IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF ARUSHA

AT ARUSHA

REVISION NO. 42 OF 2021

(Originated from, Commission for Mediation and Arbitration in Employment Dispute No. CMA/ARS/ARS/173/19)

GUSTAVE SINIZIZIYE.....1ST APPLICANT

NADEGE MUHIMPUNDU.....2ND APPLICANT

VERSUS

DEUTSHE GESELLSCHAFT FUR INTERNATIONALE ZUSAMMENARBEIT (GIZ) GmbH..... RESPONDENT

JUDGMENT

15.06.2022 & 27.07.2022

N.R. MWASEBA, J.

Gustave Siniziziye and **Nadege Muhimpundu** were employed by the respondent on diverse dates where by the 1st applicant was employed on 3.08.2012 and the 2nd applicant was employed on 23.09.2014, under a fixed term contract. Both contracts come to an end on the same date of 31.05.2019. Upon the end of their contract the respondent paid them only

a lump sum and air ticket back to their countries. The applicants were dissatisfied and made some follow ups to the respondent who said he was not legally bound to repatriate them since they were recruited here in Arusha and not from their countries which are Canada and Burundi. They referred their dispute to CMA claiming for the following; -

i. Refusal by the employer to provide the employees with payment to transport personal effects to place of recruitment.
ii. The employer subjecting employees to agreement providing lower standard than the minimum standards provided under Section 43 of ELRA 2004 and Clause 6.8 of the employment handbook.

At the end of the trial their application was dismissed on the grounds that there was no enough evidence brought before the court to prove that the 1st and 2nd applicant were recruited from their countries, Burundi and Canada respectively. Thus, the place where the contract was signed will be taken as a place for recruitment. The CMA decided further that the act of the respondent to pay them air tickets does not mean they were entitled to be paid repatriation costs. Dissatisfied with the said award the applicants lodged the present revision with the main claim to be repatriated to their respective countries.

The hearing was done by written submission whereas Mr Andrew Maganga, learned counsel represented the applicants while Mr Evold Mushi, learned counsel represented the respondent.

Having gone through the submissions made by both counsels, the record and the law the following issues will be determined to find out the merit of the application:

i. Whether the applicants are entitled to repatriation costs.

ii. If the first issue is answered in affirmative whether the employer subjecting employees to agreement providing lower standard than the minimum standards provided under Section 43 of ELRA 2004 and Clause 6.8 of the employment handbook.

Starting with the first issue of whether the applicants are entitled to repatriation costs, the applicants complained that the respondent opted not to repatriate them despite of being complied with Clause 6.8 of the Employee hand book (exhibit P.9) by submitting three invoices for moving costs of their personal effects from Tanzania to Bujumbura-Burundi and Vancouver-Canada see Exhibit P.10 and P4 respectively. The sole reason was that the respondents signed Memorandum of Understanding (Exhibit P.7 and P.2) which excludes them from being benefited with clause 6.8 of the employee's hand book (exhibit P.9).

It was his further submission that they are challenging the decision of the CMA that since their employment contract was signed in Arusha basically it is the place of recruitment (See page 7 and 8 of the award) while the evidence revealed that they were paid air tickets and moving costs from their respective countries to come to Tanzania as evidenced by Clause 16 of their Employment of contract and memorandum of understanding.

Further to that the employer violated **Section 15 (b) of the Employment and labour Relations Act,** Cap 366 R.E 2019 for their failure to indicate the place of recruitment of the applicants. His arguments were supported by the case of **Mvomero District Council Vs Thobias Liwongwe & 6 Others**, Revision No. 26 of 2019 (HC-Unreported) and **Jerome Tesha Vs University of Dar es Salaam**, revision No. 608 of 2019 (HC-Unreported). The said acts were unfair labour practices which warrant the applicants compensation for mental anguish, emotional distress and financial hardships.

Responding to what was submitted by the counsel for the applicants, Mr Mushi adopted their counter affidavit as part of their submission and added that the applicants were not entitled the repatriation costs as decided by the CMA. The act of the respondent giving them tickets back to their countries does not mean they were entitled to be repatriated. It

was his further submission that the evidence of DW1 (Gwantwa Cheyo) together with exhibit P1 and P6 collectively proved that the applicants were recruited at Arusha since they were working with East Africa Community in Arusha.

Mr Mushi argued further that **Section 43 of ELRA** is very clear that an employee will be entitled for repatriation costs if he/she will be terminated at a place other than his place of recruitment. All that was done by the respondent was just to assist the applicants and the same does not create any legal obligation to give them transport costs for their personal effects to their home countries. Moreover, exhibits P2 and P7 proved that the applicants agreed to be given allowance to cover what is provided for under clause 6.8 of exhibit P9. He supported his argument by citing the case of **Nicholaus Hamisi and 1013 others Vs Tanzania Shoe Company Limited and Tanzania Leather Associate Industries**, Civil Appeal No. 62 of 2000 (2004) TLR 356 where the Court Held that:

> *"Payment of Transport cost does not create legal obligation to pay the substance allowance as is paid only for those who are legally entitled for repatriation."*

So, he prayed for the application to be dismissed with costs for violating **Rule 51 (2) of the Labour Court Rules**, GN 106 of 2007.

