

**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION NO. 705 OF 2019**

**BETWEEN**

**NATIONAL MICROFINANCE BANK..... APPLICANT**

**VERSUS**

**EDILTRUDA NEMES LYIMO(ADMINISTRATOR OF THE  
ESTATE OF LATE ELIARINGA NGOWI)..... RESPONDENT**

*Date of Last Order: 03/06/2021*

*Date of Judgment: 11/06/2021*

**Z.G.Muruke, J,**

The respondent is the administrator of the estate of the late eliaringa ngowi who was employed by the applicant in 1991 as a Bank Clerk. He worked hard thus promoted to various positions until 22nd April 2015, when terminated on ground of misconducts. It is alleged that while serving his position as Customer Service Officer, the applicant announced the vacance of Customer Service Manager, Mbezi Branch. The respondent was among the interested employees applied for the vacancy. However, while the applicant was exploring the respondent's CV noted that, academic qualification of the respondent was Advanced Diploma in Accountancy from the Institute of Finance Management (IFM), thus asked to submit the said academic certificate, but did not. It was later discovered that he was not possessing the said qualification, thus, terminated on misconducts. Being dissatisfied respondent referred



the dispute to the Commission of Mediation and Arbitration (CMA) where it was found that termination was fair. However, on relief CMA awarded the respondent subsistence allowance and ordered the applicant to repatriate the respondent's family as they did not do so when terminating him. The applicant was aggrieved with the award and filed the present application challenging the award on the following grounds:

- i. Whether the arbitrator is mandated by the law to award the respondent subsistence allowance a relief which was not sought by the respondent in the CMA Form No.1.*
- ii. Whether the respondent is entitled to subsistence allowance.*

The application was supported by the affidavit of Lilian Komwihangiro, the applicant's Principal Officer. Ediltruda Nemes Lyimo's counter affidavit was filed to challenge the application.

Advocate Alex Felician on the 1<sup>st</sup> ground submitted that, the arbitrator awarded the applicant subsistence allowance to the tune of 40,149,535.2/=, a relief which was neither pleaded in the CMA F1, nor reflected on the issues framed by the parties at the CMA. He further submitted that, CMA F1 is the pleading which sets forth prayers and reliefs sought by the complainant at the CMA. Therefore, parties are bound by their pleadings, citing the case of **Rumishael Shoo and 64 Others v. The Guardian Limited** (2011-2012LCCD] as cited in consolidated Revision No.137 and 1541 of 2017 between **Mantra Tanzania Limited v. Joachim P. Bonaventure** and the case of **Makori Wassaga v. Joshua** (1987) TLR 88.

Applicant counsel further submitted that, arbitrator's reasoning was based on issues of repatriating the respondent something which was not in dispute between the parties that was contrary to the labour laws,

referring the cases of **Power Roads (T) Ltd v. Haji Omari Ngomero** as cited in the case of consolidated Revision No.137 and 1541 of 2017 between **Mantra Tanzania Limited v. Joachim P. Bonaventure** and the case of **Marine Service Company v. Wallboard Kalenzi, LCCD 133/2015**, to support his argument.

On 2<sup>nd</sup> ground counsel submitted that in terms of Section 43 (1) (c) of the Employment and Labour Relations Act, CAP 366 RE 2019, subsistence allowance is only granted by the court or commission when there is proof that an employee has never been repatriated to the place of recruitment upon termination of his employment. At the CMA neither of the party gave evidence on subsistence allowance. Rather it was the arbitrator who asked the Administratix of the employee as to whether the employee was repatriated. Additionally, applicant counsel contended that subsistence allowance was among the terminal benefits which were entitled to the respondent as listed in the termination letter (exhibit D2). According to the bank statement of Eliaringa Ngowi (the respondent) in account No. 2062900010 he was paid a total sum of 1,992,000/= as repatriation cost from Dar es salaam to Kilimanjaro. Thus, it was not correct for the arbitrator to ask if he was repatriated without exploring other option off being paid the repatriation costs as per Section 43(a) (b) of CAP 366 RE 2019.

Further it was submitted that, the arbitrator on determining the rights of the deceased employee relied on the hearsay evidence of the administratix contrary to the doctrine of hearsay, referring Section 62 (1) (a) (c) of Evidence Act Cap 6 RE 2019 and the case of **Subramanian v. Public Prosecutor** [1956] WLR 965 as cited with approval in the case of **R v. Malimi Elisha**, Criminal Case No.



