, the application is allowed.

It is so ordered.



I.D. Aboud

**JUDGE**

11/12/2020