

**IN THE HIGH COURT OF TANZANIA
BUKOBA DISTRICT REGISTRY
AT BUKOBA**

APPLICATION FOR LABOUR REVISION NO. 3 OF 2020

PASCHAL MGAWE.....APPLICANT

VERSUS

**TANZANIA ELECTRIC SUPPLY COMPANY LTD
(TANESCO).....RESPONDENT
(Revision from CMA/BUK/65/2017 at Bukoba)**

JUDGMENT

8 & 16 July, 2021

MGETTA, J:

Aggrieved by the decision at the Commission for Mediation and Arbitration (henceforth the CMA) the applicant, Paschal Mgawe through a legal service of Kabunga & Associates Advocates, filed this application under the provision of **Section 91(1) (a), (2)(b), 4(a) (b) and 94 (1) (b) (i) of the Employment and Labour Relations Act, 2004, Rules 24 (1) (2)(a) (b) (c) (d) (e), (f) and 28 (1) (c) (d) (e) of Labour Court Rules, GN 106/2007** seeking for the following reliefs:

- (a) That there was material irregularity and an error material to the merit of the subject matter resulting to injustices to the applicant.*

- (b) *That the arbitrator has acted in exercise of her jurisdiction illegally or with material irregularity by pointing out that the applicant failed to prove claims against the respondent.*
- (c) *That the arbitrator has misapprehended the evidence on record to reach an illegal and unjust decision which has prejudiced the statutory rights of the applicant.*
- (d) *The CMA having made an award in CMA/BUK/60A/2014 dated 29th January, 2016 of which had never been impugned by the respondent it was functus officio to overturn the same without being clothed with jurisdiction to do so.*

The application was supported by the affidavit sworn by Frank Kalory John, the learned advocate who represented the applicant; while, the respondent, Tanzania Electric supply Company LTD, was being represented by Theresia Masangya, the learned advocate who opposed the application through counter affidavit.

The facts of this matter albeit briefly are that the applicant had lodged a complaint before the CMA in CMA/BUK/60A/2014 and an award was pronounced in his favour. In the said award, the CMA ordered the

respondent to reinstate him from the date he was terminated unfairly without loss of remuneration during the period that he was absent from work in terms of **Section 40 (1) (a) of the Employment and Labour Relations Act, 2004** (henceforth ELRA). The respondent opted not to reinstate him, rather it paid compensation of twelve months salary remuneration as per the law. After the payment of compensation, the applicant returned to CMA for complaint that the benefits were meagerly paid and that he was denied some of his basic entitlements.

After the CMA had heard both parties in the impugned decision, it dismissed the applicant's claims with the exception of one claim which the CMA ordered the applicant to be paid only Tzs. 2,315,296/= as unpaid leave of the applicant in the year 2016. That decision did not amuse the applicant, hence this current revision.

Invited for oral submission, Mr. Frank for the applicant, elaborated that the decision of the CMA in No. CMA/BUK/60A/2014 which ordered reinstatement without loss of any remuneration from the date of termination during the period the applicant was absent from work due to unfair termination, was never appealable and respondent proceeded to execute it, but during implementation it did not pay fully and therefore

denied some remuneration to the applicant. He contended that the decision was referred in paragraph 3 of the applicant affidavit.

The learned advocate substantiated that despite the fact that the applicant was entitled to allowance like transport, house and responsibility allowance, he was denied and instead he was paid only salary as per exhibit P3 of the CMA record. That the paid Tzs 1,922,997/= was only salary without allowances. That that salary was paid from 15th January to December 15th, that Tzs 4,785,493/= was not paid for salary. Mr. Frank added that the respondent paid June 2016 to January, February 2016 but April, May and June were not paid. Concerning the paid leave, the applicant was not paid Tzs 784,598/=. With regard to surveillance pay, that the applicant was not paid Tzs 392,299/=. In respect to compensation of 12 months, the applicant was denied Tzs 4,707,558/=. The learned advocate further submitted that, the applicant was terminated on 10/7/2014, but the employer started paying him on August. He was therefore not paid 21 days and therefore denied of Tzs 1,457,010/=.

