IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: NDIKA, J.A., KITUSI, J.A., And MAKUNGU, J.A.)

CIVIL APPEAL NO. 248 OF 2021

KIBOBERRY LIMITED..... APPELLANT

VERSUS

JOHN VAN DER VOORT ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Moshi)

(Mwenempazi, J.)

dated the 15th day of December, 2020
in
Labour Revision No. 23 of 2019

JUDGMENT OF THE COURT

30th September & 7th October, 2022

NDIKA, J.A.:

The respondent, John Van Der Voort, succeeded in his unfair termination claim in the Commission for Mediation and Arbitration at Moshi ("the CMA") against the appellant, Kibobbery Limited, his former employer. Bemused by the said outcome, the appellant sought revisal of the award by the High Court of Tanzania at Moshi, but it was only partly successful. It now appeals to this Court.

The essential facts of the case are mostly uncontested. The respondent was initially employed as the Managing Director by Kilimanjaro

Horticultural Exports Company Limited ("Kilihortex"), which grew berries at its farm near Arusha for export. The engagement was on a contract (Exhibit R1) executed in November 2014 ending on 31st December 2017 at a monthly salary of TZS. 3,000,000.00.

Sometime in 2015, the shareholders of Kilihortex established the appellant company to operate in the same line of business from a farm in Moshi. Around that time, the two sister companies offered the respondent an additional contract (Exhibit R2) to help the appellant establish its foothold and operations in Moshi. The said tripartite contract, executed in Dutch, was an addendum or in addition to Exhibit R1. For convenience, the parties referred to it as "the Dutch contract." As per Exhibit R2, the respondent was, therefore, working for both affiliated companies and that his monthly salary increased from TZS. 3,000,000.00 to €4,000.

After the appellant company was fully established and ready for production, it was felt that the respondent could no longer continue working for both companies as each company needed full managerial attention. Accordingly, the respondent's initial contract with Kilihortex was terminated through "End of Contract Letter" (Exhibit R3) with effect from 30th April 2017 and the respondent started working fulltime for the

appellant on a separate two-year employment contract executed on 1st March 2017 (Exhibit R4) at a monthly salary of TZS. 3,300,000.00.

It was alleged, sometime in June 2018, that the respondent had misappropriated the appellant company's funds. The appellant placed him on a three-month gardening leave vide a notice dated 24th July 2018 (Exhibit R7) to pave way for conducting investigations into the allegations. Initially, the respondent reacted by instituting an unfair dismissal claim in the CMA but he withdrew it later. The appellant proceeded with the investigations, which culminated in the institution of disciplinary proceedings against the respondent. The respondent was allegedly summoned vide Exhibit R8 to a disciplinary hearing slated for 29th August 2018 at 2:00 p.m. but he refused to appear. The appellant then went ahead terminating him from employment on 28th September 2018 through a letter of termination (Exhibit R10) for misappropriation of funds.

As hinted earlier, the respondent succeeded in the CMA, which found the termination substantively and procedurally unfair. On that basis, the arbitrator awarded the respondent compensation aggregated to TZS. 172,320,000.00 and €67,200 being terminal benefits, subsistence allowance and repatriation expenses. Although on revision the High Court (Mwenempazi, J.) upheld the finding that the termination was unfair, both

substantively and procedurally, it held that the respondent was only entitled to terminal benefits based on his contract with the appellant (Exhibit R4), in addition to statutory compensation. It faulted the arbitrator for computing the terminal benefits in terms of both the terminated Dutch contract (Exhibit R2) and Exhibit R4. It held further that the ordered recompence of €8,000 as earned leave payment was erroneous because it had already been paid.

