

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

LABOUR REVISION NO. 68 OF 2021

*From the decision of the Commission for Mediation and Arbitration of DSM at Kinondoni
(Johnson: Arbitrator) dated 30th September 2021 in
Labour Dispute No. CMA/DSM/ KIN /883/2019*

AKO GROUP LIMITED.....APPLICANT

VERSUS

SHAMSI S. SAIDI.....RESPONDENT

JUDGEMENT

K. T. R. MTEULE, J.

22nd August 2022 & 12th September 2022

Dissatisfied with the award of the Commission for Mediation and Arbitration [herein after to be referred to as CMA] the applicant **AKO GROUP LIMITED** has filed this application under the provisions of **Rules 24 (1), (2) (a) (b) (c) (d) (e) (f), (3) (a) (b) (c) (d) and 28 (l) (c) (d) and (2) of the Labour Court Rules, GN. No. 106 of 2017** and **Sections 91 (l) (a) (b), (2) (a) (b) (c), (4) (a) (b) and 94 (l) (b) (i) of the Employment and Labour Relations Act No. 6 [CAP 366 RE 2019]** as amended from time to time [herein to be referred to as ELRA] and any other enabling provision of the law. The applicant is praying for an order for this Court to call for the records and examine the proceedings of the Commission for

Mediation and Arbitration at Kinondoni, Dar es salaam in Labour Dispute No. CMA/DSM/KIN/883/2019, revise it, and set aside the award therein. The applicant further prayed for any other orders as the court may deem fit.

The brief background of the dispute as gathered from the CMA record and the parties' pleadings is explained hereunder. The respondent was employed by the Applicant as a Senior Human Resource Officer under yearly fixed term contract. Their relationship turned hostile on 29th October 2019 when a notice of non-renewal of the contract was issued by the applicant to the respondent. Being not satisfied with employer's decision, the respondent filed the aforementioned labour disputed in the CMA. At the CMA the arbitrator found the termination of contract to be fair on reason that there was no reasonable expectation of renewal. However, the arbitrator awarded subsistence allowance, transfer allowances and repatriation allowance to the tune of TZS 18,400,000.00. Being resentful with the award specifically the amount of terminal benefits awarded, the respondent filed this application seeking for this court's interference by a way of revision.

The affidavit in support of this application is sworn by Mr. Benedict Mahundi who is the applicant's Principal Officer and on the other hand, the respondent filed his sworn counter affidavit. The applicant's

affidavit contained four legal issues challenging the decision of the arbitrator. These issues are: -

- a) Since the respondent was recruited in Dar es salaam and the contract of the employment ended while stationed in Dar es salaam, whether it was proper for the Commission for Mediation and arbitration to order payment of subsistence allowance and repatriation cost to the respondent.
- b) Whether it was proper for the Commission for Mediation and arbitration to order payment of TZS 8,400,000/= subsistence allowance, TZS 5,000,000/= transfer allowance, TZS 5,000,000/= repatriation costs without the respondent establishing by evidence how much should be paid and on what basis.
- c) Whether it was proper for the Commission for Mediation and arbitration to order payment of subsistence allowance, transportation allowance and repatriation costs separately.
- d) Whether claims which are time barred and not related with termination of employment can be legally brought through the back door of unfair termination.

During hearing, the applicant was represented by Mr. Richard Clement, Advocate from Joel and Co Advocates while the respondent was represented by Mr. Saulo Kusakalah from Kusakalah & Company Limited. The hearing of the application was by of written submissions. In his submissions, the Applicant's counsel Mr. Clement submitted that, it is quite clear from the proceedings of the CMA that both DW1 and PW1 concurred in their testimony that the respondent was recruited in Dar es salaam by the Applicant as a senior Human Resource – Business Partner for a fixed contract of one year starting from 1st December 2018 to 30th November 2019 as per exhibit AKO-1 but stationed at Morogoro and Dodoma.

He further stated that it is also clear from the records that four (4) months before expiry of the employment contract, the respondent was transferred from Morogoro/Dodoma to the Applicant's headquarters in Dar es salaam and on 29th October 2019 when the contract was coming to an end, he was issued with a 30 days non-renewal notice (exhibit AKO-2) which reminded about the automatic expiry of the contract on 30th November 2019.

