IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 136 OF 2021

(Arising from Labour Dispute No. CMA/DSM/TEM/19/11/2020 in the Commission for Mediation and Arbitration at Dar es Salaam -Temeke, before Hon. Batenga)

BETWEEN

KEITH BUNDA ..... 1st APPLICANT

KIRBY NG'ANDU ..... 2nd APPLICANT

VERSUS

ZAMBIA GARGO AND LOGISTRICS LTD. ..... RESPONDENT

JUDGMENT

S.M. MAGHIMBI, J:

The two applicants were employed by the respondent on a three years' fixed term contract which commenced on the 10th day of June, 2015. The first applicant (Keith Bunda) was employed as a safety officer while the second applicant (Kirby Ng'andu) was employed as the operations Manager of the respondent (EX KM-1). The two contracts were terminated under circumstances which the applicants find to be unfair. What the applicants' are basing their complaints on is what led to their termination as will be narrated briefly.

On the 15th March, 2018, both applicants were arraigned before Kisutu Resident Magistrate's Court in Economic Case No. 24/2018, they were

eventually discharged on the 22nd day of October 2019 following a Plea Bargaining agreement with the Director of Public Prosecutions. While still in custody, on 06th June 2018 the applicants received letters terminating their contract (KM-3 for the second applicant). Aggrieved by the termination, after being discharged, the applicants and three others, who are not parties to this revision, approached the CMA lodging a dispute of unfair termination of their employment. In its award dated 12th March, 2021, the arbitrator found the termination of the complainants to be substantively fair owing to the reason that they were in remand custody so they could not fulfill their duty. She cemented her reasons on ground that the offence that the complainants were charged with at the RM's court did not relate to their employer hence the employer could not continue to pay them while they could not perform any work. Subsequent to the findings, the arbitrator awarded different benefits to different complainants.

As for the applicants herein, the arbitrator ordered the respondent to pay them their repatriation allowances to Zambia as per the terms of their contract. For the remaining complainants at the CMA, the respondent was ordered to pay them their terminal benefits as per their employment letters. Aggrieved by the award, the applicants have lodged this reading under

Section 91(1)(a),Section 91(2)(c), and 94(1)(b)(i) of the Employment and Labour Relations Act, Cap 366 R.E. 2019; (ELRA) and Rule 24(1),(2)(a),(b),(c),(d),(e) & (f), Rule 24 (3)(a),(b)(c) & (d) and Rule 28(1)(b),(c),(d) & (e) of the Labour Court Rules, 2007, G.N. No. 106 of 2007 praying for the following orders:-

1. That the Honourable Court be pleased to call for records of the proceedings and award o the commission for mediation and arbitration in Labour dispute No. CMA/DRM/TEM/19/11/2020 and revise and set aside the award of the Commission for Mediation and Arbitration dated 12th March 2021 delivered by Hon. M. Batenga Arbitrator, on the ground that there has been material irregularity and an error material to the merit of the subject matter involving injustice
2. That the award was improperly procured by committing errors of facts and law.

In their affidavit to support the application, the applicants raised the following concerns:

(i) That after going through the award the counsel for the applicants discovered that the arbitrator ignored and totally disregarded

evidence, opening statements and closing arguments of the applicants and hence did not incorporate the same in the award.

(ii) That the honourable arbitrator ignored the evidence stemming from cross examination of the respondent on important facts especially the admission by PW1 that they did not adhere to the mode of delivery of notice of disciplinary hearing as a result erred in her award.

(iii) That the award was based on facts that were neither stated by witnesses nor pointed on the opening and closing statements of parties. The arbitrator ignored the fact that the reason for non renewal of 2nd applicant's contract as stated in termination letter was because the applicant was charged and remanded for non bailable offences and that he might serve long sentence.

(iv) Further that, the arbitrator was insguided by no considering the issue in dispute with regards to the 2nd applicant that , the reasons for no renewal were unfair hence unfair termination.

(v) That the honourable arbitrator misguided herself by considering that the applicants do no deserve subsistence allowance because when they got out of remand they did not report to the respondent

about their whereabouts. And the arbitrator never considered the facts that the respondent transported the 2nd applicant's vehicle to Zambia hence the respondent knew about the whereabouts of the applicants. The arbitrator even applicant's families who were also entitled to be repatriated as per the contract and the required of law.

(vi) That the honourable arbitrator misguided herself on facts that the applicants were in remand because of the alleged crime that happened at their work place and that it was not directly connected with the respondent.

