IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF ARUSHA)

AT ARUSHA

APPLICATION FOR LABOUR REVISION NO. 41 OF 2021

(Originating from CMA/ARS/ARB/19/66/2020)

LUCY EDWARD .....APPLICANT

VERSUS

PASTORAL WOMEN'S COUNCIL..... RESPONDENT

09/08/2021 & 13/10/2021

GWAE, J

Dissatisfied with the arbitral award of the Commission for Mediation and Arbitration of Arusha at Arusha ("CMA") dated 14th April 2021, the applicant, Lucy Edward filed this application praying for revision on the following grounds;

1. That, the arbitrator erred in law for holding that the applicant is not entitled to transport costs to the place of recruitment
2. That, the arbitrator erred in law and fact for denying the applicant her daily subsistence allowance at the rate of Tshs. 50,000/=from the date of termination to the date of repatriation

3. That, the arbitrator erred by for his failure to direct the respondent to issue a termination letter

4. That, the arbitrator erred in law by not ordering issuance of certificate of service by the respondent in favour of the applicant

The applicant's contract of employment was renewable yearly and the same was lastly renewed on the 1st January 2018 and was to come to an end on the 31st December 2018. The respondent unilaterally terminated the applicant's contract of employment on the 7th January 2019 leading to the present dispute. In her complaint, the applicant through her referral form claimed against the respondent for inter alia; repatriation costs from her working station (Loliondo District) to the place of recruitment (Arusha), subsistence allowance while waiting for being repatriated, salary arrears, severance pay, two months' salaries in lieu of notice, unlawful deduction of her salaries and unpaid leave.

In its award, the Commission awarded the applicant the following; severance pay at the tune of Tshs.734,192/, two months' salary at Tshs. 1,818,000/, payment of Tshs, 308, 454/73 deducted from the respondent's

salary of 2015 and payment of Tshs. 100, 000/= deducted by the respondent in April 2017.

When this application was called on for hearing before me on the 18th October 2021, the applicant and respondent were duly represented by the learned advocates, to wit; by Mr. Jonas Masiaya Laiser and Ms. Fatuma Amiri assisted by Mr. Joseph respectively.

Before arguing this application, the applicant's counsel sought for the court's adoption of their affidavit and then proceeded submitting that, the applicant was to be awarded a certificate of service pursuant to section 44 (2) Employment and Labour Relations Act, Cap 366, Revised Edition, 2019 (ELRA) and Rule 17 of the Code of Good Practice, GN No. 47 of 2017 requiring an employer to issue certificate of service. He thus argued that, it was wrong on the part of the arbitrator to abstain from ordering the employee to issue the same. He added that, the employee acted ultra vires for not issuing a termination letter as the same could be used in making follow ups of her terminal benefits including in the Fund.

On ground 1 and 2, the applicant's counsel argued that, the applicant was entitled to repatriation plus subsistence. He insisted that, it was quite clear that, the applicant's place of recruitment was Arusha whereas the last

place of work was at a secondary School located at Loliondo District and as per the parties' contracts of employment (PEI). He embraced his argument by citing section 43 (1) (a) and (b) of ELRA and the case of **Arusha v. World Vision,** Civil Appeal No. 13 of 2019 (unrepeated-CAT) at Bukoba where repatriation was found to be an entitlement of an employee and that, in the event the employee deposits such repatriation costs into an account of the employee, such employee should be notified to that effect by an employer.

Resisting the applicant's application, the counsel for the respondent also prayed for the court's adoption of their counter affidavit and then Ms. Fatuma went on arguing that, the CMA wrongly granted extension of time on the ground since the applicant did not account for each day of delay taking into account that her delay was of more than one year and her assertion that she was waiting for the respondent's reply letter to her complaint's letter and that, she was a layperson. She nevertheless did not dispute the sought entitlement of a certificate of service but she contended that the respondent summoned the applicant in order to collect the same but she declined for reason best known by her.

In the ground of the repatriation, Ms. Fatuma submitted that, the applicant is not entitled to repatriation as she was inarguably being paid per deem whenever she went to Loliondo for her duty and sometimes she used to work at Arusha. She added that the applicant was not permanently working at Loliondo. She further contested that the applicant's testimony in that context does not establish the fact that she was terminated in a place other than place of her recruitment. She cemented her argument with the case of in **Director General of PCCB vs. George Magoti,** Rev. No. 79 of 2019 (unreported) where a determinant factor for an employee to be eligible for repatriation is the place of recruitment and not the place of Domicile.