Submitting on law as to who qualifies for transport allowance, subsistence allowance and repatriation costs, Mr. Clement referred to **Section 43 (1) of ELRA**. In his interpretation, the section provides

no repatriation for an employee who has been terminated at the place of recruitment which is similar to the case at hand where the Respondent was recruited and terminated at Dar es salaam. He faulted the arbitrator for ordering payment of transport, subsistence and repatriation costs.

It is Mr. Clemence taking note of paragraph 8 (c) of the affidavit, testimonies of DW1 and PW1 which in his view indicate the source of the claim of TZS 8,400,000/= subsistence allowance, TZS 5,000,000/= transfer allowance and TZS 5,000,000/= repatriation costs, to be the Respondent's transfer from Morogoro/Dodoma to the Applicants' headquarters in Dar es salaam, he is of the view that the said transfer was done four months before the end of his fixed term contract. Referring to the evidence of DW1 all transport expenses from Morogoro/Dodoma to Dar es Salaam were covered by the Applicant and if at all he had other claims he could have claimed it while in office.

Mr. Richard Clement continued to submitted that the Respondent was transferred from Morogoro/Dodoma to Dar es salaam by the end of July, 2019 (four months before expiry of his contract) therefore he could have brought his claims of transportation costs to the Commission for Mediation and Arbitration within sixty days from the

day he was transferred as provided under Rule 10(2) of the Labour Institution (Mediation and Arbitration) Rules, G.N. No. 64 of 2007 but for unknown reason, the Respondent opted to remain silent until his contract expired on 30th November, 2019 and decided to file time barred claims through the backdoor of unfair termination.

In his view, it is undisputed that the Arbitrator erred in fact and law by concluding that the Respondent was entitled to 8,400,000/= subsistence allowance, 5,000,000/= transfer allowance, 5,000,000/= repatriation costs without taking into consideration that the Respondent was terminated at the place of recruitment. He thus prayed for this court to revise and set aside the decision of the CMA and declare that the Respondent is not entitled to repatriation expenses since he was recruited in Dar es Salaam and his contract expired while stationed in Dar es Salaam.

In resisting the application, Mr. Kusakalah started by refuting the assertion that that the counter affidavit admitted all the fact of the affidavit. He submitted that at the CMA the sole witness of the applicant testified that the respondent was not paid other claims, including transfer allowance, repatriation allowance and subsistence allowances and the same was not objected by the respondent hence cannot be objected at this juncture. He remarked that the witness

stated that the claims were not paid because the applicant did not request to be paid according to the policy which was not tendered as exhibit. He thus prayed for the application to be dismissed.

In rejoinder the applicant challenged the use of the words strict proof in counter affidavit which in his view apply in pleadings only. In his view, a counter affidavit which does not controvert the affidavit implies admission. He supported this assertion with the case of **East African Cables (T) Limited v. Spencon Services Limited (supra)**. He maintained that neither in the counter affidavit nor in his submission does the applicant dispute the fact that the respondent was recruited in Dar es salaam on 1st December 2018 and terminated in Dar es salaam on 30th November 2019. He reiterated that the arbitrator ordered payment of transport, subsistence and repatriation costs contrary to **Section 43 (1) of the Employment and Labour Relation Act, Cap 366 R.E 2019**.

Having gone through the parties' submissions and their sworn statements, I am inclined to deal with one issue, as to **whether the applicant has adduced sufficient grounds for this Court to exercise its power to revise and set aside the CMA award**.

In addressing the above issue, all grounds of revision raised by the applicant will be considered.

The first ground which consolidated affidavit legal issues (a), (b), and (c) in the affidavit centers on whether it was proper for the CMA to order payment of subsistence allowance, transfer allowance and repatriation cost to the respondent who was recruited in Dar es Salaam and terminated in Dar es Salaam. Before going into the details of this issues, I will firstly explore on the position of law regarding payment of subsistence allowance and repatriation cost.

Section 43 (1) of the ELRA states that: -

"(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."

From the above provision, it is clear that the employer has a duty to repatriate an employee to his place of recruitment when such employee is terminated while on a place other than where he was recruited. It is a further duty of the employer to pay for the costs of that repatriation.

At the CMA the arbitrator having found that the termination was fair due to ending of a fixed term contract, he awarded to the respondent subsistence allowance, transfer allowance and repatriation allowance all making total of TZS 18,400,000.00.

According to the Applicant the respondent should not have been paid for these claims because she was recruited in Dar es Salaam and his fixed contract of employment ended while stationed at Dar es salaam. From the foregoing, whether the respondent was at the place of recruitment is where the parties' contention lies. The Applicant is claiming that the respondent was already transferred to Dar es Salaam at the time of the end of his contract. This assertion is disputed by the respondent.

