IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM
REVISION APPLICATION NO. 23 OF 2021
(Originating from Labour Dispute No. CMA/DSM/KIN/R.470/19/222)
BETWEEN

DAR ES SALAAM WATER SUPPLY AND SANITATION AUTHORITY (DAWASA)..... APPLICANT

VERSUS

JOY L. CHIDOSA.....RESPONDENT

JUDGMENT

Date of Last Order: 01/11/2021
Date of Judgment: 18/03/2022

I. Arufani, J.

The respondent in the present application was employed by the National Urban Water Authority (NUWA) from 8th July, 1985 on permanent basis contract. NUWA was thereafter transformed to Dar es Salaam Water and Sewerage Authority (DAWASA), the applicant herein. In 2006 there was changes as regard to the form of employment of the applicant's employees, as a result the respondent was employed on a fixed term contract of three (3) years which was subject to renewal.

On 8th February, 2016 the respondent was notified her fixed term contract of employment with the applicant of three years expired on 31st December, 2013. The respondent was aggrieved by termination of her employment and referred her grievances to the Commission for Mediation and Arbitration (hereinafter referred as the CMA). The CMA decided the matter in favour of the respondent. The applicant was aggrieved by the award and filed the present application in this court to challenge the award basing on the following grounds:-

i. *The Honourable Arbitrator erred in law and fact by awarding the respondent the relief which were not claimed.*
ii. *The Honourable arbitrator erred in law and fact for not considering the evidence adduced by the applicant and final submission in support of their case.*
iii. *The Honourable arbitrator erred in law and fact by awarding the respondent Tshs. 448,387,270.4/= without having sufficient reason to do so.*

The application was supported by the affidavit of Florence Saivoiye Yamat, the applicant Principal Officer and it was challenged by the counter affidavit of the respondent. While the applicant was represented in the matter by Ms. Zakia Seleman Mroy, the applicant' Principal Officer, the respondent was represented by Mr. Evances R.

Nzowa, learned advocate. By consent of the counsel for the parties the application was argued by way of written submission.

The counsel for the applicant prayed to adopt the affidavit supporting the application to form part of her submission. She started her submission by raising a point of preliminary objection that the CMA had no jurisdiction to entertain the dispute between the parties. She stated that, the applicant is a government entity responsible with supply of water and sewerage services to the public at large. She stated that, the respondent was employed by DAWASCO which was established under Section 4 (1) of the Public Corporation (DAWASCO) Establishment Order.

She submitted further that, the respondent was a public servant who was supposed to exhaust the remedies available under the Public Service Act, CAP 298 RE 2019 and not to go to the CMA. She argued that, the respondent was supposed to exhaust all the internal remedies before referring the matter to the CMA. To support her submission, she cited the cases of **Godfrey Ndigambo V. Tanzania Ports Authority**, Revision No. 772 of 2019 and **Tanzania National Roads Agency V. Brighton Kazoba and Julius Charles**, Revision

No. 16 of 2018 and prayed the CMA's award to be quashed and set aside.

Submitting on the grounds of revision, the counsel for the applicant stated in relation to the first ground that, the arbitrator wrongly awarded the respondent the sum of Tshs. 448,387,270.4/= which includes subsistence allowance while awaiting to be repatriated. She stated that, the arbitrator awarded the respondent 57 months' salary equal to the sum of Tshs. 261,902,237.7/= which was neither pleaded nor claimed by the respondent in the CMA F1 dated 15th December, 2016. She contended that, it is a trite law that court cannot grant what has not been pleaded and prayed for.

She submitted that, the arbitrator had no sufficient cause to grant the said compensation and disregarded the position of law that parties are bound by their own pleadings. To strengthen her submission the counsel for the applicant referred the court to the case of **Gasper Perter V. Mtwara Uban Water Supply Authority**, Civil Appeal No. 35/2017, where the Court of Appeal confirmed the decision of the High Court which reversed the decision of the CMA which awarded the relief which had neither been pleaded nor claimed by the complainant. She insisted that, making a decision

basing on a relief which was neither pleaded nor prayed, denied the applicant her fundamental right to defend the matter.