164/2015. Arbitrator's Act of relying on the hearsay and granting relief not pleaded in the CMA F1, contravened the rule of fair trial and a right to be heard, hence the decision is void, referring the case of **Mbeya Rukwa Auto Parts and Transport Ltd v. Jestina George Mwakyoma** [2003] TLR. In totality, applicant counsel prayed for the CMA award be revised and set aside.

In response to the applicant's averments, Advocate Edward Peter Chuwa for the respondent, prayed to adopt the counter affidavit opposing the application to form part of his submission. On the 1<sup>st</sup> ground Mr. Chuwa submitted that the law under Section 39 of CAP 366 RE 2019, casts the burden of proof to the employer. Therefore, the applicant had a duty to prove that he duly paid the respondent his subsistence allowance. Failure to do so, the respondent cannot be denied of his rights. Further, it is undisputed that the respondent was entitled to the subsistence allowance as it was reflected in the termination letter. The same is a matter of right in terms of Section 43 of CAP 366 RE 2019. Even if it was not pleaded in CMA F1, being legal and statutory right, the arbitrator cannot be faulted for awarding it, referring the case of **Eddy Martin Nyinyoo v. Real Security Group & Marine**, Lab. Rev. No 114/2011, [2013]LCCD 1, and the case of **Pyrethrum Company of Tanzania Ltd v. Edda Nyalifa**, Lab. Rev. No.181/2013, LCCD 2013. Mr. Chuwa prayed for this court invoke Section 28(1) of the Labour Courts Rules,2007, to reverse and re calculate the subsistence allowance so as to include time from 30<sup>th</sup> August,2018 when the respondent was awarded the subsistence allowance to the date when the same is paid to the respondent.





On the 2<sup>nd</sup> ground Learned Counsel insisted that, as submitted by the applicant that subsistence allowance is only granted to the respondent if proven that he was not repatriated, the respondent having not been repatriated to the place of recruitment, he is entitled to subsistence allowance as a matter of right, referring the case of **Geoffrey Mhindwa v. The General Secretary East Lake Victoria Diocese**, Rev. No. 197/2013 [2013] LCCD 1. The applicant attached a bank statement to his submission, that was contrary to the law as it was a new evidence, it can not be considered by this court. It will be against the principle of natural justice as the respondent cannot be called at this stage to cross examine on the document, referring the case of **John Mwanjela (Administrator of Estate of Ignatus John Mwanjela v. KIMMS Security System Co. Ltd and William Kiwango**, Rev No.12/2013[3013]LCCD 1. Counsel prayed for the bank statement be ignored by this court, the applicant ought to have brought the bank statement to prove that the respondent was paid subsistence allowance if at all he was paid during trial at (CMA).

Further, Mr. Chuwa argued that the applicant's counsel misdirected himself when he submitted that the testimony of the administratrix of late Eriaringa Ngowi over the rights given to the late Eliaringa Ngowi as the employee during his termination, is hearsay hence not admissible.

In rejoinder the applicant's counsel reiterated their submission in chief. In addition, it was submitted for the applicant that, the cases of **Edy Martin Nyinyoo v. Real Security Group & Pyrethrum Company of Tanzania v Edda Nyalifa** are distinguished with the facts in the matter at hand, because the late Eliaringa Ngowi was paid repatriation costs immediately after his termination. Also there is no any

new evidence which was brought at this stage hence the case of **John Mwanjela (Administrator of Estate of Ignatus John Mwanjela v. KIMMS Security System Co. Ltd and William Kiwango** (supra), is irrelevant and distinguishable. Counsel insisted on the prayers in the submission in chief.

Having considered the parties submission, laws applicable and records, the issues for determination are:

- i. **Whether it was proper for the arbitrator to award the respondent claims not prayed in CMA F1?**
- ii. **Whether it was correct for the arbitrator to order subsistence allowance to the respondent?**

On the 1<sup>st</sup> issue the applicant alleged the arbitrator erred in law by awarding the respondent a tune of 40,149,535.2 as subsistence allowance as the same were not pleaded in the CMA F1. The respondent's counsel argued that the same is the respondent's right hence can be awarded even if it was not pleaded in CMA F1.