In the end, the court confirmed the award in the respondent's favour in the aggregated sums of TZS. 104,820,000.00 and €59,200 in the following breakdown: one, remuneration for 15 months at the rate of TZS. 3,300,000.00 per month totalling TZS. 49,500,000.00; two, four months remuneration as bonus for two years as per the contract in the sum of TZS. 1,320,000.00; three, housing allowance in the sum of €25,500; four, transportation allowance in the sum of €11,900; five, medical allowance totalling €14,400; six, repatriation expenses at €7,400; and finally, subsistence allowance amounting to TZS. 54,000,000.00.

The appellant has lodged four grounds of appeal, which raise five issues as follows:

1. Whether the termination was for a valid and fair reason.
2. Whether the termination was in accordance with a fair procedure.

3. Whether the terminal benefits awarded by the High Court were part of the employment contract.
4. Whether some of the terminal benefits awarded to the respondent by the High Court had already been paid by the appellant.
5. Whether the High Court awarded the respondent unreasonable and unsubstantiated terminal benefits.

As it was before the CMA and the High Court, Ms. Patricia Eric and Mr. George Njooka, learned advocates, appeared before us for the appellant and respondent respectively. However, this time, Mr. Njooka had the assistance of Ms. Miriam Matinde, learned counsel. We propose to deal with the first and second issues individually and tackle the rest of the issues conjointly.

On the first issue, Ms. Eric contends for the appellant that it was established in the evidence that the respondent, who was a signatory to the company's account, committed the following: first, that he misallocated or misappropriated TZS. 53,823,640.00 withdrawn from the company's bank account, as evidenced by the Account Quick Report (Exhibit R9) prepared by the appellant's Assistant Accountant, Philip Juma Mbalamwezi (RW2). Secondly, that he overspent €26,481.50 beyond the budget threshold of €125,000 on the construction of a farmhouse for the

company as shown by the farm residence accounting report (Exhibit R11); and finally, that he paid enormous amounts of money through petty cash vouchers (Exhibit R5) and failed to claim electronic fiscal device (EFD) receipts from the recipients of the funds. The failure to obtain EFD receipts, it was alleged, meant that the appellant suffered a loss of TZS. 45,609,697.00 in possible value added tax (VAT) refunds that could not be claimed without documentary proof.

It is further argued that the alleged misappropriation of the funds amounted to an act of gross dishonesty in terms of rule 12 (3) the Employment and Labour Relations (Code of Good Practice) Rules, Government Notice No. 42 of 2007 ("the Code of Good Practice Rules") justifying termination of employment.

For the respondent, Mr. Njooka submits that none of the exhibits proves the alleged losses or misappropriation. He counters further that the alleged losses could have been substantiated by an audited report, but none was produced. He supports the arbitrator's finding, which was upheld by the High Court, that the Account Quick Report (Exhibit R9) was unreliable due to being prepared by an unqualified accountant in contravention of sections 29 and 30 the Accountants and Auditors (Registration) Act, Cap. 286 ("the AARA"). It is also contended that the

respondent was not involved or interrogated on any audit report on the appellant company or investigation report into the allegations and that no such report was ever availed to him. Reliance was placed on **Severo Mutegeki and Another v. Mamlaka ya Maji Safi na Usafi wa Mazingira Mjini Dodoma (DUWASA)**, Civil Appeal No. 343 of 2019 (unreported).

We have dispassionately considered the contending arguments of the learned counsel on the issue at hand. We wish to observe, at first, that the rejection by the courts below of the Account Quick Report (Exhibit R9) on the reason that it was made by an unqualified accountant was misconceived. The said report was a routine periodic financial report generated from the appellant company's accounting package meant for internal managerial decision-making in the appellant company. As such, it did not have to be issued and signed by a Certified Public Accountant. It would certainly have been different if the report were an end-of-the-year final financial statement of an entity, which, in terms of the scheme of the AARA, must be issued and signed by a registered professional accountant.

