IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 52 OF 2016

BETWEEN

CHIEF COURT ADMINISTRATOR .....1ST APPLICANT

THE ATTORNEY GENERAL.....2ND APPLICANT

VERSUS

JOHNSON JOLIGA TANDA.....RESPONDENT

(ORIGINAL/CMA/DSM/ILALA/R. 669/13/907)

JUDGMENT

22/09/2016 & 25/11/2016

Mipawa, J.

This revision has been filed by the applicants namely Chief Court Administrator and the Attorney General as against Johnson Joliga Tanda herein referred to as the respondent.

The revision initiated by the notice of application is made under Rule 24 (1) (2) (a) (b) (c) (d) (e) (f) (3) (a) (b) (c) and (d) 28 (1) (c) and (e) of the Labour Court Rules[1], section 91 (1) (a) and (2) (b) and (c) of Employment and Labour Relations Act[2]. The same was also painted and lubricated by a chamber summons made under Rule 24 (1) (2) (a) (b) (c) (d) (e) (f) (3) (a) (b) (c) and (d) 28 (1) (c) and (e) of the Labour Court

[1] Government Notice (GN) No. 106 of 2007

[2] Act No. 6 of 2004 Cap 366 R.E. 2009

Rules[3], section 91 (1) (a) and (2) (b) and (c) of Employment and Labour Relations Act[4]. The application is supported by an affidavit of one Killey Ebrania Mwitasi, State Attorney.

Briefly the facts which led to the instant revision may be summarized as follows; in an ex-parte hearing due to default appearance on part of the respondent. The Commission empowered under the provision of section 88 (8) of the Employment and Labour Relations Act[5] as amended by Act No. 2 of 2010 read together with Rule 28 (1) (b) of the Labour Institution (Mediation and Arbitration)[6] proceeded to the hearing ex-parte Chief Court Administrator and the Attorney General respectively.

The Respondent Johnson Joliga Tanda told the Commission that he was employed by the first respondent on 30th October, 1985 as a Primary Court Magistrate. He was serving the respondent as a Magistrate at Nyabubizwa Primary Court (Court of first instance). Sometime in the year 1992 the respondent was arraigned before the Maswa District Court for corruption related charges and subsequently acquitted by the Court on 15th July 1994 after being found not guilty.

The respondent after the acquittal, served the first respondent with the copy of judgment preferably for showing that he was found not guilty and therefore should continue with his duties as a Primary Court Magistrate. On 5th July, 1996. The respondent was terminated from his

[3] *op. cit* note 1
[4] *op. cit* note 2
[5] *op. cit* note 2
[6] Government Notice No. 67 of 2007

employment allegedly on grounds similar to the one which he was acquitted by the Court of Law.

The respondent further told the Commission that he pursued for his terminal benefits for many years until on 10th July, 2013 when he was paid the repatriation costs. The respondent pushed forward before the commission his claim of being paid the daily subsistence allowance for the period between his termination i.e. 5th July, 1996 and the date the first respondent (employer) paid him the repatriation costs. The basis of the claim is that he was not given immediately after being terminated his repatriations costs (i.e. following his employer's decision to terminate him).

The respondent claimed before the Commission to be paid the daily subsistence expenses on the basis of his monthly salary per day between the date of termination and the date he was given the repatriation costs in terms of section 43 (2) of the ELRA[7]. That was also the requirement of law under section 53 (1) of the Employment Ordinance[8] which was applicable by the time the complainant now respondent was terminated from the service. At the end of the day the Commission ordered the employer to pay the employee the daily subsistence expenses in the manner the Commission had stated. The award was delivered on 6th day October, 2014 and copied to the first and second respondent respectively ***id-est*** the Chief Court Administrator and the Attorney General[9].

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[7] ELRA refers to the Employment and Labour Relations Act No. 6 of 2004 Cap 366 R.E. 2009
[8] Cap 366 Employment Ordinance now repealed
[9] CMA Arbitration award in CMA/DSM/ILALA/R. 669/13/907

On 21st May, 2015 the applicants emerged from a "*twilight sleep*" and filed an application before the Commission in terms of Rule 14 (5) and 6 of the Labour Institutions Mediation and Arbitration Guidelines[10] and Rule 29 (1) (2) (3) (4) and 31 of the Labour Institutions (Mediation and Arbitration) Rules[11] and section 87 (2) (a) and (5) of the Employment and Labour Relations Act[12]. In which they prayed for the Commission to extend time within which to make an application to set aside the ex-parte award dated 6th October, 2014.

The applicants gave reasons of the delay for setting aside the ex-parte award that on July, 2014 to around November 2014, the office of the Attorney General was under internal renovations which renovation led to the transfer of case files from room to other registries/archives and rooms. Consequently as the result of this process some files were misplaced including the case file of this case. The applicant lost the track of the case and thence the ex-parte award. The applicants had also informed the Commission that they were not notified on the hearing of the dispute and hence condemned unheard.

The applicants also had challenged that the dispute was lodge outside the time limit prescribed by the law, that the claim of subsistence allowance is time barred. That the arbitrator who also presided as a mediator had no jurisdiction to sit as arbitrator. That the second applicant who is Chief Legal Advisor of the Government of Tanzania became aware

[10] GN. No. 67 of 2007 *op. cit*
[11] GN. No. 64 of 2007
[12] Act No. 6 of 2004 *op. cit*

of the ex-parte award after having been informed by the first applicant via letter dated 4th March, 2005 which was received by the second applicant on 6th March, 2005. They started to trace the file which was later found mistakenly sent to National Archives at Kawe.