(vii) That the award in fundamentally flawed that it injustices the applicants hence it is in the interest of justice that it is reversed.

From those issues allegedly arising from material facts of the matter, the applicants narrowed down the legal issues for determination by this court:

1. Whether the arbitrator was right to hold that termination of the employment was fair justified by fair reasons and adhered to laid procedures.
2. Whether the arbitrator was right to order repatriation and refuse subsistence allowance for the applicants.

3. Whether the relevant provisions of labour legislation and case laws were properly interpreted and applied by the arbitrator in reaching her decision.

On their part, the respondent opposed the application praying for its dismissal. The application was disposed by way of written submissions. The applicant's submissions were drawn and filed by Mr. Barnabas Nyalusi, learned advocate while the respondent's submissions were drawn and filed by Ms. Irene Mchau, learned advocate.

Having considered the submissions of the parties, I have noted a legal issue raised by the respondent in their reply submissions which I find a need to address it before going into the merits of this application. In his submissions, Mr. Nyalusi brought to the attention of this court competence of this Application regarding the 2nd Applicant - Kirby Ng'andu. His argument is that Kirby Ng'andu's case is incompetent before this Court because one; there is no any affidavit deposed by him to support the chamber summons and two that there is no any order of this Court to allow Keith Bunda to act as representative of Kirby Ng'andu. His submission to the objection was based on what he argued to be a settled law that any party aggrieved by the decision of the CMA has to apply for revision before this Court under Section

91(1) (a) (b) of the Employment and Labour Relations Act Cap 366 R.E 2019 (ELRA). That Section 91 (2) (a), (b), (c) states the grounds upon which the Labour Court can set aside the Award made by the CMA and that Rules 24(1), (2), (a), (b), (c), (d), (e), (f) and (3) (a), (b), (c) and (d) of Labour Courts Rules 2007 GN 106 of 2007 (the Rules) state the mode of presentation of the application for revision.

He then outlined that simply stated, the aggrieved party must, among other things, present to this court a notice of application complying substantially with Form No. 4, supported by an affidavit comprising of all matters stated under sub-rules (a) – (d) of Rule 24(5) of the Rules. Further that representation in this court is not automatic including for a party who comes to this Court by way of revision. He argued that the interested party must apply and be granted leave to appear under representation according to Rule 44(2) of the Rules which he cited as such:

"where there are numerous persons having the same interest in a suit, one or more of such person may, with the permission of the court appear and be heard or defend in such dispute, on behalf of or for the benefit of all persons so interested, except that the court shall in such case give at the complainant's expenses, notice of the

institution of the suit to all such persons either by personal service or

institution of the suit to all such persons either by personal service or where it is from the number of persons or any other service reasonably practicable, by public advertisement or otherwise, as the court in each case may direct".

He also supported his submissions by citing the decision of this Court in the case of **Said Msangule & Others Vs. Sokoine University of Agriculture (SUA), Labour Court Case Digest Part II 2014 labor Revision No.2011 of 2013** whereby this Court, Hon. Rweyemamu, J (as she then was) had this to say:

"...the rationale for this view is fairly apparent. Where for instance, a person comes forward and seeks to sue on behalf of others persons, those other person might be dead, non-existent, or otherwise factitious. Else he might purport to sue on behalf of a person who have not in fact authorized him to do so. If this is not checked it can lead to undesirable consequences. The court can exclude such possibilities only by granting leave to the representative of sue on behalf of persons whom he must satisfy the court that they do exist and that they have dully mandated him to sue him on their behalf".

The court then concluded:

"In the result of all the above, I find that the applicant had no proper leave to appear in a representative capacity, and that the application is for that reason, incompetent. I order the same struck out".

He then concluded that Kirby Ng'andu's case is incompetent before this Court as the defects stated above are incurable. His prayer was that Kirby Ng'andu's case be dismissed on this ground.

