IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LUBUVA, J.A, RUTAKANGWA, J.A & KILEO, J.A.)

CIVIL APPEAL No. 49 OF 2004

THE ATTORNEY GENERAL.....APPELLANT

VERSUS

1. **AHMAD R. YAKUTI**
2. **W. M. J. FERUZI** } **.....RESPNDENT**
3. **NASSORO S. UMMI**

(Appeal from the Judgment and decree of the High court of Tanzania at Dar es Salaam)

(Kimaro, J.)

Dated the 25th day of May, 2003
in
Civil Case No. 365 of 1998

JUDGEMENT OF THE COURT

13 Nov & 7 Dec,2006

RUTAKANGWA, J. A.

The three respondents in this appeal, together with many others whom they are representing, were employees of the then Friendship Textile Mills Ltd up to 30th March, 1997 when their employment was terminated by way of retrenchment. The circumstances surrounding their termination made them eligible to be

paid some terminal benefits. However, these benefits were not paid immediately. The first payment began to be effected after a lapse of more than one hundred (100) days and they were not all paid on the same day.

After they had all received what their employer, the government which took over this responsibility, believed to be their full benefits, the respondents thought that their entitlements were underpaid and not paid at all some other benefits. They presented their grievances, through their trade union, to the employer. The stand of the government, the appellant in this appeal, was that what was paid to them was what they were entitled to. The ex-employees through the three respondents then instituted a suit against the appellant in the High Court at Dar es Salaam, claiming a number of reliefs.

After a full trial, the High court (Kimaro, J, as she then was) was satisfied that the respondents had failed to establish their claims except for their entitlement to what was persistently referred to as "subsistence allowances" for the entire period they were kept waiting for payment of their terminal benefits. They were also granted costs of the suit.

In order to appreciate the basis of this appeal we wish to point out at this juncture that in the High Court the respondents were

claiming to be paid Tshs. 7,500/= per day as "subsistence allowance." Although initially the appellant had categorically disputed this claim it finally gave in and accepted to pay the respondents if only the conditions stipulated in section 53 (3) (b) of the Employment Ordinance as interpreted by the High Court in the case of the CRDB vs REGIONAL LABOUR OFFICER RUKWA in D. C Civil APPEAL No. 28 of 1994 (Mbeya District Registry) were satisfied.

In her judgement the learned trial judge held that the respondents were entitled to "subsistence allowance" but not at the rate suggested by them. This is how she reasoned:-

> ***Lastly is the issue of subsistence allowance.*** *There is no dispute at all that the plaintiffs were not paid their terminal benefits immediately after retrenchment. DW 2 said that the first payment was effected after 101 days.* ***The only question here is how much should the plaintiffs be paid as subsistence allowance during*** *the period they were kept waiting for their payment (emphasis is ours).*

After directing her mind to the submissions of Mr. Mkongwa, learned advocate for the plaintiffs who had contended that the respondents (plaintiffs) were entitled to Tshs. 6,000/= per day and Mr. Chidowu, learned State Attorney, that the court should be

guided by section 53 (3) (b) of Cap 366 and the CRDB case decision (supra), the learned held:-

> *I allow monthly salaries to each of the plaintiffs for the whole period they were delayed in receiving their terminal benefits.*
>
> *The plaintiffs claim is allowed in terms of their entitlement to subsistence allowance for the whole period their payment of terminal benefits was delayed, plus costs of the suit. (emphasis is ours).*

Surprisingly, this decision aggrieved the appellant although it was accepted by the respondents. The cause of dissatisfaction on the part of the appellant was that it was believed that the High Court had awarded the respondents "both monthly salaries and subsistence allowances for the whole period the payment of their terminal benefits were delayed". Unfortunately also, even the decree which was drawn thereafter and signed subsequently by another judge was to that effect. Hence this appeal based only on this ground.

Submitting in support of the appeal, Mr. Ngwembe, learned Principal State Attorney, told the Court that in awarding both subsistence allowance and monthly salaries the learned trial judge proceeded in utter disregard of section 59 (3) (b) of the Employment Act, Cap. 366, R. E. 2002 as well as settled case law. He relied very

strongly on two unreported cases of this Court. The cited cases are:-

(a) NICHOLAUS HAMISI AND 1013 OTHERS VS TANZANIA SHOE CO. LTD AND ANOTHER, CIVIL APPEAL No. 62 of 2000 and

(b) ATTORNEY GENERAL AND TWO OTHERS VS ELIGI EDWARD MASSAWE AND 104 OTHERS, CIVIL APPEAL No. 86 OF 2002.