She stated in relation to the second ground that, the arbitrator failed to consider the evidence adduced by the applicant at the trial. She argued that, the respondent was a former employee of the defunct DAWASCO holding the position of Chief Human Resource Officer at Gerezani in three (3) years fixed term contract. She stated that, the respondent's employment contract shows her place of recruitment was Dar es Salaam and even her address on her job application letter to NUWA which was inherited by DAWASCO was P.O Box 5921 Dar es Salaam. She went on submitting that, there is no evidence on the CMA's proceedings to prove that the respondent place of recruitment was outside Dar es Salaam.

It was submitted further by the counsel for the applicant that, even if the respondent would have testified that her place of recruitment and domicile were out of Dar es salaam, prudence dictates that the respondent was expected to have made decision to go to her place of domicile instead of waiting to be paid the un-pleaded sum of TZS 261,902,237.7 as subsistence allowance. To support her submission, she referred the court to the case of **Hamza**

Said V. Marine Service Company Ltd., Revision No. 86 of 2019. She argued that, the arbitrator misdirected himself as he awarded the respondent a huge sum of money without considering the evidence that her place of recruitment was in Dar es Salaam.

Concerning the third ground of revision, it was contended by the counsel for the applicant that, the arbitrator erred in law and fact by awarding the respondent TZS. 448,387,270.4/ without any justification. At the end she prayed the court quashed and set aside the impugned award.

Responding to the applicant's submission, the counsel for the respondent submitted that, the applicant misconceived himself on the law that, an employee of DAWASCO is a public Servant because DAWASCO was a public corporation hence he was required to exhaust all available internal remedies provided under the Public Service Act. She argued that, even if the assertion was true but still section 32A of the Public Service Act, as amended by the Written Laws (Miscellaneous Amendments) Act No. 3 2016 does not apply to the respondent as it was enacted after the respondent had already been terminated from his employment and he had already initiated the matter before the CMA on 12th May, 2016. The counsel for the

respondent submitted that, under that circumstances the CMA had jurisdiction to entertain the matter.

It was a further submission by the counsel for the respondent that, according to section 3 of the Public Service Act, DAWASCO was established under a written law namely Public Corporation (DAWASCO) Establishment order), 2005 under the Public Corporation Act, CAP 257 R.E 2019 as submitted by the counsel for the applicant. Therefore, the employees of DAWASCO are not public servants. He supported his argument with the case of **Saleh Komba & Revocatus Rukonge v. Tanzania Ports Corporation**, Revision No. 12 of 2018. He distinguished the cases cited by the counsel for the applicant on the reason that they are not applicable in the matter at hand. Counsel for the respondent submitted that, the CMA had jurisdiction to entertain the respondent's dispute and prayed the point of objection raised by the applicant to be found is devoid of merit.

Submitting in relation to the grounds of revision raised by the applicant the counsel for the respondent stated that, all the reliefs granted by the CMA were claimed by the respondent in the CMA F1. He stated it is the court's position that CMA F1 should not confine the arbitrator or the court to grant only what is in the CMA F1. He

supported his argument with the case of **A- One Products and Bottlers Ltd. V. Abdallah Almas and 25 Others**, [2015] LCCD 179.

He stated the claim of subsistence allowance is provided under section 44 (1) (f) read together with section 43 (1) of ELRA and argued that, the respondent is entitled to the subsistence allowance until when she will be repatriated to her place of domicile which is Mvumi, Dodoma and paid her terminal benefits. He distinguished the case of **Hamza Said** (supra) cited by the counsel for the applicant on the reason that, in that case the employee was paid all his terminal benefits while in this case the applicant neglected to pay the respondent her terminal benefits.

He submitted that, the arbitrator was correct to award the respondent 57 months' salaries as subsistence allowance, the amount which will be piling up until the date when the respondent will be paid her terminal benefits. To cement his argument, he cited various cases including the case of **Twiga Bancorp Limited v. Zuhura Zidadu and Another**, [2015] LCCD 18 where it was held that the daily subsistence allowance can be taken to be the daily wage calculated on the basis of monthly salary.