The respondent opposed the application for extension of time in the CMA as submitted by the applicants. The respondent told the Commission that the Mediation was done by Massawe Esq. Mediator while the arbitration process was conducted by Massay Esq. Arbitrator. That the applicants non-appearance was caused by negligence on their part and that the said internal renovations of the office of the Attorney General which led to the transfer of the case files from the room to other registry hence losing the track of the case is not a good cause for non-appearance.

The respondent told the Commission further that the applicants were duly served and signed the service of summons for hearing of the dispute at arbitration. Hence they voluntarily waived their right to be heard for their non-appearance at the hearing of the dispute.

The respondent also argued and stated before the learned arbitrator that the Commission properly entertained the dispute as the respondent applied for condonation which was granted. That the applicants were fully aware of the ex-parte award since 7th day of October, 2014 when the respondent addressed a letter to the second applicant for the payment of daily subsistence expenses as per arbitral award. However the applicant severally wrote letters in response to the respondent that the applicants

were working on his payment for daily subsistence expenses as per the award.

In his ruling the Learned Arbitrator recalled that the respondent, then complainant, filed the complaint for daily subsistence expenses before the Commission on 24th September 2013. That the complaint was accompanied with the application for condonation. The application for condonation was heard and granted by Massawe, Esq. On 16th January, 2014 was assigned to Mr. Massay, Esq. Arbitrator. Thence it was not true that the same mediator conducted arbitration. What was done by the arbitrator was to allow parties to settle the dispute which is permissible under section 88 (b) of the Employment and Labour Relations Act No. 6 of 2004. Hence the Commission had jurisdiction to entertain the dispute.

The Learned Arbitrator further held that the application to set aside the award ex-parte dated 6th October, 2014 was filed on 21st May, 2015, the degree of lateness being almost around six (6) months. The reason for delay put forward by applicants was transfer of case file by mistake to Kawe National Archives. That the applicants received or became aware of the ex-parte award on 6th March, 2015 when they received the copy. Nevertheless this was disputed by the respondent who alleged that the applicants should blame themselves for negligence.

The respondent opposed the grounds for delay because he had earlier communicated with the applicants whereof he was promised that

they were working out on his claims. The respondent then complainant attached the correspondence to that effect.

The Commission agreed with the respondent that there were no valid reasons for the delay of six month put forward by the applicant. The learned arbitrator found that the Commission issued the ex-parte award to the respondent on 7th October, 2014 and served the copy of the award accompanied with the letter to the first applicant for payment. The first applicant respondent through the letter dated 23rd December, 2014 replied that:-

> *...Kwa barua hii ninapenda kukutaarifu kwamba barua yako inafanyiwa kazi kwa kufuata sheria kanuni na taratibu zinazohusika katika utumishi wa umma. Aidha nakuomba uwe na subira kwa wakati huu ili suala lako lifanyiwe kazi kwa ufasaha...*

The Commission held further that it was unclear whether the first applicant was intending to honour the award and whether or not they informed the second applicant (Attorney General). However the Commission noted that the first applicant did not communicate with the second applicant their legal advisor until 6th March, 2014 though they were aware about the ex-parte award since 7th October, 2014[13].

The Commission concluded that the misplacement of the case file which suggests negligence could also not be valid ground of extension of

[13] CMA arbitration award *op. cit* note 9

time or setting aside the ex-parte award as the case may be, the CMA dismissed the application. Hence this revision.

The hearing of the revision was by way of written submission in which the applicants through the services of the Senior State Attorney raised five grounds of revision which I will quote them; they are:-

(i) *The arbitrator failed to consider that the ex-parte award was heard and decided in contravention of the law on limitation as there was no condonation application which was interparty heard and the order made thereof in favour of the respondent*[14].

(ii) *The arbitrator illegally ignored that the ex-parte award in question was procured in contravention of the Rule 28 (2) of the Labour Institution (Mediation and Arbitration Guidelines) Rules GN. 67 of 2007*[15].

(iii) *The arbitrator failed and illegally ignored to consider that the respondent was awarded the award in question without having proved his claims as required by the law*[16].

(iv) *The arbitrator illegally and overlooked that the ex-parte proof against the Attorney General must follow the procedure* ***interalia*** *which is laid down under Order VII Rule 14 of the Civil Procedure Rules (sic) Cap 33 RE. 2002*[17].

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[14] Applicants written submission in support of the application for revision pursuant to this Court's order of 16/08/2016

[15] *ibid*

[16] *ibid*

[17] *ibid*

(v) The arbitrator failed and improperly assessed the reason/grounds availed to the Commission for delay in filling an application to set aside an ex-parte award advanced by the applicant in paragraphs 7 and 9 of the affidavit which stated very clear that the ground for extension of time to set aside an award was illegality[18].

Submitting on the first ground of revision the applicants counsel argued that Rule 10 of the Labour Institution (Mediation and Arbitration)[19] Guidelines states that dispute about fairness of an employee termination must be referred to the Commission within thirty days and for other disputes within sixty days from when the dispute arises, that the right to be heard on the part of the applicants was violated at the time of hearing condonation and no ruling for condonation was attached by the respondent.