The learned advocate further submitted that all these claimed unpaid remunerations were refused by the employer and blessed by the CMA on the reason that the applicant was not at work while the decision of the first

CMA ordered the applicant to be paid as the employee who was at work in terms of **Section 41 of ELRA**.

The learned advocate went on that the subsistence allowance was paid from Bukoba to Mpanda, while he was supposed to be paid from Bukoba to Dar es salaam. He added the law requires to be paid from place of termination to place of recruitment and not place of domicile. Mr. Frank faulted the reason of the respondent and CMA that he was paid from Bukoba to Mpanda which is a place of domicile according to provision 7 of "*Hali Bora*" contract that it was misinterpretation of the said provision as the applicant did not resign, but was terminated. He was therefore of the view that up to this time subsistence allowance has never been paid.

Mr. Frank further submitted that according to "*Hali bora*" contract, the employee is entitled to 750 units of electricity. That they claimed it at CMA for 24 month which make a total of 18,000 units. That this right was denied on the same reason that the employee was not at work. The learned advocate concluded that the decision was tainted with illegalities as the Arbitrator failed to scrutinize the evidence on record.

In a reply submission, Ms. Theresia submitted that the applicant's advocate has concentrated to inadequate payment but doesn't tell what he was to be paid and how. That there is a difference between benefits and allowance. That allowance is payable to employee after performing certain task. That she supported the CMA decision on page 11 – 13 of award as it was clearly explained what amounts to allowance and benefits.

With regards to issue of repatriating the employee to his place of domicile instead of place of recruitment, Ms Theresia argued that **Section 67 of ELRA** requires employer and employee to reach agreement for the benefit of the employee. He was therefore of the view that *Hali Bora contract* binds the parties. The said agreement is optional and the employee signed it that at the end of his termination he will be repatriated to place of domicile. The CMA was right on its finding that the employer was transported to his place of domicile as per the *Hali bora contract*. With regard to the claim of electricity, she conceded that it is true as per *Hali Bora contract* that the employer will give units of electricity but his benefit is not specific units; the money depend the amount the employer contributes. The employer gives 10,000 to employee as electricity per month. As to the issue of unpaid allowances, that the applicant was not

supposed to be paid allowance as he had no responsibilities which he was undertaking at work. That he could not be given transport allowance as he was not even travelling. Ms. Theresia concluded that the claims are unfounded and therefore prayed the claims to be dismissed.

In rejoinder, Mr. Frank submitted that CMA did not reject their claims on the ground that they were not proved, but on the ground that the employee was not at work. When the respondent was cross-examined at page 31 of the proceedings, he conceded that the salary to be paid was Tzs 2,180,000/= per month and that he was denied Tzs 380,000/= as salary arrears per month. It was applicant's conviction that allowances and benefits are pegged to salary and therefore ought to be paid with salary.

With regard to repatriation payment, he contended that the respondent's advocate does not dispute that the applicant was recruited from Dar es salaam. On electricity claims, Mr. Frank submitted that the respondent's advocate has conceded it but the reasons for denial of it is simply that the applicant was not at work. He concluded that the total of claimed money brings Tzs 69,439,774/= and 18,000 units.

I have keenly considered the arguments of both parties and the entire record of this revision. Now, therefore, I believe, I have to determine one main issue of whether this revision is meritorious. In dealing with main issue, interlocutory issues will be discussed and answered: (i) Whether allowances are remunerations to be paid to employee who is not at work during unfair termination period, (ii) Whether parties ever agreed on the place of repatriation after termination of the employee, (iii) If the answer in (ii) is in negative, whether the applicant was ever repatriated, and (iv) What are unpaid salary arrears.

The take off point of this court in this revision is the judgment of the CMA in CMA/BUK/60A/2014 which was admitted as exhibit P1 in the trial CMA proceeding subject to impunity. The said decision was referred in the applicant's affidavit in para 3. When the applicant's advocate was submitting, he encountered a stumbling block from the respondent's advocate who objected its reliance on the ground that the said judgment was not annexed in the applicant's affidavit. This objection does not hold water and should not therefore detain me. The reason is not far to fetch, that since it was tendered and admitted as exhibit P1 in the trial CMA proceedings it therefore forms part of this record.