Nonetheless, we think that, for all its worth, Exhibit R9 is not proof of the alleged misuse of funds. What it provides is a record of all the cash withdrawals made by the respondent from the company's bank account

between 3rd July 2017 and 30th April 2018, without more. Based on RW2's evidence, the complaint was that of all the payments made, withdrawals amounting to TZS. 53,823,640.00 had no supporting documents. Admittedly, the absence of supporting documents can trigger a reasonable suspicion of wrongdoing but it does not lead to an irresistible inference of misappropriation.

Equally problematic is the claim that the respondent overspent €26,481.50 beyond the approved farmhouse construction budget. Indeed, the budgetary limit may have been exceeded but that did not necessarily imply that the overspent funds were embezzled or stolen by the respondent. There was no shred of evidence suggesting misappropriation of the said funds save for a bare claim of over-expenditure.

The allegation over the use of petty cash vouchers for making huge payments of money certainly raises eyebrows as much as the accusation that the respondent did not claim EFD receipts against the payments he made. However, we cannot imply misappropriation from these claims too. No evidence was led in form of the appellant company's financial rules and guidelines governing the use of petty cash vouchers or collection of receipts that the respondent flouted. Negligence may have been involved in the transactions but not necessarily misappropriation.

Given the foregoing, we go along with Mr. Njooka that the appellant ought to have conducted and produced an audit report to substantiate the alleged misappropriation. We also find it significant that although, according to the appellant's Human Resources Manager, Magdalena Sabaya (RW1), the appellant, through its director, Erick Costa, conducted a full-fledged investigation into the allegations against the respondent after he was suspended from duty, the said report was never availed to the respondent, nor was it produced at the hearing before the CMA. The report, according to RW1, was the basis of the disciplinary proceedings against the respondent. As we held in **Severo Mutegeki** (*supra*), the failure to involve the appellant in the investigation that led to the formulation of the report coupled with the omission to share a copy thereof with the respondent was a serious irregularity. Inevitably, we uphold the concurrent finding by the courts below that the appellant failed to demonstrate that the impugned termination was for a valid and fair reason.

We need not travel a long distance over the question of fairness of procedure applied in the termination. It is the appellant's contention that the respondent was summoned vide Exhibit R8 to the disciplinary hearing scheduled for 29th August 2018 at 2:00 p.m. but he refused to appear, and

that the appellant then went ahead terminating him from employment on 28th September 2018 through a letter of termination (Exhibit R10) for misappropriation of funds. The respondent, on the other hand, denies that he received the said notice, but it is common ground that the termination was made without the scheduled disciplinary hearing being conducted. Even if it were assumed, for the sake of argument, that the respondent defaulted appearance, the pertinent issue is whether the appellant was entitled to terminate the employment without any hearing. The parties were starkly in contrast on the issue.

The controlling provision on the issue is rule 13 (6) of the Code of Good Practice Rules providing as follows:

> *"Where an employee unreasonably refuses to attend the hearing, the employer may proceed with the hearing in the absence of the employee."*

The above stipulation is couched in permissive terms. It gives the employer two options where the employee unreasonably refuses to attend the hearing after being duly served with the notice. The first option is proceeding with the disciplinary hearing in the absence of the employee with the evidence substantiating the charges against the employee being presented and a verdict reached. The second possibility is to adjourn the

hearing. We are firmly of the view that the above stipulation does not give the employer a carte blanche to terminate the defaulting employee without conducting a hearing.

In the instant case, the appellant terminated the respondent without any hearing upon recognizing that he had defaulted appearance. This course was a palpable contravention of the procedure we have just explained. In the result, we answer the second issue in the negative.

We now turn to the third, fourth and fifth issues whose common thread is the question whether the terminal benefits awarded by the CMA and upheld by the High Court are justifiable.