It is true that the claims before CMA are initiated by the CMA F1, where the complainant has to state the reliefs sought. It is also undisputed that the relief of subsistence allowance was not pleaded by the respondent in his CMA F1, while initiating his complaint. However, it is a requirement of the law under Section 43(1) of CAP 366 RE 2019 that, after termination regardless of the reason the employer has to repatriate the employee who has been terminated in a place other than the place of recruitment. The employee to be repatriated, is entitled to subsistence allowance to the day when the employer will pay his repatriation costs. Therefore, subsistence allowance is a statutory right

to the employee. This has been the position in various cases including the case of **Geoffrey Mhindwa v. The General Secretary East Lake Victoria Diocese**, (supra) as cited by the respondent's counsel and the case of **Eddy Martin Nyinyoo v. Real Security Group & Marine**, where it was stated that:-

*'the rule stands for the proposition that award can be made of rights which in law follow the decision e.g. in a case of employment termination, an award of severance pay, notice, transport to place of recruitment etc, may be made even if not claimed. That is because the said payments are payable as of right under Section 41, 42, and 43 of Sub -part F of CAP 366 RE 2019.'*

On basis of the position above, I find the arbitrator had mandate to order payment of subsistence allowance even if it was not pleaded in CMA F1.

As regard to the 2<sup>nd</sup> issue the applicants contends that, the arbitrator wrongly awarded the respondent subsistence allowance without assessing the mode he was paid. Only the arbitrator relied on the hearsay evidence of the respondent who is the administratrix of the late Eliaringa Ngowi. He contended that the repatriation costs was one among the reliefs which were paid to the respondent as per the termination letter. The same was refuted by the respondent's counsel as there is no proof that he was paid the same.

With due respect to the applicant's counsel, the evidence adduced by the respondent, is not hearsay as she had mandate of suing and be sued on behalf of deceased Eliaringa Ngowi. The law is very clear under Section 100 of CAP 352 RE 2009, that provides that: -



*'100. An executor or administrator has the same power to sue in respect of all causes of action that survive the deceased, and may exercise the same powers for the recovery of debts due to him at the time of his death, as the deceased had when living.'*

Now, 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 including the case of **Paul Yustus Nchia v. National Executive**



**Secretary CCM & Another**, Civil Appeal No. 85/2005 CAT DSM  
(Unreported) it was 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, repatriation costs are paid to the employees who were terminated out of a place of recruitment. The law clearly states 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. Thus, subsistence allowance is paid when the employer delayed to repatriate the employee from the date of termination.

I have gone through the applicant's evidence before CMA, there is no any evidence showing that the respondent was paid repatriation costs on his termination. When DW1 was cross examined he was asked if the respondent was paid repatriation costs as reflected at page 19 of the typed CMA's proceedings, his answer was "sijui, sina uthibitisho hapa" and on the other day another applicant's witness had no evidence as regard to the same. In proving fairness of termination the employer must also state and proof payment of the statutory entitlements of the terminated employee if he has or has no any entitlement as the two are inseparable. Unfortunately, applicant has not proved to the standard required, there was only an attempt to do so.



It is on record that the applicant on 24<sup>th</sup> July,2018 submitted the applicant's salary slip for the commission to see respondent's salary, but the same was not received as an exhibit so it is not part of the CMA's records and this court either as the applicant attached to his submission. However, I had a glance on the said salary slip for the interest of justice even if the CMA or this Court would have relied on the same to decide, it is not specifying as to how much was the respondent paid as his repatriation costs. It is not easy to know if the said 1,992,000/= included repatriation costs.

For the interest of justice, respondent to be paid repatriation costs if not paid at the time of termination. Equally so, if was paid, then there will be no need of subsistence allowance, and in the case, not paid, then respondent is entitled to the subsistence allowance to the date of fully payments. All these to be done during execution stage where proof of the same will be checked, upon evidence. In totality Revision allowed to that extent.

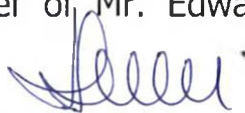


Z.G.Muruke

**JUDGE**

11/06/2021

Judgment delivered in the presence of Alex Felician, Counsel for applicant and also holding brief of Mr. Edward Chuwa, Counsel for respondent.



Z.G.Muruke

**JUDGE**

11/06/2021