I have carefully read the submissions of the parties, the CMA records and the laws governing employment in Tanzania, I am inclined to depart from the CMA award on the reasons to follow. In the foremost it is pertinent in matters of this nature to first establish as to whether the applicants in this application are eligible to the repatriation costs. In order to be in a good position to establish this, the court always looks at either the employment contracts or the employment letter where in most cases it will demonstrate the place where the employee was recruited.

Unfortunately, in our case the applicants were not issued with the employment letters, however the evidence on record is so contradictory as to the place of recruitment as there is no direct evidence showing that the applicants were the residents of Arusha. I am saying so because looking at the employment contracts of the applicants, it shows that the applicants resided in Arusha, however I have had a look at the memorandum of understanding which was signed together with the 2nd applicant's employment contract provides as follows and I wish to quote for easy of reference;

"Paragraph 16 of the contract of employments of 01/08/2012 states as hereunder:

Special Agreements:

The employee shall receive reimbursement of the costs of an economy return ticket Canada – Kilimanjaro"

Moreover, I have also looked at exhibit P10 and P14 which were the air tickets offered by the respondent to the applicants to return them back from their countries of origin. Another piece of evidence is that on exhibit PE5 collectively which shows email correspondences and the respondent herein had showed intention of offering the applicants USD 4000 from the initial offer of USD 500 as moving costs in addition to home flight tickets already issued to them.

I have also gone through the proceedings of the CMA, in particular the testimony of DW1 one Gwantwa Cheyo on cross examination admitted that the applicants were employed as expatriates and that they are not the citizen of Tanzania.

From the above demonstrated evidences, it is with no doubt that the applicants were not the residents of Arusha and that is why even the respondent was willingly, to deport them back to their countries of origin after their employment contracts had come to an end. I am aware that not in all occasions non-citizens must be repatriated from their countries of origin, but the circumstances of this case are distinguishable as the

respondent even reimbursed the 2nd applicant the costs for air ticket from Canada to Kilimanjaro and more so the applicants were also paid installation allowance of USD 3000 meaning that the applicants were recruited away from Arusha as suggested by the respondent.

I have noted that the respondent in her testimony stated that the payment of the tickets to deport the applicants to their countries of origin was done out of good will, I hardly buy the respondent's idea on the reason that if at all the applicants were the residents of Arusha by any means the respondent would not bother to repatriate them, by doing so it means that the respondent was aware of the fact that the applicants were to be repatriated.

Section 43 of the ELRA provides that;

> "1. *Where an employee's contract of employment is terminated at a place other than where the employee was recruited, the employer shall either*
>
> (a) *transport of the employee and his personal effects to the place of recruitment,*
>
> *(b) pay for the transportation of the employee to the place of recruitment, or*
>
> *(c) pay the employee an allowance for transportation to the place of recruitment in accordance with subsection (2) and*

daily subsistence expenses during the period, if any, between the date of termination of the contract and the date of transporting the employee and his family to the place of recruitment."

The same was decided by the CAT in the case of **Paul Yustus Nchia Vs. National Executive Secretary CCM & Another**, Civil Appeal No. 85 of 2005 CAT DSM (Unreported) 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."

See also the case of **Geofrey Mhindwa Vs the General Secretary East Lake Victoria Diocese**, Revision No. 197 of 2013 [2013] LCCD 1 and **Juma Akida Seuchago Vs Sbc Tanzania Ltd** (Civil Appeal 7 of 2019) [2020] TZCA 319 (18 June 2020).

That being the legal position I am confident to hold that the applicants had the right to be repatriated. Thus, the first issue is answered in affirmative.

Having said the above, I now proceed to determine the second limb of the first issue as to whether the applicants are entitled to repatriation costs as per the employment contracts, addendums to the contracts of

employment Memorandum of Understanding and the GIZ Employment Hand book.

It is the contention of the respondent that the applicants by signing the Memorandum of understanding they were automatically excluded from receiving moving costs. I have carefully gone through the employment contracts of the parties together with the amendments thereto, the memorandum of understanding and the GIZ hand book, in the memorandum of understanding it is provided that the agreement covered all claims regarding moving costs as stipulated in the GIZ Employment Handbook under clause 6.8. In this agreement there is no clause which excluded the applicant from being covered with moving costs as provided by clause 6.8 of the GIZ Employment Handbook. More to that since the agreements between the parties cannot supersede the provisions of the law, this court finds that the applicants are entitled for the transportation of their personal effects and their belonging to their country of origin as per **Section 43 (1) of ELRA**.

For the said reasons the second issue is answered in affirmative that the employer subjected the employees to agreement providing lower standard than the minimum standards provided under **Section 43 of ELRA** 2004 and Clause 6.8 of the employment handbook.

As for the issue of compensation for unfair labour practices the applicants provided no proof so the court finds no merit regarding the said claims.

Before I pen down, the counsel for the applicants raised an issue that at the CMA's award, Hon. Arbitrator discussed the issue of unfair termination while it was not among the claim of the applicants and prayed for the same to be expunged. Having revisited the trial court's records this court noted that the allegation is true. The issue of unfair termination was not placed before the trial Commission then the Arbitrator was not supposed to discuss it in his award. Thus, I hereby expunge the same from the CMA's award.

As alluded herein, I promptly hold that, this application succeeds as explained above. Accordingly, the award of the CMA is hereby quashed and set aside. Each party to bear his or her costs of this application and those in CMA.

It is so ordered.

DATED at **ARUSHA** this 27th day of July 2022.

N.R. MWASEBA

JUDGE

27.07.2022