The applicant further submitted that the facts of this dispute does not establish when the respondent was employed, when the dispute to his employer arose, when the respondent was terminated from employment and when his employer made a final decision to terminate. The applicants therefore conclude that they were not served at the time of hearing of condonation application filed by the respondent thence condemned unheard **contra** Article 13 (6) (a) of the Constitution of the United Republic of Tanzania[20]. The applicants also referred to this Court the

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[18] *ibid*

[19] GN. No. 64 of 2007 *op. cit*

[20] Cap 2 of the Laws Article 13 (6) (a) is concerned with entitlement to a fair hearing and the right to appeal etc.

holding in the case of **Selcom Gaming Management Tanzania Limited**[21] which reads:-

> *...The prayer for interim injunctive order given without giving the applicant an opportunity to be heard contrary to the Cardinal Principle of Natural Justice that a person should not be condemned unheard a principle now embodied in Article 13 (6) (a) of the Constitution, no reasonable Judge mindful of his duty to act judicially should have made such adverse order against the applicant*[22]*...*

He concluded at this juncture on ground one that the arbitrator failed to consider that the ex-parte award was heard and decided in contravention of the law of limitation as there was no condonation application which was interparty heard[23].

In reply the respondent submitted that the applicant submitted at lengthy on the merit of the award dated 6th day of October, 2014 which is a misdirection as the parties are supposed to argue on the decision of arbitrator dated 7th day of January, 2016 which rejected the reasons advanced by the applicants to have the award ex-parte dated 6th October 2014 be set aside.

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[21] [2006] TLR 200
[22] *ibid* as quoted form applicants written submission
[23] *op.cit* note 14

I entirely and respectfully agree with the respondent that the applicants have submitted also on the merits of the ex-parte award dated 07/12/2014 instead of the decision of the arbitrator in his ruling dated 7th January, 2016 which rejected and dismissed reasons for the delay to set aside the ex-parte award advanced by the applicants in the Commissions. Be that as it may this Court has the ***Dunamis*** (GK Power) to deal with any labour matter the way it seems just and equitable to dispose it the soonest in order to maintain social justice and industrial harmony which are the key role of the labour legislation, under Rule 55 (2) GN. 106 of 2007 of the Labour Court Rules[24], it reads that; I quote:-

> *...In the exercise and performance of its powers and functions or in any incidental matter, the Court may act in a manner that it considers expedient in the circumstances to achieve the objects of the Act and or the good ends of justice...*

The first ground raised by the applicant is devoid of merits because as the record shows clearly that, the respondent had applied for condonation which was granted by the Commission before filing the complaint. As rightly submitted by the respondent in his written submission, the record shows that the applicant were duly served with

[24] GN. 106 of 2007 *op. cit*

summons as noted by the Commission in the record on 21/11/2013:-

> *...Mlalamikiwa hajafika bila taarifa pamoja na kupatiwa wito...pia shauri haiwezi (sic) kusikilizwa kwa kuwa jengo halina umeme...*

The applicants as noted above were not present on 21/11/2013 inspite of being served as indicated by the Commission. I have no reasons to doubt the record of the Commission when the learned arbitrator said in the proceedings as above noted. Failure of the applicants at no apparent reason to attend the hearing of condonation was a negligence ***par-excellence***, it was as if he had agreed with the application for condonation and or waived his right to be heard on the application for condonation. Hence condonation application was heard and granted ex-parte for failure of the applicants to appear on the hearing date without giving good reasons or any reasons to that effect. The CMA ruled that:-

> *...Mlalamikaji: Johnson Tanda*
>
> *...Mlalamikiwa: Chief Court Administrator (hayupo)*
>
> ***Hali ya shauri usuluhishi**: Hearing ya condonation. Mlalamikaji anaeleza kuwa alichelewa kwa kuwa alikuwa anaumwa, kwa vielelezo vilivyopokelewa kama exhibit X1 amechelewa kwa siku 2. Madai yake ni allowance ya miaka 17 na mishahara kwa kuwa alipokea transport allowance tarehe10/07/2013 na aliachishwa kazi tarehe 05/06/1996.*
>
> ***Ruling**: Tume baada ya kupitia maelezo ya mlalamikaji na kuona vielelezo vyake imeridhia maombi yake ya*

kusikiiza shauri nje ya muda. Hivyo kuruhsu mgogoro uendelee hatua ya uamuzi ili kesi isikilizwe on merits...

The above excerpt shows that condonation was heard ex-parte and the ruling issued thereof in favour of the respondent because the applicants were negligent and acted without due diligence in handling the matter. They waived their rights to be heard for negligently defaulting appearance before the Commission at no apparent reasons whatsoever. The applicants negligence and undue diligence cannot by and large be protected by Article 13 (6) (a) of the Constitution and the holding in **Selcom Gaming Limited** case (supra). Hiding under the constitution protection cannot be "***au secour***" (a help) when a party acts negligent and without due diligent and waiving his right to be heard.