As for the second ground, the counsel for the respondent argued that, the applicant's counsel does not dispute the pleaded amount of TZS. 259,846,570/=. He stated that, what the applicant's counsel is challenging in her submission is the 57 months' salaries granted to the respondent pending payment of the terminal benefits including repatriation costs to the place of domicile. He stated that, the applicant and FIBUCA (a trade union at the applicant's place of work) had an agreement which provides for better terms than the minimum standard set by the law. He stated the said agreement titled "MKATABA WA HIARI BAINA YA SHIRIKA LA MAJI SAFI NA MAJI TAKA DAR ES SALAAM (DAWASCO) NA CHAMA CHA WAFANYAKAZI WA TAASISI ZA FEDHA, VIWANDA, MABENKI, BIASHARA NA KILIMO (FIBUKA)" was admitted in the case as Exhibit P13 and quoted in his submission clause 9 of the referred contract.

The counsel for the respondent argued that, where the parties agreed on better terms than what is provided under the law, the parties agreement takes precedence. He stated that, repatriation of an employee to the place of domicile provided in the parties' agreement was a better term than repatriation to the place of recruitment. He referred the court to the case of **Salum Omary**

Mavunyira V. The Director General NHC, [2014] LCCD 107 to bolster his argument. He stated the respondent was recruited in Dar es Salaam, but she is entitled to enjoy the better term of agreement for being repatriated to her place of domicile which is Mvumi, Dodoma.

With regards to the third ground, it was stated by the counsel for the respondent that, the impugned subsistence allowance of 57 months salaries is at the second paragraph of page 9 of the award where the CMA granted the sum of Tshs. 261,902,237.7 being subsistence allowance pending repatriation. He submitted that, the applicant's contention has no merit and prayed for the dismissal of the application.

In her rejoinder, the counsel for the applicant reiterated her submission in chief and added that, the respondent in her submission stated that, the CMA F1 should not confine the CMA or court to grant what is in the CMA F1 and cited the case of **A- One Products and Bottlers Ltd.** (supra) to support his submission. The counsel for the applicant argued that, the law under doctrine of precedence is that, in conflicting decisions the lower courts are bound by the decisions of the higher court where the material facts are similar. She submitted

that, the prevailing position of the law is the case of Court of Appeal cited in her submission in chief which states a court can not grant a party an order or relief which has not been pleaded or prayed for. At the end she prayed for the application be granted.

Before going to the merit of the application, the court has found it is worth to start with the point of law raised by the counsel for the applicant that the CMA had no jurisdiction to entertain the dispute between the parties in the present application as the respondent was a public servant who was required to exhaust the remedies available in the Public Service Act, Cap 298 R.E 2019 (PSA) before going to the CMA which uses general labour laws to determine disputes.

The court has found proper to start with the said point of law because the issue of jurisdiction is a bedrock of power of a tribunal or a court to entertain any dispute referred to it. That was stated so in the case of **Mwananchi Communications Limited & others, V. Joshua K. Kajula and 2 others**, Civil Appeal No. 126/01 of 2016,

where the Court of Appeal of Tanzania held that:-

> *"Jurisdiction is the bedrock on which court's authority and competence to entertain and decide matters rests."*

The position of the law as emphasized in various cases, which one of them is the case of **Wakf and Trust Commissioner V. Abbass Fadhili Abbass & Another,** [2003] TLR 377 is that, the issue of jurisdiction of a court or tribunal to entertain a case is fundamental and can be raised at any stage of a case even at the appellate stage. Therefore, although the point of law that the CMA had no jurisdiction to entertain the respondent's dispute was not an issue before the CMA but under guidance of the position of law stated in the above cited case this court is competent to entertain and determine the said point of law.

The counsel for the applicant argued in her submission that, the respondent was a public servant who was required to exhaust the internal remedies provided under the PSA and its regulations before going to the CMA. The question as to who is a public servant is answered by section 3 of the PSA which states that, a public servant

is a person holding or acting in a public service office. The same provision of the law defines a public service office as follows:-

A public service office means:-

a. A paid public office in the United Republic charged with the formulation of government policy and delivery of public services other than;

i. A parliamentary office.

ii. An office of a member of a council, board, panel committee or other similar ***body whether or not corporate, established by or under any written law;***

iii. An office the emoluments of which are payable at an hourly rate, daily rate or term contract.

iv. An office of a judge or other judicial office

v. An office in the police force or prison service

b. ***Any office declared by or under any other written law to be a public service office."*** [Emphasis added].