In reply, Ms. Mchau submitted that Rule 44(2) of the Rules as cited by Mr. Nyalusi is relevant in matters filed to the Court as suits/complaints for instance matters filed under Rule 23 of the Rules. She argued that in the matter before me, the rule is irrelevant as the matter is not a suit rather an application for revision. She went to define a suit under Section 2 of the Law of Limitation Act, Cap. 89 R.E 2019 as:

"any proceeding of a civil nature instituted in any court but does not include an appeal or application"

She went on submitting that the term suit is also defined by the High Court in the case of **Mlenga Kalunde Mirobo V. The Trustees Of Tanzania Natioonal Parks And Attorney General. Labour Revision Application No. 6 of 2021**, High Court Labor Division Iringa where the

Court at page 10 cited with approval the case of **Burafex Ltd V. Registrar Of Titles Civil Appeal No. 235 of 2019,** High Court Dar es Salaam District Registry, whereby Hon. Mlyambina, J defined a suit as:

> *"any proceedings of a civil nature in court of law involving two or more parties on a dispute or claim which needs to be adjudicated upon to determine or declare the rights of the disputing parties"*

She then argued that this application for revision is neither to determine nor declare the rights of the disputed parties as the rights of the parties were determined and declared at the CMA, the duty of this Court at this juncture is to determine whether they were properly determined or declared. Further that a revision is a re-examination of a case which involves the illegal assumption, non-exercise or irregular exercise of jurisdiction; it does not confer any substantive right to the parties. That even if the 1st Applicant was required to obtain leave and he has not and no affidavit for the 2nd Applicant, the only remedy is for this court to struck the application where the applicant, may seek a leave to re-file and not to Dismiss the matter as misleadingly pleaded by the counsel for the Respondent in their reply to submission. She concluded that the argument fronted by the counsel for the respondent is without merit and should be ignored and dismissed.

Having considered the rival submissions of the parties, my analysis will be based on what the ELRA and the Labour Court Rules provide in circumstances like the one at hand. The rationale being that the procedures in Labor Court are not governed by the Civil Procedure Code, Cap. 33 R.E 2019 or the limitation Act as argued by Ms. Mchau. As per our Rules it only where there is a lacuna that this court may resort to the CPC. Now, Mr. Nyalusi's argument is based on Rule 44(2) of the Rules which provides:

"where there are numerous persons having the same interest in a suit, one or more of such person may, with the permission of the court appear and be heard or defend in such dispute, on behalf of or for the benefit of all persons so interested, except that the court shall in such case give at the complainant's expenses, notice of the institution of the suit to all such persons either by personal service or institution of the suit to all such persons either by personal service or where it is from the number of persons or any other service reasonably practicable, by public advertisement or otherwise, as the court in each case may direct".

In principle, Rule 44(2) makes a requirement that a person wishing to represent another person with the same interest in the dispute to get the permission of the court appear and be heard or defend in such dispute, on behalf of or for the benefit of all persons so interested. Although Ms. Mchau strongly argued that the word used is *a suit*, she missed the following words where the rule allows a person to be heard and defend "a dispute" on behalf of the others. Therefore the key word in the Rule is the dispute that is to be defendant because as I said earlier, in labor regime, we have no suits as strictly inteprated in the cited cases. Here we have disputes and complaints depending on the nature of complaint tabled for determination. In the cited case of **Mlenga Kalunde Mirobo V. The Trustees Of Tanzania Natioonal Parks And Attorney General. Labour Revision Application No. 6 of 2021**, which I fully subscribe to, a suit includes any proceedings of a civil nature involving two or more parties on a dispute or claim which needs to be adjudicated. The key words which Ms. Mchau based her arguments on are "*to determine or declare the rights of the disputing parties*" her argument being that in Revision before me, I am not to declare any rights because that has been done by the CMA. With respect, I find that Ms. Mchau has misconstrued the one kind of revision that is done by the Labor

Court regarding the awards of the CMA under Section 91 of the ELRA and the ordinary revisions done under the CPC. In the latter, it is done under the provisions of Section 79 of the CPC which provides:

"The High Court may call for the record of any case which has been decided by any court subordinate to it and in which no appeal lies thereto, ***and if such subordinate court appears-***

(a) to have exercised jurisdiction not vested in it by law;

(b) to have failed to exercise jurisdiction so vested; or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit."

Indeed as she argued, the Court is only limited to deal with the matter if such subordinate court appears to have exercised jurisdiction not vested in it by law , have failed to exercise jurisdiction so vested or to have acted in the exercise of its jurisdiction illegally or with material irregularity. The remedy available therein is make such an order as it deems fit. Therefore in revisions under the CPC, the High Court does not determine the rights of the

parties; rather it makes an order fit under the circumstances. On the hand however, the Section 91(1) of the ELRA provides that:

> *"Any party to an arbitration award made under section 88(10)who alleges a defect in any arbitration proceedings under the auspices of the Commission* ***may apply to the Labour Court for a decision to set aside the arbitration award..***"

Now, in revision under Section 91 of the ELRA, this court may set aside the award altogether. Sub-section 4 of the same Section 91 further confers of this Court, after the award is set aside, to determine the dispute in the manner it considers appropriate and/or make any order it considers appropriate about the procedures to be followed to determine the dispute.