In these two cases this Court decided that under the said section 59 (3) (b) an ex-employee is entitled to some form of allowance on the basis of his/her monthly salary for the whole period one is detained while waiting for payment of terminal benefits. It is on this basis that Mr. Ngwembe has urged the Court to allow the appeal with costs and order that the respondents are only entitled to subsistence allowance as held in the two cases cited.

On her part, Ms. Mruke, learned advocate for the respondents, prayed for the dismissal of the appeal with costs as it is totally misconceived. To her understanding and that is the position of the respondent, the High Court held that the respondents were only entitled to be paid subsistence allowance for the entire period they were kept waiting for their terminal benefits on the basis of each respondent's monthly salary at the time of retrenchment. She went on to submit that the High Court could not have granted monthly

salaries in addition to subsistence allowance because the respondents never sought that particular relief in the suit. She therefore, pointed out that the problem was not in the judgment of the High Court but in the extracted decree. She accordingly urged the Court to act under rule 3 (2) (b) of Court of Appeal Rules, 1979 to direct the High Court to amend the drawn decree so as to bring it in conformity with its judgment.

We have carefully and objectively gone through the impugned High Court judgment. We are of the settled mind that the position of the respondent on what was actually decreed by the High Court is the correct one. It is an undisputed fact that the respondents had not claimed for payment of monthly salaries either in the alternative or in addition to subsistence expenses. Therefore an award of salaries on top of subsistence expenses would have been contrary to both procedural law as provided under the Civil Procedure Code, 1966 and substantive law, under section 59 (3) of Cap 366. The said subsection provides as follows:-

> 59 - (3) The expenses of repatriation shall include –
>
> (a) travelling and subsistence expenses or rations during the journey ; and
>
> (b) subsistence expenses or rations during the period, if any, between the date of

termination of the contract and the date of repatriation.

In view of the established facts in this case and the law as expounded in the cases referred to the Court by Mr. Ngwembe, we agree with both counsel in this appeal that the respondents were only entitled to be paid **subsistence expenses** for the entire period they were kept waiting for payment of their terminal benefits. This was indeed what the High Court held.

In conclusion, we would like to observe that this appeal was unnecessary. If one had read the High Court judgment as a whole with an open mind, one would have readily realized that the High Court, after accepting the submission of Mr. Chidowu, allowed the respondents' claim only to the extent of their entitlement to subsistence expenses in terms of section 59 (3) (b) of Cap 366 on the basis of their monthly salaries. That is the import of the last two paragraphs of the High Court judgment when the two are read together and also in conjunction with the preceding two paragraphs which we have earlier reproduced in this judgment for ease of reference. There having been no dispute on the issue of entitlement to subsistence expenses, the learned trial judge, was left with the issue of how much was to be paid as subsistence expenses and she adopted the formular suggested by Mr. Chidowu at the trial. The High Court judgment, therefore, cannot be faulted.

However, we are alive to the undisputed fact that the drawn decree does not reflect what was decided in the judgment. It is trite law that a decree should always correctly express the judgment given by the court so that no party suffers any detriment on account of a mistake or error committed by the issuing court: See MULLA ON THE CODE OF CIVIL PROCEDURE ACT V OF 1908, 15th edition, Vol.9 at page 945. For this reason, by invoking the Court's revisional powers it is ordered that the matter be remitted to the High Court with direction to the parties to apply under section 95 of the C. P. C. 1966 for the amendment of the decree. The application once filed should be determined as expeditiously as possible. It is so ordered.

Otherwise the appeal is dismissed with costs.

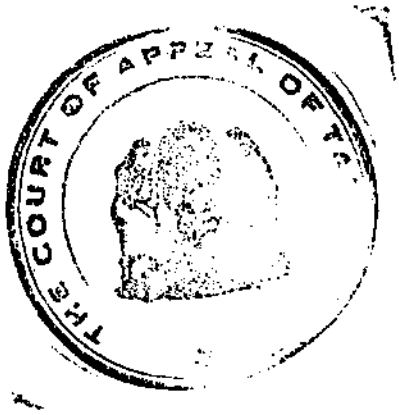
DATED at DAR ES SALAAM on this 29th day of November, 2006

D. Z. LUBUVA
JUSTICE OF APPEAL

E. M. K. RUTAKANGWA
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

I certify that this is a true copy of the original



S. M. RUMANYIKA
DEPUTY REGISTRAR