From the definition of the term public service office given in the above quoted provision of the law it is crystal clear that, for the applicant to be a public service office it must be established the applicant is an office charged with a duty of formulating Government Policy or is delivering public service or is declared by a written law to

be a public service office. It must also be established that the applicant is not falling in the offices excluded by the above quoted provision of the law from the definition of a public service office.

To know a public service office is established for the stated purpose, one has to go through a legislation or instrument established the stated office. The court has found the applicant in the present application was established by the subsidiary legislation published in the Gazette of the United Republic of Tanzania dated 20th May, 2005. The Order established the applicant is cited as Public Corporation (DAWASCO) (Establishment Order), 2005 which its section 4 (1) states that:-

> *"There is hereby established a public corporation to be known as the Dar es Salaam Water and Sewerage Corporation."*

The above quoted provision of the law shows the applicant is a public corporation established for the purpose of providing water supply and sewerage services in the applicant designated areas. If the applicant is a public corporation established by the written law, then as rightly argued by the counsel for the respondent, the

applicant is not a public service office envisaged in the definition of public service office given under section 3 of the PSA.

The court has arrived to the above finding after seeing that, the applicant is excluded from being a public service office by section 3 (a) (ii) of the PSA which states a body corporate established by or under any written law is excluded from the definition of a public service office. The court has also found that, it has not been stated anywhere that the applicant is declared by any written law to be a public service office as provided under section 3 (b) of the PSA. The court has found that, as stated under the order established the applicant, the applicant is a public corporation and not a public service office.

Let us now see what is a Public Corporation. A public corporation is defined under section 3 of the Public Corporation Act, Cap 257 R.E 2002 (PCA) which states as follows:-

> *"Public corporation means any corporation established under this Act or any other law and in which the Government or its agent owns a majority of the shares or is the sole shareholders."*

If you read the provisions of the PCA and specifically sections 6 and 9 you will find the role played by the President and the Minister where the Government is a sole or majority shareholder in a public corporation. The President is the one appoints the Managing Director or Chairman of the Board of Directors, and other members of the Board are appointed by the responsible Minister. The responsible minister is charged with a duty of giving the Board of Directors of the public corporation directives of general or specific character as to how to perform their functions. The accountability of the public corporation is to the Government and that is provided under part IV of the Public Corporations Act.

That being the characteristics of a public corporation the court has found there is no dispute that the Government is owning majority of shares in the applicant's corporation and the applicant is under the control of the Government. That can be seeing under section 6 (2) of the order established the applicant which states that, no person other than Treasury Registrar shall be entitled to subscribe for or hold any share in the applicant. The court has also found the Chairman of the Board of the applicant is appointed by the Minister responsible for water.

If the Government is the majority shareholder of the applicant, the applicant is under control of the Government and the applicant is providing the service of water supply and sewerage to the public on behalf of the Government can it be said the applicant is a public service office? In order to be able to answer the above question properly the court has found proper to have a look on other categories of the employees other than the public servants who as defined under section 3 of the PSA are supposed to be governed by PSA.

The court has found section 31 (1) of the PSA states that, servants in the Executive Agencies and Government Institutions are supposed to be governed by provisions of the law established the respective Executive Agencies or Institutions. Subsection (2) of the above cited provision of the law states that, the public servants referred in the above cited provision of the law shall also be governed by the PSA. The court has found the executive agencies are established under the Executive Agencies Act, Cap 245, R.E 2002 and the Government Institutions on the other hand are mostly established by Acts of Parliaments for specific purposes.