In his assistance to Ms. Fatuma, Mr. Joseph argued that the applicant had been severally called by her employer in order to be given a means of transport but she declined to accept the same. He further submitted that the applicant was also notified of the respondent's move to repatriate her through mobile phone communication.

Rejoining to the oral submission by the respondent's counsel, Mr. Joseph stated that, if the respondent was aggrieved by condonation of the applicant's dispute by the CMA, she ought to raise her grievances through

an application for revision in order to challenge the ruling enlarging time to the applicant within which file the complaint out of the prescribed period. According to him, the respondent's contention is unfounded.

The counsel for the applicant further rejoined that, the applicant being a senior sponsorship officer, she used to be paid her monthly salaries and that she was never being paid per diem while working at Loliondo area. Finally, the counsel for the applicant stated that, the applicant was not called by the respondent for collection of transport costs.

Having briefly detailed what transpired before the Commission and before this court, I should now revert to the determination of the applicant's grounds for revisions. I will however determine 1st and 2nd ground jointly as they are related, these two applicant's complaints read;

> **That, the arbitrator erred in law for holding that the applicant is not entitled to transport costs to the place of recruitment and that, the arbitrator erred in law and fact for denying the applicant her daily subsistence allowance at the rate of Tshs. 50,000/=from the date of termination to the date of repatriation**

It is the requirement of the law that an employee whose contract comes to an end at the place of work other than the place of recruitment must be transported to the place of his or her recruitment. Transport

includes the employee and his personal effect. Section 43 of the ELRA provides and reproduce it herein under in extenso;

> "43 (1) Where an employee's contract of employment is terminated at a place other than where the employee was recruited, the employer shall either-
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> (a) transport the employee and his personal effects to the place of recruitment;
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> (b) pay for the transportation of the employee to the place of recruitment; or
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> (c) pay the employee an allowance for transportation to the place of recruitment in accordance with subsection (2) and daily subsistence expenses during the period, if any, between the date of termination of the contract and the date of transporting the employee and his family to the place of recruitment.
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> (2) An allowance prescribed under subsection (1) (c) shall be equal to at least a bus fare to the bus station nearest to the place of recruitment.
>
> (3) For the purposes of this section, "recruit" means the solicitation of any employee for employment by the employer or the employer's agent.

My reading of the provisions of section 43 of the Act envisages that, if the applicant is proved to have been recruited in Arusha, the fact which

is not contentious, but her duty station is in another region or in a district other than Arusha, she is thus entitled to transport costs and subsistence allowance between the date of termination to the date of repatriation unless the contrary is established.

According to the contract of employment the (PE1) applicant was undoubtedly recruited in Arusha but her working station (work place) was Loliondo District. She is thus supposed to be repatriated from Loliondo, place of her work to Arusha and not either to Tabora as the place of her domicile as rightly argued by Miss Fatuma or to Ololosokwani area where the applicant wanted to be repatriated merely because she has established herself thereat (See page 6 of the typed proceedings). Therefore, the finding by the arbitrator that, there was not evidence as to the place of termination and therefore the applicant was not entitled to transport costs and subsistence allowance is unfounded. Such finding is thus revised and set aside.

Nevertheless, in our case, the applicant is said to have been called to collect her transport costs but she declined to go for the same. That being the assertion by the respondent, I am therefore obliged to go through the evidence adduced by the parties before CMA. My thorough perusal of the

record reveals that there was a letter in form of e-mail addressed to the applicant dated 8th January 2019 which requested the applicant to go to Arusha in order to be provided with means of transport from Loliondo to Arusha in accordance with the labour law.

Similarly, there was oral evidence adduced by the respondent's witness (DW1) which is to the effect that, the applicant was notified of how the issue of transport from Loliondo District would be solved (See page 8 of the typed proceedings). Considering the fact that transport of an employee may be in form of money or provision of means of transport such as a moto vehicle.

That being the court's observation, the acts of the applicant of not going to discuss on how she would be transported to the place of recruitment must have been associated with her desire to be repatriated to Ohosokwani area or technical desire to deprive the respondent on the ground that she was not transported and therefore she is eligible for subsistence while waiting to be transported as per section 43 (1) (c) of the ELRA. I am alive of the principle of the law judiciously articulated by the Court of Appeal of Tanzania when interpreting section 43 (1) (c) in **In**

Attorney General v Ahmad R. Kakuti and two others, Civil Appeal No. 49 of 2004 (unreported) where stated inter alia that;

> "From its wording, the section does not in our view, have a condition tying an employee to the place of his employment for the whole period until the date of transportation. In that regard Mr. Mtembwa conceded the employee's entitlement to subsistence is not conditional upon confinement to the place of his employment pending payment of his transportation".