The applicants manifested also their negligent acts and undue diligence when they failed to appear before this Court on the hearing of the preliminary objection that was raised by the respondent inspite of the naked fact that they were present on 03/05/2016 when this Court fixed the hearing of the preliminary objection on 05/07/2016. Surprisingly without and notification or reason the applicants defaulted appearance and hence this Court proceeded ex-parte to hear the preliminary objection that was raised by the respondent against the applicant. Ruling ex-parte the Chief Court Administrator and Attorney General was had on 08/07/2016. This Court noted on 05/07/2016 that:-

...The applicant is absent before the Court though he was present on 23/05/2016 when the matter

was fixed for hearing of the preliminary objection. I will now proceed in the absence of the applicant who has waived his right to appear and be heard at no apparent reasons...

I think by and large now that the applicant cannot come and say that the Court or the Commission below proceed ex-parte in contravention of the law. The condonation was heard ex-parte due to negligence of the applicant for not appearing before the Commission. Further the hearing of the dispute on merit in the Commission was not heard interparties because the applicant persistently continued to show the world that the on default appearance and hide or take refugee under the constitution and other holdings of the Courts of this country despite his negligence and undue diligence.

The Commission record is clear that when the matter was fixed for hearing interparties the applicants were represented on *14th May, 2014* by Mr. Makondoo, Learned State Attorney where hearing date was fixed on *12th June, 2014* and the applicants/respondent were represented by Mr. Kinudo, State Attorney and Elifadhili Mmbaga for Chief Court Administrator. The applicants who were respondents in the CMA prayed for adjournment in order to settle the matter. Hearing was fixed on *23rd July, 2014* where again the applicant was represented by Elifadhili Mmbaga who prayed for three weeks adjournment. On 27th August, 2014 the date fixed by the Commission, negligence on part of the respondent who are now applicants become pregnant and manifested itself. The respondents applicants in this

revision defaulted appearance without notice the record is clear on 27th August, 2014 before the Commission look:-

> *...Complainant: Johnson Joliga Tanda: Present*
> *Respondent: Absent*
> *Complainant: The respondent are absent without notice the hearing will proceed ex-parte as requested...*

In view of the above I think rightly that the first ground of revision dies a "*cockroach*" death for the applicants playing a "*cockroach dance*".

The second ground of revision that the arbitrator illegally ignored the ex-parte award in question was procured in contravention of Rule 28 (2) of the Labour Institutions Mediation and Arbitration Guidelines GN. 67 of 2007 counsel for the applicants in their submissions referred to Rule 28 (2) that:-

> *...Where an arbitrator proceeds in the absence of a party the party present has to prove its case and to present an opening statement, evidence and any argument in support of its case*[25]*...*

The applicant added the third ground which he submitted together with the second ground of revision. The third ground reads that:-

> *...The arbitrator failed and illegally ignored to consider that the respondent was awarded the*

[25] *op. cit* note 14

award in question without having proved his claims as required by the law[26]*...*

The applicant substantiated by quoting section 110 (1) of the Law of Evidence Act[27] as regard to the **charge *de la preuve*** (burden of proof) that whoever desires any Court to give judgment as to any legal right or liability depends on the existence of the facts which he asserts must prove that those facts exist[28].

The applicant further argued that the facts of this dispute shows that the respondent was the one who filed the dispute alleged that he was employed by the first applicant who failed to pay daily subsistence allowance. The respondent was the one who had the burden to prove that he was employed by the first applicant and was entitled to receive subsistence allowance following termination from employment and the one who was supposed to present the opening statement, adduce evidence/exhibits[29].

The applicant quoted the Court of Appeal case in **Halmashauri ya Kijiji cha Mabwegere V. Hamis (Shabani) Msambaa and 32 others**[30], that:-

...Annextures in the plaint which were not produced in Court to form part of the

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[26] *op. cit* note 14
[27] TEA Cap 6 R.E 2002
[28] *ibid* section 110 (1)
[29] *op. cit* note 14
[30] Civil Appeal No. 53 of 2010 (CAT) unreported at p. 13

evidence/exhibits would not be relied by the Trial Court[31]*...*

The respondent controverted on the issues above that he (respondent) proved his claims as required by the law and the Commission record clearly shows that the respondent was heard ex-parte by the Commission following the non-appearance of the applicants at the hearing date. The respondent adduced oral evidence (***viva voce***) and documentary evidence to prove his claim. The respondent based his claim on daily subsistence allowance as per section 53 (1) of the Employment Ordinance (now repelled) which was applicable by the time he was terminated.

I entirely and respectfully agree with the respondent that the second and third grounds of revision are baseless in my view they are "*mere kicks of a dying horse* ***in articulo mortis***" (at the point of death). The respondent proved his claim by oral evidence and produced exhibits A1, A2 and A3 collectively.

The claim of repatriation costs is as of right to the employee who was terminated for misconduct having lost all his benefits except that of being repatriated back home by his erstwhile employer i.e. the right to pay repatriation costs which he was not given by the employer from the date he was terminated on 05/07/1996 and the applicant employer paid him the

[31] *ibid* Kimaro JA., Kalegeya, JA and Mbarouk, JA.

repatriation costs on 10th July, 2013. The oral evidence of the respondent complainant in the Commission was under Oath (proved under Oath):-

> *...I was employed by the respondent (now applicant) in present revision) on 30th October, 1985 and Primary Court Magistrate ...I was prosecuted in Maswa District Court for corruption related charges. I was acquitted on 15th July, 1994 when the Court found me not guilty. I was terminated from service on 5th July, 1996 on the ground similar to that which I was acquitted by Court. I pursued my terminal benefits until 10th July, 2013 when I was paid repatriation expenses. I am claiming for daily subsistence expenses from the date of termination to the date was paid repatriation expends...documents are admitted as A1, A2 and A3 collectively*[32]*...*