Now the words *"to determine the dispute in a manner it considers appropriate"* is what differentiates the revision under ELRA and the conventional revisions done under the CPC. By dealing with the dispute in a manner considered appropriate is what allows this court to re-analyse the evidence and proceed to determine and declare the rights as it will be deemed appropriate. This means the comparison of definition of a suit where declaration of rights is concerned is distinguished in labour disputes

therefore the need for a person to prove permission to represent the other person becomes mandatory. And in the absence of that like our case at hand, then the only conclusion that can be made which I hereby proceed to make is that there is no proof that the 2nd respondent gave permission to the 1st applicant to represent him in this revision. In the absence of that proof, then the revision on behalf of the 2nd applicant is incompetent and the remedy is, as correctly argued by Ms. Mchau, to strike out the revision for the 2nd applicant and not to dismiss it. In conclusion, the 2nd applicant's revision is hereby struck out. The rest of this judgment will only deal with the 1st respondent.

Starting with the issue of substantive and procedural fairness of the termination, Ms. Mchau submitted that after going through the award, they discovered that the arbitrator ignored and totally disregarded evidence, opening statements and closing arguments of the applicants and hence did not incorporate the same in the award. That it is evident from the opening statement of the respondent that the termination of employment for Keith Bunda was mainly because he abounded from employment and was untraceable to be served with notice to disciplinary hearing that is why they conducted the disciplinary hearing ex-parte. She then argued that the

honourable arbitrator misdirected herself in reasoning by holding out that Keith was nowhere to be seen to be served with notice while both the contract and the testimony of the H.R. (PW1) is evident that the notices were supposed to be served by a registered mail if not physical. Further that the honorable Arbitrator also failed to analyse the fact that, the last date that Keith received payment was on the 04th March 2018 and that the honourable arbitrator did not address important issue such as the termination benefits that the applicant witness conceded that they were yet to be paid Keith amounting to 10,000 US Dollars.

Ms. Mchau submitted further that the honourable arbitrator ignored the evidence steaming from cross examination of the respondent on important facts especially the admission by PW1 that they did not adhere to the mode of delivery of notice of disciplinary hearing as a result erred in her award. She pointed out that in her award, the honourable arbitrator did not at all consider, analyse and decide on the fact that the contract of employment between the applicant and the respondent clearly stated that, all correspondents shall either be at the physical address or through a home address by a registered mail. This was established by the applicant Keith Bunda and was never disputed by the Respondent H.R. who was PW1 and

that the respondent never justified why they chose to use Court Broker to serve a summons to disciplinary hearing. Her argument was that the issue touches the procedural aspect on the reason to conduct an ex-parte disciplinary hearing hence prejudicing the applicant's rights to be heard.

In reply, Mr. Nyalusi pointed out that according to Exh. KM-8, it is proved in evidence that Keith was employed in the position of Security Officer under a specific contract of three (3) years commencing 10th June, 2015 to 10th June, 2018. That the evidence is loud and clear that Keith signed this contract of employment thereby agreeing to all terms and conditions stated therein. He argued that since no evidence was led to negate the freedom and willingness of parties to contract, the terms and conditions thereof are sacred and binding on the parties. In other words, the principle of sanctity of contract applies. He supported his submissions by referring this court to the decision of the Court of Appeal sitting in Mwanza in the case of **Simon Kichele Chacha Vs. Aveline M. Kilawe, Civil Appeal No. 160 of 2018,** where at p. 8-9 it was held that:-

"It is settled that parties are bound by the agreements they freely entered into and this is the cardinal principle of the law of contract. That is, there should be a sanctity of the contractor as lucidly state in

Abuay Alibhai Azizi versus Bhatia Brothers Limited [2000] TRL 288 at p. 289 thus:-

"The principle of sanctity is consistently reluctant to admit excuses for non-performance where there is no in capacity no fraud (actual or constructive) or misrepresentation, and or no principle of public policy prohibiting enforcement".