The CMA judgment (exhibit P1) is the one which gave rights to the applicant and the said judgment is never appealable by the respondent as rightly observed by the applicant's advocate. In the said exhibit (judgment) after the Arbitrator had heard both parties it came to its conclusion and findings that the applicant was unfairly terminated and therefore employed the provision of **section 40(1)(a) of ELRA** and ordered reinstatement of the employ from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to unfair termination.

The CMA went further to quote the definition of reinstatement and remuneration under the interpretation section, **Section 4 of ELRA** of which I concur with and it is therefore relevant to reproduce hereunder:

"Reinstatement is defined to mean that the contract has revived with all its incidents and that the employee is entitled to all his rights during the period of absence from actual service."

"Remuneration is also defined to mean the total value of all payments, in money or in kind, made or owing to an employee arising from employment of that employee."

The above provisions of law are clear and actually shut the discourse on what remuneration entails and whether remunerations ought to be paid to the employee who is not at work. My harmonious judicial interpretation on **sections 4 and 40 of ELRA** is that once the CMA finds the termination unfair and orders reinstatement, the employer should pay the employee all his remunerations which were entitled to him/her arising from employment of that employee during the period the employee was absent from work due to unfair termination without any loss. This is because in reinstatement the contract of employment is revived with all its incidents and the employee is therefore entitled to payment to all his rights during the period that he was absent from his actual work due to unfair termination. This is the same as to say that it is as if the employee was never terminated because the termination was unfair. The term **all his rights** entail all what was payable to him/her as entitlements and should therefore include salary, allowances, remuneration and any other entitlement.

The employer is legally allowed to opt for paying compensation of 12 months salary and decides not to reinstate the employee. However, this move cannot save the employer from evading paying the employees benefits from the date of unfair termination to the date of final payment as provided under **section 40(3) of ELRA**. This is because the law stipulates that compensation of 12 months salary is paid as an additional to other benefits or rights and not in substitute for any other amount to which the employee may be entitled in terms of any law or agreement as provided under **section 40(2) of ELRA**. Therefore, this is to say, the only advantage the employer can get in opting for compensation of 12 months wages instead of reinstatement is that of not continuing working with the employee but not escaping paying other benefits.

Once termination is held to be unfair there is no way the employer can escape from paying the benefits entitled to the employee from the date of unfair termination to the date of final payment which brings the total dates the employee was absent from his work. I therefore dismiss the argument advanced by the respondent's advocate and CMA in the impugned decision that the employee was no supposed to be paid his rights simply he was not at work. This court holds that all rights which

were denied by the employer basing on the reason that the employee was not at work should therefore be paid.

There was another confrontation between parties where the applicant's advocate advanced that the applicant has never been repatriated to his place of recruitment as required by law. He based that he was paid transportation money from Bukoba to Mpanda, the place of domicile, while he was recruited from Dar es Salaam and therefore was supposed to be paid money from Bukoba to Dar es Salaam. The respondent's advocate responded that the payment from termination place to domicile was as per provision 7 of *Hali Bora* Contract.

I am therefore called upon to interpret provision 7.1 (ii) of *Hali Bora contract*. I am alive that **section 67 of ELRA** allows agreements of employer and employees in benefit payment. This is where *Hali Bora agreement* (exhibit P4) originates. I quote the provision:

"Mwajiri hata lazimika kutoa nauli ya kumsafirisha mfanyakazi kwenda kwao wala kulipia usafirishaji wa mizigo yake kama mfanyakazi huyo ataacha kazi kwa hiyari yake mwenyewe"

Reading this provision keenly, I am inclined to agree with the applicant's advocate that this provision is irrelevant and it refers to an employee who resigns from his employment and not a terminated employee. If the said provision was meant to regulate transportation of employees to place of domicile after termination, with due respect to the respondent's advocate, I hold that it was poorly drafted and I think it needs quick amendment because as it stands, it serves no purpose. I therefore rule out that the applicant and respondent have never agreed on where the applicant should be repatriated after termination of employment and therefore the provision of **section 43 of ELRA** which requires the employer to repatriate the employee to the place of recruitment should be resorted to. Since the respondent doesn't dispute that the applicant was recruited from Dar es salaam and posted to Mbeya as the respondent (DW1) conceded on page 30 of the proceedings therefore the applicant was supposed to be repatriated to Dar es salaam (the place of recruitment) from Bukoba (a place of termination) as required by **section 43 of ELRA**.