Since the applicant was established under the PCA and not under the Executive Agencies Act or by Act of Parliament the court has found it cannot be said the applicant is a public service office envisaged under section 3 of the PSA whose servants are supposed to be governed by the provisions of the PSA. As it has not been stated anywhere else that there is any other specific law governing the issues of the employees of the applicant the question to determine here is whether the respondent's dispute against the applicant was supposed to be governed by the PSA or general labour laws. The court has found the letter transferred the respondent from City Water Services Limited to DAWASCO dated 9th June, 2005 (exhibit P5) states clearly that, her employment would be guided by Tanzania Labour Laws.

In addition to that, the court has found the contract of employment of the respondent with DAWASCO dated 14th March, 2006 and letter of renewal of her contract of employment dated 2nd April, 2013 (exhibits P6 and P7 respectively) shows the respondent was required to continue to work under the same term and condition of her employment until when her contract of employment was terminated on 8th February, 2016 (exhibit P8). The court has also

found that, the said exhibits do not show anywhere that the respondent was bound to follow the remedies provided under the provisions of the PSA.

As the respondent was not bound by the remedies provided under the provisions of the PSA the court has found section 2 (1) of the ELRA states clearly that, the ELRA is a general law governing all employees including those in the public service of the Tanzania Mainland. Since there is no specific law governing employment of the respondent the court has found the CMA had jurisdiction pursuant to the provisions of Part VIII of the ELRA to entertain the respondent's dispute.

The court has gone through the cases of **Godfrey Ndigambo V. TPA** and **TANROAD V. Brighton Kazoba & Another** cited by the counsel for the applicant to support her submission but find that, as rightly argued by the counsel for the respondent those cases are distinguishable from the case at hand. The court has found the Government Authority and Agency involved in the mentioned cases were established under different laws from the law established the applicant in the case at hand. The court has also found that, even if it would be said the respondent was a public servant who under section

32A of the PSA was bound to follow the remedies provided under the mentioned law as intensively argued by the counsel for the applicant but the court has found that, as rightly argued by the counsel for the respondent the mentioned provision of the law came into force after the dispute of the respondent had already arisen and taken to the CMA.

The court has arrived to the stated finding after seeing the respondent was terminated from her employment on 8th February, 2016 while the above cited provision of the law came into operation on 18th November, 2016. In the premises the court has found the point of law raised by the counsel for the applicant that the CMA had no jurisdiction to entertain the respondent dispute as she had not exhausted the internal remedies provided under the PSA has no merit and is hereby overruled in its entirety.

Back to the merit of the application the court has considered the rival submission from the counsel for the parties, and after going through the record of the matter and the relevant laws it has found the issue to determine here is whether by basing on the issues raised by the applicant the impugned award was improperly procured. Starting with the first issue raised in the affidavit supporting the

application, the court has found the applicant alleged the arbitrator wrongly awarded the respondent a total sum of Tshs. 261,902,237.7 being 57 month's salaries as a subsistence allowance while awaiting to be repatriated to his place of domicile, a relief which was neither pleaded nor claimed by the respondent in the CMA F1 filed in the CMA on 15th December, 2016.

After going through the CMA F1 mentioned by the counsel for the applicant together with the CMA F1 filed in the CMA on 19th June, 2019 the court has found it is not true that the respondent did not claim for subsistence allowance while awaiting to be repatriated to her place of domicile. The court has found the respondent claimed in both CMA F1 to be paid subsistence allowance while waiting to be paid her terminal benefits. As rightly argued by the counsel for the respondent it is clearly provided under sections 43 (1) (a) and 44 (1) (f) of the ELRA that an employee who has been terminated from his or her employment is entitled to be paid repatriation costs to his or her place of recruitment.

Since the respondent had claimed for payment of subsistence allowance while awaiting to be paid her terminal benefits it cannot be said the Arbitrator erred in awarding the respondent the stated

repatriation allowance on ground that it was neither pleaded nor claimed for in the CMA F1 filed in the CMA on 15th December, 2016. To the view of this court what would have been said was not stated by the respondent in the mentioned CMA F1 is the actual amount she was claiming from the applicant for the stated relief. After considering the nature of the stated relief the court has found it would have not been easy to state the actual amount the respondent was claiming from the applicant in the stated CMA F1 as she was not certain as to when she would have been paid the claimed relief.