I have gone through the CMA record to ascertain what was the evidence regarding the location of the respondent's workstation during the end of her employment. It is not disputed that the Respondent was stationed in Morogoro. What is not clear is whether he was transferred back to Dar es Salaam. In the evidence given in the CMA, it did not feature anywhere as to whether there was an official transfer of the respondent from Morogoro/Dodoma to Dar es Salaam. The arbitrator's reasons for payment of subsistence allowance, transfer allowance and repatriation costs is that the applicant did not object the respondent's entitlement to the claims. The arbitrator acknowledged existence of the applicant's contention that the respondent ought to have claimed the payments while in office due to their HR Manual. However, the arbitrator condemned the respondent for having not produced the said HR Manual. The arbitrator further condemned the applicant for having not discharged his duty to keep employee's record in accordance with Section 96 (1) (a) of Cap 366 of 2019 R.E.

The issue of transfer was not amongst the issues raised in the CMA. The applicant cannot be condemned for having not tendered the evidence to prove the transfer since the issue of transfer was not clear if it was contentious in the CMA.

In the submission, the applicant insisted in the contents of paragraph 5 of the affidavit that four months before the expiry of the employment contract the respondent was already transferred from Morogoro to Dar es Salaam and all the payments were covered. The Respondent disputed the fact that at the end of the respondent's contract, he was already transferred to Dar es Salaam.

It is not disputed that the place of the respondent's recruitment was in Dar es Salaam, this is apparent in Exhibit AKO 1 at Clause 2 which is the contract of employment. It is further not disputed that the respondent was in Dar es Salaam when his contract came to an end. Was the respondents' presence in Dar es Salaam due to transfer?

Although the above question was not an issue in the CMA, it has raised a hot debate in this revision. Failure to have it addressed in the CMA cannot be attributed to a single party but to both parties and the arbitrator who failed to ensure that an issue is framed to tackle the puzzle.

The arbitrator made a long statement blaming the applicant for having not proved the issue of transfer. In my view, these blames should not have been mounted on the respondent alone because there was no issue framed to require this kind of evidence in the CMA. It was to be assumed as undisputed fact.

A more confusing state is where the applicant claimed transfer amongst the claims of repatriation at the same time refusing to have been transferred. The arbitrator yielded to his request and allowed transfer costs along with the repatriation and subsistence costs. In my view, the arbitrator was wrong in making this award in combination. Transfer and repatriation can not co exist in this kind of contention.

In the **second** ground covered by item (d) of the legal issues of affidavit the applicant questions as to whether claims which are time barred and which are not related to termination can be brought through a back door. According to the applicant, the respondent moved from Morogoro to Dar es Salaam in July 2019. He challenged the bringing of the transport costs after November 2019 when his contract ended. In his view, the claim was contrary to Rule 10 (2) of the Labour Institution (Mediation and Arbitration) Rules GN No 64 of 2007 which requires such kind of a claim to be brought to CMA within 60 days from the time it arose.

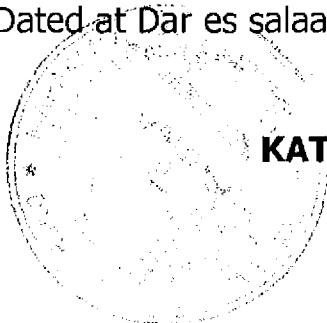
Since it is not established as to whether there was a transfer, this issue cannot be answered at this moment. In my view, this situation convinces me to revert the record back to the CMA for the matter to be heard afresh where the CMA shall include the issue as to whether

the Respondent's presence in Dar es Salaam at the time of ending the contract was due to transfer or not. Evidence should be taken from the parties to ascertain whether the respondent was transferred to Dar es salaam or not.

From the foregoing, the first issue as to whether there are sufficient reasons adduced by the applicant for this court to revise and set aside the CMA awards is answered affirmatively. As a result, the CMA proceedings in Labour Dispute No. CMA/DSM/883/2019 is hereby revised, quashed and the award therein set aside with an order that the record be remitted back to CMA to be determined afresh by another arbitrator.

It is so ordered.

Dated at Dar es salaam this 12th Day of September 2022



Handwritten signature of Katarina Revocati Mteule.

KATARINA REVOCATI MTEULE

JUDGE

12/09/2022