The present applicant as per the above authority would be entitled to subsistence allowance equal to her monthly salary from the date of termination to the date of repatriation if she was not notified to go to the head office in order that the issue of her repatriation would be resolved. However, as she unjustifiably declined to go as requested by her former employer, it follows that, she should not benefit the subsistence allowance to the statutory requirement that is from the date of termination to the date of repatriation due to her clear unjustifiable abstinence from going to her employer, head office. Meanwhile the respondent if she was prudent enough, she would have deposited the amount of money for her transport as mileage must have been known by the respondent.

I have further gone through the decision of the case of **Arusha v. World Vision,** Civil Appeal No. 13 of 2019 (unrepeated-CAT) sitting at Bukoba and found that, this authority was distinguishable since in the former case the transport costs were deposited in the account of the employee unlike the present case where the applicant was summoned for repatriation but declined to go for no apparent reason.

Basing on the parties' contract of employment (PE1) and reasons given herein above, the learned arbitrator is found to have erred in holding that, the applicant was not entitled to transport costs from Loliondo to her place of recruitment with the respondent on the basis that it is not clear s to the place where she was terminated. Therefore, the award of the CMA in that regard is revised and set aside and the same is substituted by an order of this court that, the applicant is entitled to repatriation expense.

However, basing on the above discussions, the applicant is fully not entitled to subsistence allowance from the date of termination to the date of repatriation. She is therefore entitled only to four (4) months' salaries as her subsistence allowance due to reason that even the respondent, if acted diligently, would have deposited the transport costs into the applicant's account thereby eliminating unnecessary complaints and wastage of time.

Consequently, the 1st ground ground is not without merit and the 2nd ground is partly granted.

In the 3rd ground which reads, that, the arbitrator erred by for his failure to direct the respondent to issue a termination letter.

In our case, it goes without saying that, neither the applicant nor the respondent tendered a termination letter except the general termination notice as lucidly testified by the applicant (See page of the typed proceeding). It is trite law that, upon termination of employment, an employer shall issue a letter of termination which will be useful for an employee for inter alia, if aggrieved for the termination of her specific contract of employment attracting expectation of renewal. Thus, the respondent is directed to issue the letter of termination in favour of the applicant. This ground is also merited.

Lastly, that, the arbitrator erred in law by not ordering issuance of certificate of service by the respondent in favour of the applicant

According to wording of section 44 (2) of ELRA, it sounds to me that, upon termination of a contract of employment, an issuance of a certificate of service by an employer in favour of an employee is mandatory as argued

by the applicant's advocate and conceded by the respondent's counsel. More so, if one carefully examines, PE5 tendered by the applicant, it is plainly clear that, the respondent duly notified the applicant of her terminal benefits including the certificate of service. Perhaps an omission by the arbitrator to give such order is, in my view, legally wrong as complained of by the applicant yet an issuance of certificate of service in favour of an employee by an employer is a mandatory requirement notwithstanding whether there is an order to that effect issued by this court or Commission or otherwise.

I am also of the view that, the issue of condonation of the applicant's complaint by the CMA was not founded out of the legal ambit, I am saying so simply because through its ruling dated 24th March 2020, the CMA clearly gave its reason as why the dispute should be condoned, noted reason being arguable points of law and prospects of success. Illegalities or overwhelming chances of success constitute good cause for the court to grant extension of time. Hence the CMA rightly exercised its discretion (See the decisions of the Court of Appeal of Tanzania **Lyamuya Construction Company Ltd vs. Board of Registered Trustees of Young Women's Christian Association of Tanzania,** Civil Application No. 2 of 2010

(unreported) and **Omari R. I brahim v. Ndege Commercial Services Ltd**, Civil Application No. 83/01/2020). I have also found that, the respondent had no proper forum to raise that concern for an obvious reason, that, if she was aggrieved by such decision, she would have filed an application for revision immediately after the procurement of the impugned award as correctly argued by the applicant's counsel.

Consequently, for the foregoing reasons, this application is partly granted in that the applicant is entitled to repatriation costs depending on the current fare per milage and subsistence allowance of only 4 months which is equal to her monthly salary (909,090/=x 4=3,636,360) and other terminal benefits awarded by the CMA, these are; Tshs. 734,192/ being severance pay, two months' salary at Tshs. 1,818,000/, payment of Tshs, 308, 454/73 deducted from the respondent's salary of 2015 and payment of Tshs. 100, 000/= deducted by the respondent in April 2017. As this matter is labour where costs are not usually grantable, I thus refrain from making an order as to costs.

It is so ordered.

M. R. GWAE
JUDGE
13/12/2021