To the view of this court the issue would have not been the stated relief was neither pleaded nor claimed by the respondent in the CMA F1 as alleged by the applicant and argued by its counsel but whether the respondent was entitled to be awarded the stated relief. That makes the court to find the case of **Gasper Peter** and **DR. Abraham Israel Shuma Muro** cited by the counsel for the applicant to support her submission is distinguishable from the case at hand.

The counsel for the applicant argued that, the Arbitrator failed to consider the applicant's evidence that, the respondent's place of recruitment was in Dar es Salaam hence she was not entitled to be

awarded the said subsistence allowance. The court has found the law as provided under Section 43 (1) of the ELRA states that:-

> *"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.*** [Emphasis added].

The position of the law stated in the above quoted provision of the law has been considered in a number of court decisions. In the case of **Ibrahim Kamundi Ibrahim Shayo V. Tanzania Fertilizer Company Ltd. (TFC),** Labour Dispute No. 1 of 2014, HC at Moshi as cited in Consolidated Revision No. 137 and 151 of 2017 **Mantrac**

Tanzania Limited V. Joaquim P. Bonaventure, 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) 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 position of the law cited hereinabove it is crystal clear that, repatriation and payment of subsistence allowance are statutory rights entitled to an employee whose employment contract has been terminated by an employer and the employee has been waiting for the employer to repatriate him or her to the place of recruitment, if the employee has been terminated in a place other than the place of recruitment.

As submitted by the applicant's counsel in the present case, the records reveals that the respondent's place of recruitment was Dar es Salaam. If the place of recruitment of the respondent was Dar es Salaam and her contract of employment was terminated while at Dar es Salaam it is crystal clear that, as provided under section 43 (1) (c) of ELRA she was not entitled to be paid subsistence allowance she was claiming for and awarded by the CMA. That is because the place of her employment and the place of termination of her employment was at Dar es Salaam.

The court has also found that, as rightly argued by the counsel for the parties the respondent had a voluntary agreement with the trade union (FIBUKA) which represented the respondent at the place of work which was admitted in the case as exhibit P13. The court has found it was agreed in the said agreement that, where employment of an employee has been terminated, an employee will be entitled to be repatriated to his or her place of domicile. The stated agreement is provided under clause 9 of the agreement which states as quoted

hereunder:-

"*9.0* ***KUSITISHA MKATABA WA AJIRA***

Mkataba wa ajira unaweza kusitishwa na pande mbili ambazo ni mwajiri na mawajiriwa kama sheria ya kazi na mahusiano kazini inavyoelekeza.

MAFAO YA KUSITISHA MKATABA WA AJIRA

(a) ***Mwajiri***

Endapo mawajiri ataamua kusitisha mkataba wa ajira ya mfanyakazi au mkataba wa ajira ya mfanyakazi utakapo koma, mwajiri atawajibika kulipa mafao yafuatayo:-

i. Notisi ya mwezi mmoja au malipo ya mshahara wa mwezi badala ya notisi.

ii. ***Nauli hadi nyumbani kwao (Place of domicile)***

iii. Malipo ya mizigo tani tano kwa barabara Pamoja na asilimia kumi (10) ya malipo hayo kama gharama za upakiaji na uharibifu.

iv. Kipengele 9.0 (a) (ii) (iii) havitatumika kwa mfanyakazi ambaye mkataba wake utasitishwa kutokana na sababu za kinidhamu.

[Emphasis added].

From the wording of the cited clause of exhibit P13 there is no expression that, the employer's delay to repatriate the employee to the place of domicile will entitle the employee with subsistence allowance. What is provided under the bolded paragraph ii of the quoted clause is that the employee is entitled to be paid a transport

allowance to his or her place of domicile. It is a principle of law that, subsistence allowance is paid to an employee who is awaiting to be repatriated by the employer to the place of recruitment and not otherwise.