In the same vein, I don't subscribe the reasoning by CMA that the applicant failed to prove the place of recruitment by document as the CMA shifted burden of proof wrongly to the applicant. **Section 15(5) of ELRA**

stipulates that burden of proof in any legal proceeding lies to the employer who has failed to produce a written contract or written particular such as form and duration of contract, place of recruitment and job description. I am constrained to agree with the applicant's advocate that since the respondent failed to repatriate the applicant to Dar es salaam and instead to Mpanda, it is as good as the applicant was not repatriated and this gives rise to another right of fare and subsistence allowance due from date of termination to the final payment together with employee's family as required under **section 43(1) (a)-(c) of ELRA** which stipulates what is supposed to be paid when the employee is being repatriated.

As regards to the issue of salary arrears, in exhibit P3 which was the payment sheet from the employer, the salary was Tzs 1,922,997/= per month which the applicant's advocate submitted that the salary to be paid was supposed to be Tzs 2,180,000/=. A thorough scrutiny on page 33 of CMA proceedings, DW1 agreed that the applicant was supposed to be paid Tzs 2,180,000/= as monthly salary and conceded that deducting from what he was paid monthly from the actual payment, he was denied Tzs 380,000/= per month. I therefore agree with the applicant's advocate that

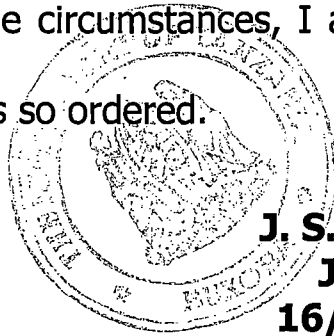
the applicant was denied his basic salary to that conceded extent by the respondent.

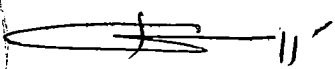
Having resolved the above issues, I find this revision has merit and it is therefore allowed with the following orders:

1. As exhibit P3 reveals that the applicant had been paid some of the meagre payments the fact which has no dispute, the subsequent payments must therefore consider and deduct what is already paid in accordance with the calculation formula stipulated by the law.
2. All benefits (unpaid) including electricity, house, transport and responsibility allowances should be paid and should start from the date of termination to the date of judgment of the CMA in CMA/BUK/60A/2014, except subsistence allowance which is payable up to the date of finalization of payment.
3. The applicant should be paid from the place of termination to the place of recruitment (Bukoba to Dar salaam), in terms of **section 43 of ELRA** but the amount already paid to him from Bukoba to Mpanda should be deducted from the payment to be made.

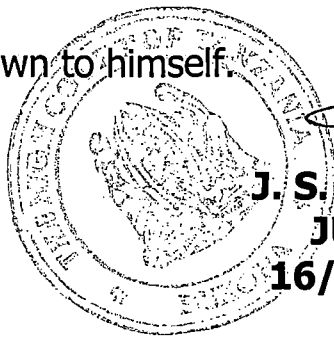
4. As the respondent himself has conceded the total of unpaid benefits to sum up Tzs 69,439,774/=, however the greater the formula the result will yield, it should not exceed the amount he has agreed himself.

Under the circumstances, I accordingly order each party to bear its own costs. It is so ordered.



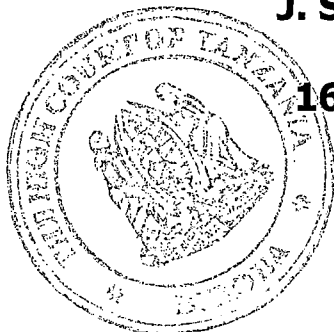

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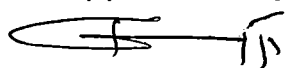
COURT: This judgment is delivered today this 16th July, 2021 in the presence of Mr. Frank John, the learned advocate for the applicant, but in the absence of the respondent for reasons known to himself.




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COURT: Right of appeal to Court of Appeal is fully explained.




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