There was also a relevant document annexed by the respondent in the Commission as A5 from the Honourable Chief Justice and Chairman of "***TUME YA UTUMISHI WA MAHAKAMA***" to the respondent titled "**KUKUMBUSHIA MALALAMIKO YAKO YA KUTOKUTENDEWA HAKI NA TUME MAALUM YA MAHAKAMA NA KUNYIMWA HAKI ZAKO ZOTE** Reference No. CFB/48/192/01/52 of 28th June, 2011, the relevant

[32] CMA arbitration proceedings in CMA/DSM/ILALA/R. 669/13/907 between Johnson Joliga Tanda and Chief Court Administrator and the Attorney General at page 8

part reads:-

> *...Tume maalum katika Mkutano no. 1994/4 uliofanyika tarehe 02/03/1995 na 07/03/1995 na kwa kutumia taarifa ya uchunguzi wa Bodi ya Wilaya ya Maswa ilikufukuza kazi hatua ambayo iliridhiwa na Waziri wa Sheria na Mambo ya Katiba tarehe 21/05/1996 na wewe kuandikiwa rasmi barua ya kukufukuza kazi ya tarehe 05/06/1996. Aidha mtumishi anapofukuzwa kazi anapoteza haki zake zote isipokuwa haki ya kurejeshwa nyumbani kama ilivyokuwa imeainishwa katika Kanuni F. 45 (b) ya Kanuni za Kudumu za Utumishi wa Umma Toleo la 1991*[33]*...*

The claim of the respondent as regards to the subsistence allowance cannot be said that it was not proved. The respondent proved his case before the Commission on the balance of probabilities that he was employed by the applicant then dismissed for misconduct on 05/06/1996. He was not paid his repatriation costs/expenses immediately after dismissal until a painful following of his rights to repatriation expense which the applicant himself through the Chief Justice and Chairman of Tume ya Mahakama subscribed that repatriation expenses were of right to a dismissed employee.

[33] Letter from Tume ya Utumishi wa Mahakama to the Respondent Ref. No. CFB/48/192/01/52 of 28th June, 2011 (A5)

The applicant turned a deaf ear to pay the repatriation expenses or repatriate the dismissed employee as of right to his place of domicile despite the fact that the applicants are all together ***proclaire de lois*** (entrusted with keeping the law) The question to ask is what was keeping the dismissed employee in subsistence (the ability to live) if the employer dismissed him on 05/06/1996 and paid him the repatriation costs on 10th July, 2013 nearly 17 years?

It is now trite law that if the employer does not repatriate the employee to his place of domicile "*kurejeshwa nyumbani*" or pay the repatriation costs/expenses immediately after dismissing him the employer shall be bound to pay the employee subsistence allowance, to enable him, live, while awaiting to be repatriated or paid repatriation costs/expenses an amount of money equal to his monthly salary he was earning at the material time as his subsistence allowance per month to the time when the employer will repatriate him or pay him repatriation costs of expenses. The rationale behind is that a monthly salary being a subsistence allowance or money of the employee when he was performing his duties.

Paying the employee daily subsistence allowance of equivalent to his monthly salary or a subsistence allowance equivalent to the perdiem on safari duties is a misdirection and not acceptable the arbitrator was wrong to hold that:-

> *...On the account that the complainant was not given instantaneously given the repatriation costs following his termination from service he will*

therefore be ***entitled to the daily subsistence expenses on the basis of his monthly salary per day between the date of termination and the date*** *he was given the repatriation costs in terms of section 43 (2) of the Employment and Labour Relations Act...(emphasis mine not the arbitrator)*

The above decision led the employer to dispute the amount calculated by the employee in his CMA F1 in which the respondent claimed subsistence allowance at the total of Tzs 350,000,000/= accrued from 1996. This calculation in my view was calculated for subsistence allowance of monthly salary of the employee daily i.e. the daily subsistence allowance at the rate of monthly salary.

Now bearing in mind that the subsistence amount of money which enabled the employee to live was his monthly salary, then it is prudent therefore that the employee should be paid the subsistence allowance of monthly salary from the date of dismissal (cease of paying salary) to the date of being repatriated or paid the repatriation costs/expenses to his place of domicile which is in our case at hand seventeen years (17). However the nagging question is two fold:-

First*: Why did the employer failed to pay the employee his repatriation costs/expenses immediately after he dismissed the employee respondent? Why did he wait until a duration of 17 years (seventeen) from the date*

of termination to the date he paid the repatriation costs?

***Second**: Why did the employee waited until seventeen years have passed before instituting a claim in the Commission for Mediation and Arbitration or the like. Why did he not in a reasonable time institute his claims for repatriation costs/expenses.*

I must confess that there was negligence on part of the employer for not paying the employee his repatriation costs/expenses, he should not have waited until 17 years have passed then nowhere from a twilight sleep embarked to pay the repatriation costs after seventeen years regard being had to the fact that the applicant is a key machinery in the implementation of justice and by and large entrusted to dispenses justice, as one of the strong arms of the state enjoying the separation of powers as one of the three arms of the state.