The court has found it is also a trite law that, parties are bound by the terms of their contract and both parties are required to honour the terms of their agreement. No party is allowed to claim remedy out of their agreement. The stated position of the law can be seeing in the case of **Uniliver Tanzania Ltd V. Benedict Mkasa t/a BEMA Enterprises,** Civil Appeal No. 41 of 2009 where it was held that:-

> *"Parties are not allowed to divert from their terms of agreement as it is not the role of this court to create terms for them by re-drafting the clause but rather to enforce them".*

From the wording of the above quoted clause of the parties' agreement and the position of the law stated in the above quoted case the court has found the respondent was not entitled to 57 months' salary as a subsistence allowance while awaiting to be paid her terminal benefits as that is not covered in their agreement

admitted in the case as exhibit P13. That means, as rightly submitted by the counsel for the applicant the Arbitrator misdirected himself in awarding the respondent the stated sum of money as a subsistence allowance. Therefore, the court is in agreement with the counsel for the applicant, though in another way of thinking that the order of payment of Tshs. 261,902,237,7/= awarded to the respondent was erroneously made.

Coming to the second issue, the counsel for the applicant states the Arbitrator erred in not considering the evidence adduced by the applicant and their final written submission in support of their case that the respondent was employed at Dar es Salaam and she was not entitled to be repatriated to any other place. The court has found as rightly argued by the counsel for the applicant the evidence adduced by the applicant established without being disputed that the respondent was employed at Dar es Salaam and her employment was terminated at Dar es Salaam. That can be seeing in the letter of employment of the applicant and in the letter of terminating her employment which both of them shows the respondent was employed at Dar es Salaam and her employment was terminated while at Dar es Salaam.

Therefore, as stated in the first issue the court is in agreement with the counsel for the applicant that the Arbitrator failed to evaluate properly the evidence adduced by the parties and erred in awarding the respondent the sum of TZS 261,902,237.07 being subsistence allowance while awaiting to be repatriated to her place of domicile while she was employed at Dar es Salaam and her employment was terminated while at Dar es Salaam. As for the rest of the awarded amount which made the total sum of TZS 448,387,270.4 the court has found the counsel for the applicant states it was awarded without having justifiable reason to grant the same.

Having gone through the impugned award, the court has found the Arbitrator ordered the respondent be paid corrugated iron sheets (mabati) valued Tshs. 1,400,000/=, cement valued Tshs. 1,3000,000/=, six months salaries equal to Tshs. 27,568,656 and long service equal to Tshs. 3,500,000/=. After going through the voluntary agreement admitted in the case as Exhibit P13 the court has found that, as provided under clause 16 of the voluntary agreement the said benefits are supposed to be paid to an employee who has retired from his or her employment. It is not paid to an

employee whose employment has been terminated by the employer as it was done to the respondent. That being the position of the voluntary agreement entered by the parties the court has found the respondent was not entitled to the said benefits as her contract was terminated and did not end on retirement.

The court has found it is undisputed fact that the respondent's employment was for a fixed term contract. The contract was terminated while there was renewal by default as provided under Rule 4 (3) of the GN. No. 42 of 2007 and as rightly found by the CMA. Therefore, the respondent is entitled to the salaries of the remaining period of time. As the respondent was terminated from her employment on 8th February, 2016 and the contract renewed by default was supposed to expire on 31st December, 2016 the respondent is entitled to be awarded the salary of eleven months remained in her renewed contract of employment and not thirteen months as claimed by the respondent. The rest of the reliefs claimed by the respondent were not proved to the standard required by the law.

In the premises the court has found the application of the applicant deserve to be partly allowed, hence the award of the CMA is

accordingly revised and altered as stated hereinabove. As exhibit P9 shows the respondent's monthly salary was Tshs. 4,594,776 she will be paid the sum of Tshs. 50,542,536/= being compensation for the period of eleven months remained in her contract of employment renewed by default. In addition to that she is also entitled to the benefits stated in the letter of termination of her employment if she has not been paid the stated benefits. It is so ordered.

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

I. Arufani

JUDGE

18/03/2022

Court: Judgment delivered today 18th day of March, 2022 in the presence of Mr. Amos Enock, State Attorney for the applicant and in the presence of the respondent in person. Right of appeal to the Court of Appeal is fully explained.

MAHAKAMA KUU YA TANZANIA (The High Court of Tanzania) DIVISHENI YA MAHAKAMA YA KAZI (Labour Division)

I. Arufani

JUDGE

18/03/2022