He then submitted that Keith was Zambian national and a permit for him to work here in Tanzania was obtained (Exh. KM-9) and that according to Exh. KM-10, Keith absconded from work for more than 14 working days. In terms of the Schedule to the Code, at page 74 thereof, the offence constituted *"serious misconduct leading to termination of employment"* which misconduct was absence from work without permission as without acceptable reason for more than five working days.

He then pointed out that according to DW-1, Keith absconded from work without permission and or knowledge from the Respondent or any other officials of the Respondent. That in his testimony, Keith who testified as DW-2 also admitted that he did not attend work for the entire period of 14 days and without any permission from the Employer – the Respondent. That the only statement made by Keith (DW-2) is that he informed the CEO

through his cell phone that he was sick. However, he was unable to submit any proof to authenticate his testimony. Further that the CMA was right and the holding of the CMA is supported by the holding of the Court of Appeal in the case of **Paulina Samson Ndawavya vs Theresia Thomasi Madaha (Civil Appeal 45 of 2017) [2019] TZCA 453 (11 December 2019**); where it was held at p. 16 :-

> *"It is again trite that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his and that the burden of proof is not diluted on account of the weakness of the opposite party's case. We are fortified in this view by the extracts form the celebrated works of Sarkar on the India Evidence Act, 1872 largely borrowed by the Tanzania Evidence Act, Cap 6 [R.E 2002]. At the risk of making this judgment unduly long, we take the liberty to reproduce the relevant passage from Sarkar's Laws of Evidence, 18th Edition M.C. Sarkar, S.C. Sarkar and P.C Sarkar, published by Lexis Nexis as below:*
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> > *"... The burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies it; for negative is usually incapable of proof. It is ancient rule founded on consideration of good sense and*

should not be departed from without strong reason ... Until such burden is discharged the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom the burden lies has been able to discharge his burden. Until he arrives at such a conclusion, he cannot proceed on the basis of weakness of the other party..." *(At page 1896).*

On the procedural fairness, Mr. Nyalusi submitted that according to Exh. KM D-11, Keith was summoned to attend disciplinary hearing and service thereof was effected by DW-2, Mr. Benson Yekonia Swai, a registered Court Process Sever who also tendered in evidence Exh. KM-33, an affidavit to prove non-service to Keith due to absence. That DW2 also testified that on 19th March, 2018 DW1 gave him documents to serve Mr. Keith and in the process he consulted Balozi wa Mtaa who took him to Keith's residence where he found the door locked and Keith was not there. that he then ried to serve him again on 21st March, 2018 but without success and therefore swore an affidavit of proof of service which he tendered (Exh. KM-33). He argued that the exhibit is self-explanatory that Keith could not be traced hence hearing of the matter proceeded ex-parte and he was ultimately

terminated from employment after hearing was conducted pursuant to Exh. KM 13 and KM-12 respectively. He also argued that the disciplinary hearing was conducted on 23rd March, 2018 after service failed to be effected and affidavit procured on 21st March, 2018 which is a period of more than 48 hours required under Regulations 13(3) of the Code. He concluded that after termination, Keith was paid all his benefits as required.

Having gone through the records of the application, I am inclined to agree with the arbitrator that the termination of the 1st applicant was substantively fair. As per the records, the applicants were arraigned in court for economic offences which were not in connection with the respondent herein. Since they were in custody charged with unbailable offences, the respondent could not be certain as to when they will be able to work for her again. Furthermore, as submitted by Mr. Nyalusi, there is evidence to show the respondent's attempts to serve the 1st applicant with a notice of disciplinary hearing and undisputed fact that the 1st applicant was in custody. Therefore by being in custody for unspecified period, for offences not committed against their employer and having no formal notice of their arrest tabled before the employer, then it would only be fair for the conclusive finding made by the employer that the employee absconded from work. The

question to be put forth is whether the offence of abseeintism justified the termination of the 1st applicant. As per the evidence adduced, Keith who testified as DW-2 admitted not to attend work for the entire period of 14 days and without any permission from the Employer – the Respondent. Although the 1st applicant Keith alleged to have informed the CEO through his cell phone that he was sick, he could not bring any proof to that effect and the facts proved that he was in custody instead.

It is also pertinent to note that, the applicant were under obligation to notify their employer of the misfortune, something which the record is silent on whether they so did. Therefore the respondent continued to pay the applicants their salaries for many months which they did not work for until when the decision to terminate them came on.