The employee respondent was also negligent for sleeping over his rights for seventeen years, he ought to have opened a dispute, say after one or two years to claim his repatriation costs. In addition to the above, what was he eating for seventeen years? was it reasonable for him to stay at place of work for seventeen years without making any arrangement to go back to his place of domicile and await for the transport expenses/costs while at home? There was also contributing negligence on part of the employee respondent.

The respondent employee cannot after seventeen 17 years come forward to claim repatriation costs expenses for all those years after he had slept for his right all time long. Was he receiving any subsistence allowance for staying all the seventeen years without going to his place of domicile or arranging for his own way through while awaiting for the employer to pay him the repatriation costs?

I quash and set aside the order of the Commission to grant the respondent subsistence allowance of Tzs 350,000,000/= for the seventeen (17) years he was awaiting for repatriation costs.

Subsistence allowance should be granted at the rate of a monthly salary of the employee ***a cet moment la*** (at that time) and not on daily basis. Nevertheless be that as it may regard must also be had that the negligence act of the employer to pay the repatriation costs cannot be **condoned** and the negligence act of the respondent employee for sleeping on his rights for 17 years without claiming in Court his repatriation costs sails in the same boat. But since paying of subsistence allowance pending repatriation by employer is the right of the employee, I order the employer applicant to pay the employee subsistence allowance of at least five (5) years monthly salary instead of 17 years subsistence allowance of 350,000,000/= as ordered by CMA. I rightly think that:-

> *...The date of dismissal on 05/07/1996 to the date when the employee respondent was paid by the employer applicant his repatriation expenses on 10th July, 2013 (17 years) is a long and*

unreasonable time to grant subsistence allowance for all that period of 17 years regard being had the negligence of both parties...

The fourth ground of revision by the applicants is couched in the following calculated words:-

...That the arbitrator illegally and overlooked that the exparte proof against the Attorney General must follow the procedure ***interalia*** *what is laid down under Order VII Rule 14 of the Civil Procedure Rules Cap 33 R.E. 2002...*

Submitting on this issue the learned counsel for the applicants referred to this Court Order IX Rule 6 of the Civil Procedure Code which provide the procedure exparte to be followed where the defendant is the Attorney General. The applicants further argued that they are aware that the Civil Procedure Code is not applicable in the Labour Court unless there is a lacuna in the Labour Court Rules. He reiterated that the Labour Court Rules does not provide the procedure for the complainant to apply for leave to proceed exparte where the defendant is the Attorney General. He quoted Order IX Rule 6 of the Civil Procedure Code that:-

6 (1)...Where the plaintiff appears and the defendant does not appear when the suit is called for hearing them.

(i) If the defendant is the Attorney General and it is proved that the summons was duly served, the plaintiff may apply for leave to proceed exparte

and the Court shall there upon fix a day for the hearing of the application and shall direct that notice of application and of such day be given to the Attorney General.

(ii) Where the Attorney General appears at the hearing of an application under this paragraph and assigns good cause for his previous non-appearance, he may upon such terms as the Court may direct as to costs or otherwise be heard in answer to the suit as if he had appeared on the day fixed for hearing to the suit.

(iii) If it is proved that summons was duly served the Court shall direct a second to be issued (sic) and served on the defendant or

(iv) If it is proved that summons was served on the defendant but not sufficient time to enable him appear and answer on the day fixed in the summons the Court shall postpone the hearing of the suit to a future day to be fixed by the Court and shall direct such day to be given to the defendant[34]*...*

The applicant therefore concluded that there is a lacuna in the Labour Court Rules on that aspect of the Attorney General being a party. He expected therefore that the learned arbitrator could have resorted to the Civil Procedure. ***In limine*** (at the outset) I should remind the Learned

[34] Applicant written submission at pp. 12 – 13 *op. cit*

State Attorney for the applicants that the Commission for Mediation and Arbitration CMA did not apply the Labour Court Rules 2007 in which the Learned State Attorney submitted that there is a ***lacuna***.

The Labour Institution (Mediation and Arbitration) Rules GN. No. 6 of 2007 is the case in point and it provides the procedure to be used in case of a party who fails to appear either for Mediation and Arbitration it reads:-

> *28 (1) When a party fails to attend an arbitration hearing an arbitrator may do the following:-*
>
> *(a) Where a party who referred the dispute to the Commission fails to attend the hearing the arbitrator may dismiss the matter or postpone the hearing.*
>
> *(b) Where a party against whom relief is sought fails to attend the arbitrator may proceed in the absence of that party or postpone the hearing*[35]*...*

I entirely and respectfully agree with the respondent that the labour legislation does not discriminate, regardless of the party's status for the purpose of adhering to the procedure, and if the parliament had wanted to separate the treatment of parties according to status it could have specifically done saw in respect of the Attorney General, but the wisdom of the parliament so it prudent not to lay ***caste*** kind of treating parties. The parliament had regard to the objectives of labour legislation and this Court

[35] Labour Institution (Mediation and Arbitration) Rules 2007 Government Notice No. 67 as quoted by the respondent in his written submission

shares the same views. Principal objects of the legislation the Employment and Labour Relations Act No. 6 of 2004 include:-

(a) To promote economic development through economic efficiency productivity and social justice.

(b) To provide the legal frame work for effective and fair employment relations.

(c) .....

(d) To regulate the resort to industrial action as a means to resolve disputes.

(e) To promote a frame work for the resolution of disputes by Mediation Arbitration and adjudication.

(f) .....

(g) .....

In view of the fact that labour legislation focus on social justice promotion ***vis-à-vis*** legal justice, the rules regarding exparte procedure have been met and duly elaborated in the Labour Institution (Mediation and Arbitration) Rules GN. No. 67 of 2007 and it carters for both parties irrespective of their status, because the relationship that we find in the work place can be divided into two categories as correctly observed by Proffessor Basson in his Book titled Essential Labour Law Vol. 1 individual Labour Law Third Edition 2002[36], that:-

> *...There are individual relationship between employer and an employee. We call this an individual relationship because it relates to the*

[36] Prof. Basson et al Essential Labour Law 3rd Ed.

employee as an individual. Therefore individual labour law focuses on the relationship between the ***employer*** *and the individual* ***employee****. Individual labour law therefore relates to the conclusion of the contract by the employer and the individual employee*[37]*...*

The labour law further focus on what is known as collective labour law as regard to the parties in labour disputes apart from the individual labour law. This is what Prof. Basson states:-

...The relationship between employers, employers' organizations, trade union and trade union federations are called "collective" relationships because they are relationship between collective entities or "groups". Collective labour law therefore concentrates on matters such as collective bargaining between employers and trade unions[38]*...*

It is therefore clear that labour legislation have procedure which is different from the Civil Procedure Code this is because the labour legislation are centered to meet the objectives of the Act which include the Employment and Labour Relations Act No. 6 of 2004. The Learned Author in the text book titled **Essential Labour Law by Prof. Basson et al** ***supra*** observed when writing on the purpose and objectives of the Labour

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[37] *ibid*
[38] *ibid*

Relations Act 1955 (South Africa) which is in parimateria with the Employment and Labour Relations Act 2004 (Tanzania) that:-

> *...The Labour Relations Act simplifies and streamlines procedures ... as for as dispute resolution procedure are concerned where there is always the possibility that aspect of procedure (the procedure a party must follow to have a dispute resolved) over shadows substance. The Act has been drafted in a revolutionary style and language that is simple and free of technicality easy to understand*[39]*...*

The above spirit applies to all Labour Legislation and Rules or Guidelines including the Labour Institution (Mediation and Arbitration) Rule 2007 which provides for the procedure to be followed when a party fails to appear before the Commission. The Labour Legislation do not discriminate and laydown what I should call "*caste system*" in determining labour dispute like the Civil Procedure Code because **social justice** which labour legislation champions to promote industrial harmony is different form **legal justice** which the Civil Procedure is concerned. The different between **social justice** and **legal justice** has been given by Proffessor Surya Narayan Misra in his book titled Introduction to Labour and Industrial

[39] *ibid* p

Law[40], that:-

> ...***Social justice*** *is different from* ***legal justice****. The different is not of objective but aim at dispensing justice. The different is due two reasons:-*
>
> (i) ***Social justice*** *aims at doing justice between classes of society and not between individual.*
>
> *(ii) The method which it adopts is not unorthodox compared to the method of municipal law, justice dispensed according to the law of master and servant bases upon the principle of absolute freedom of contract and doctrine of* ***laissez faire****, is legal justice.* ***Social justice*** *is something more than mere justice it is a philosophy superimposed upon the legal system[41]...*

To put the parties at a same level without distinction or discrimination is the solely aim of the labour legislation in work place parlance and it is geared to promoting social justice ***par excellence***. In the words of Ellen Baldry and Ruth Maccaustand, therefore:-

> *...The words or at least concepts of social justice are used in context where people understand social justice to be about fairness beyond individual justice[42]...*

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[40] Prof. Surya Narayan Misra Introduction to Labour and Industrial Laws 14th Edition Central Law Publication Darbhanga Colony (1994) Alahabad

[41] *ibid*

[42] Unpublished paper 2008

Fairness therefore should be without distinction of tile or discrimination it should apply to both parties be it the Attorney General or the individual employee or employer. The Labour legislation procedure as stated above deals with the parties on the same footing in order to advance "***economic development, social justice, labour peace and industrial harmony and democratization of the work place by fulfilling the primary objectives of the Act i.e. to provide for more effective dispute resolution procedure and mechanism for both dispute of right and dispute of interest... to keep the procedures underlying labour litigation as simple as possible in order to speed up litigation***[43]" I will conclude by saying that as one distinguished judge in the Supreme Court of South Africa observed more or less that:-

> *...The Attorney General title is not a* ***magic wand*** *which when raised always renders the Court to deviate and/or circumvent the procedure laid down in labour legislations enacted by the parliament...*

Ground four of revision is in the event of the foregone "*a mere kicks of dying horse*" ***in articulo mortis*** (at the point of death) I proceed to dismiss it.

The last ground of revision which is the fifth goes like this:-

> *...The arbitrator failed to assess the reasons/grounds advanced by the applicant for delay in filling the application to set aside an*

[43] See Professor Basson et al Essential Labour Law *op. cit*

application for award that led to arrive on illegal decision for non-compliance with the established rules of solving labour disputes...

I have carefully and duly considered the parties submission on the fifth ground of revision and I must confess that what I discovered in the course of scrutiny of the submission is that the applicant has "*jetted*" in the reason of illegality of the CMA award arbitrarily and on private opinion in my view.