At this point, I find that the termination of the applicant was substantively fair as the employer did not have formal information of the applicant's arrest, the offences were unbailable hence the period of absence was indefinite hence termination could be the only option. Further to that, since the respondent proved the attempts to serve the 1st applicant with a notice of disciplinary hearing, then the termination was procedurally fair.

I have noted that the applicants are faulting the CMA on the ground that after going through the award the counsel for the applicants discovered that the arbitrator ignored and totally disregarded evidence, opening statements and closing arguments of the applicants and hence did not incorporate the same in the award. This is not the case because in the award of the CMA the evidence of the parties were considered and that is when the arbitrator came up with the finding that the respondent could not continue employment of the applicants after they were arraigned and remained in custody for an indefinite period. The evidence of all witnesses were considered before the verdict was made.

The second issue is whether the arbitrator was right to order repatriation and refuse subsistence allowance for the applicants. Ms. Mchau submitted that the honourable arbitrator misguided herself by considering that the applicants do not deserve subsistence allowance because when they got out of remand they did not report to the respondent about their whereabouts. Further that the arbitrator never considered the fact that the respondent transported the 2nd applicant's vehicle to Zambia hence the respondent knew about the whereabouts of the applicants. She also submitted that the arbitrator even acknowledges the fact that there was

Dar Es Salaam where Z.G. Muruke, J., cited with approval the case of **Paul Yustus Nyachia Vs. National Executive Secretary CCM & Another, Civil Appeal No. 85/2005** where the Court of Appeal of Tanzania held inter alia 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."

Mr. Nyalusi replied that the CMA was right to order repatriation in accordance to employment contract, first because the Applicants have not stated in their submission how the CMA wronged by ordering repatriation of the Applicants in accordance to their employment contracts. Second is that the order for repatriation is made in accordance to S. 43(1) (a) because clauses No. 3.2.10 for both contracts (Keith and Kirby) refers to such provision. He also distinguished the case of **Kenya Kazi Security Vs. Kirobotoni Ramadhani and Others** referred by the Applicants is distinguishable from the present case because in the present case there is no delay in paying the Applicants. As exhibited in their testimonies all stated that they continued to stay in Tanzania on their own volition and because

they were following up the case at CMA. Furthermore the Applicants had another obligation in the Economic Criminal case NO. 24 of 2018 which they settled with DPP and ordered to pay settlement money. That the Applicants admit in their testimony they were still making repayments and could not leave Tanzania until the debt were settled in full. He concluded that under the circumstances, the applicants cannot claim any justification to be paid subsistence allowance under 43(1), (c) as suggested.

On Ms. Mchau's submission that the provisions of Rule 27(5) of the Code applies in the present matter because criminal charges which the Applicants stood charged happened at the Respondent's work place; directly concerned the business of the Respondent and that Applicants were arrested when performing the Respondent's works. Mr. Nyalusi submitted that the argument has no merits for a simple reason that the Respondent was not a party to the criminal case (supra) neither was his business affected by the stealing of customers' consignment. He argued that after all the Applicants were convicted on own admission.

Having considered the parties' submissions, the issue is whether the 1st applicant was entitled to be paid subsistence allowance after being paid repartriation allowance. I find it pertinent that I first define when substitence

allowance is to be paid and then relate it to the ciscumstances under which the 1st applicant was terminated. Section 43(1)(c) provides:

Where an employee's contract of employment is terminated at a place other than where the employee was recruited, the employer shall either-

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.

As per the cited case of Kenya Kazi Security (supra) subsistence allowance is paid to an employee for the period between his termination to the period when he is paid repatriation allowance to his place of domicile. The issue in this case would be the amount which the respondent would have paid the 1st applicant as substance allowance. According to the evidence adduced, while the 1st applicant was terminated, he was still in police custody hence there is no way that the employer could pay subsistence then because it was indefinite as to when he will be released.

Furthermore, the evidence adduced during arbitration established that the 1st applicant continued to stay in Tanzania for reasons known and beneficial to him, one of them being a follow up on this dispute at the CMA and that the Applicants had another monetary obligation in the Economic Case which they settled with DPP. It would have then be unfair to impose a duty on the respondent to pay the applicant subsistence allowance for all this period. This ground also lacks merits.

With the above analysis and findings, I see no need to fault the award of the CMA. The revision before me lacks merits and it is hereby dismissed.

Dated at Dar es Salaam this 18th day of August, 2022.

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S.M. MAGHIMBI

JUDGE