I have clearly demonstrated in the judgment above that the Commission award did not harbour any illegality so to speak. The applicant did not pass the "*test*" in which the Commission or Court may have granted extension of time. The guidelines were set forth in **Lyamuya Construction Company Ltd. Vs. Board of Trustees of Young Women's Christian Association of Tanzania**[44] (CAT) 2010 that:-

(a) *The applicant must account for all the period of delay.*

(b) *The delay should not be inordinate.*

(c) *The applicant must show diligence and not apathy, negligence or sloppiness in the prosecution of the action that he intends to take.*

(d) *If the Court feels that there are other sufficient reasons, such as the illegality of the decision sought to be challenged.*

[44] Civil Application No. 3 of 2010 Court of Appeal of Tanzania at Arusha per Massati, JA.

As demonstrated in the judgment at hand the applicant did not account for all the delay before the CMA and the arbitrator found as a result that there was negligence on part of the applicant who received the copy of the exparte award served to him for the purpose of complying with what the Commission had ordered. Further there was communication between the applicant and the respondent who was being calmed by the applicant that they were working on, in accordance to the law, his payments.

The delay to file the application for leave to set aside the exparte award was by and large inordinate, the time had "*crossed the floor*" for around six months delay. Inspite of the applicant being aware of the exparte award and the claims of the respondent. The applicant was aware of the award right from when it was delivered to him. He did not account for all the period of delay and the misplacement of the case file was sheer negligence[45].

The applicants showed negligence in prosecuting the matter for not showing himself to the Commission or Court inspite of the fact that he had attended the previous session. The non-appearance of the applicants due to negligence was not only demonstrated by them in the Commission but even before this Court when the Court proceeded exparte in the hearing of the preliminary objection that was raised by the respondent. Hence the applicant was negligent as correctly found by the arbitrator and indeed he was sloppiness in the prosecution of the action.

[45] Sheer negligence means: pure unmixed with anything else see Longman Dictionary of Contemporary English

On the ground of "*illegality*" of the award put forward as a "*jetting force*" by the applicant to be granted extension of time by this Court as it was held by the Court of Appeal in **Principal Secretary Ministry of Defence and National Service V. Devian Valambhia**[46] that a **point of law of importance such as the legality of the decision sought to be challenged could constitute a sufficient reason for extension of time**[47]. The applicants have missed the point and failed the test expounded by the Court of Appeal of Tanzania.

Because the same Court of Appeal had held in **Lyamuya Construction Company Limited V. Board of Trustee of Young Women Christian Association of Tanzania 2010**[48] that "*illegality*" *must be of sufficient importance and it must also be apparent on the face of the record such as the question of jurisdiction not one that would be discovered by a long drawn argument or process*[49].

It has been a practice for parties to put forward the ground of illegality of a decision in appeal or revision that wherever the issue of illegality is a ground the Court must grant the prayer of extension of time but as we have read this is not the spirit of the decision in **Lyamuya** case above.

In the two judgment of the Court of Appeal of Tanzania supra it is not the position of the law that whenever the ground of illegality is raised

[46] [1992] TLR 387
[47] *ibid*
[48] Civil Application No. 3 of 2010 CAT
[49] *ibid* per Massati, JA.

the Court must grant the prayer for extension of time. The Learned Justice of Appeal in **Lyamuya Construction Company Limited**[50] case ***supra*** sealed the point that:-

> *...Since every party intending to appeal seeks to challenge a decision either on points of law or fact, it cannot be said that in Valambhia case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises point of law, should as of right be granted extension of time if he applies for one*[51]*...*

To conclude, I rightly think that the applicant's "importation" of illegality as a ground of revision for this Court or the Commission to grant him the extension of time or to agree with him that there was illegality in the award impugned is by and large **contra** and short of the guidelines put by the Court of Appeal ***supra***. It is therefore trite law that not every applicant who demonstrates that his intended revision raises a point of law and illegality should as of right be granted the extension of time if he applies one[52]. Further I would add that:-

> *...The ground of illegality or point of law is not a* ***magic wand***[53] *which when raised, in the application for extension of time or in an appeal*

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[50] *ibid*

[51] *ibid*

[52] See Lyamuya Construction Company Limited V. Board of Trustee of Young Women Christian Association of Tanzania *ibid*

[53] Magic wand means: a small stick used by magician in doing magic tricks for example the government can't just wave a magic wand and make this problem go away. See Longman Dictionary of Contemporary English

before the Court, renders as of right for the Court to grant the application thereof...

In the event of the forgone the fifth ground of revision also fails and is dismissed to the extent explained in this judgment above save to the order of the CMA which ordered the applicant to pay the respondent the subsistence allowance of Tzs 350,000,000/= for the seventeen (17) years from the date of termination on 05/07/1996 to the date of payment of repatriation expenses to the respondent which was on 10/07/2013 which is set aside and substituted thereof the order for payment of five (5) years' salary (sixty (60) months) as subsistence allowance to the respondent.

I.S. Mipawa
JUDGE
25/11/2016

Appearance:-

1. Applicant: Benjamin Kashinje, State Attorney
2. Respondent: Present and his Personal Representative Joachim Joliga

Court: Judgment is read in the presence of both parties as shown in the appearance above.

I.S. Mipawa
JUDGE
25/11/2016