In the beginning, it is settled that remedies for unfair termination are governed by section 40 of the Employment and Labour Relations Act, Cap. 366 ("the ELRA"), which provides thus:

> *"**40.**-(1) If an arbitrator or Labour Court finds a termination is unfair, the arbitrator or Court may order the employer –*
>
> *(a) to reinstate the employee from the date the employee was terminated without loss of remuneration during the period that the employee was absent from work due to the unfair termination; or*

(b) to re-engage the employee on any terms that the arbitrator or Court may decide; or

(c) ***to pay compensation to the employee of not less than twelve months remuneration.***

(2) An order for compensation made under this section shall be in addition to, and not a substitute for, any other amount to which the employee ***may be entitled in terms of any law or agreement.***

(3) [Not applicable]"[Emphasis added]

In the instant case, the parties do not dispute the award of remuneration for 15 months at the rate of TZS. 3,300,000.00 monthly amounting to TZS. 49,500,000.00 made pursuant to section 40 (1) (c) of the ELRA. Moreover, they appear to appreciate that in terms of section 40 (2) above, the compensation under subsection (1) above is, in terms of subsection (2), in addition to any other amount to which the respondent was entitled pursuant to his employment contract. It should be recalled that the High Court held, rightly so, that the terminal benefits must be computed based on the respondent's contract with the appellant (Exhibit R4), not under both the terminated Dutch contract (Exhibit R2) and Exhibit R4 as had been computed by the arbitrator. The issue at this point is

whether the respondent was entitled to the impugned allowances under Exhibit R2.

It would be helpful to extract from Exhibit R2 what it provides in its operative part:

> "Both the employer and employee agree the following:
>
> 1. Employment will continue to December 31st, 2019....
> 2. Employee is employed on married status. Salary payable will be TZS. 3,300,000.00 gross per month. Employer to deduct taxes and NSSF contributions as required by the Tanzanian laws.
> 3. A bonus of two months' salary is paid when the annual job evaluation of employee by the [Kiboberry] Chairman with a satisfactory result or better.
> 4. Health insurance will be covered by the company in The Netherlands.
> 5. Two tickets to The Netherlands are to be paid by the company at the completion of this contract plus two return tickets to Europe halfway the contract period for annual leave. A maximum of Euro 1,200 per ticket can be claimed from employer.
> 6. Paid annual leave of one month due after 11 months on the job.
> 7. Employee is eligible to use a company car for business and private use but only inside the United Republic of Tanzania. The cost is to be borne by the employee. The employer decides on make and price of this company car.
> 8. [Not applicable]
> 9. [Not applicable]"

It is apparent that the above contract, like any contract, creates rights, but rights can be either vested or contingent. The learned author

N.V. Paranjape, in **Studies in Jurisprudence and Legal Theory,** Central Law Agency, Allahabad, 2004, at page 255, states that:

> *"A vested right accrues when all the facts have occurred which must by law [or contract] occur in order that a person in question would have the right. In case of contingent right, only some of the events necessary to vest the right in the contingent owner have happened.*
>
> *"A vested right creates an immediate interest. It is transferable and heritable. A contingent right does not create an immediate interest and it can be defeated when the required facts have not occurred."*

It defies dispute that the respondent in the instant case would be entitled to terminal benefits in terms of section 40 (2) of the ELRA in respect of rights that accrued under his contract of employment (Exhibit R40) at the time of his termination on 28th September 2018.

We now advert to the terminal benefits alleged to have not been made under Exhibit R4. The first one is the award of four months remuneration as bonus for two years as per the contract in the sum of TZS. 1,320,000.00. Both parties are in stark disagreement over this benefit, but we are decidedly of the view that the bonus was wrongly

awarded. As per the contract, the bonus for two months' remuneration was awardable at the end of the year upon a satisfactory evaluation of his job performance by the appellant's Chairman as stipulated in the contract. It was, therefore, a contingent right at the time of the termination. For even though the respondent may have completed a year or so of service with the appellant on the contract, there was no proof that he received a satisfactory job evaluation.

The second benefit assailed on the same ground is the housing allowance amounting €25,500. This complaint poses no difficulty; the claimed allowance features nowhere in Exhibit R4. Without demur, we hold that it was wrongly awarded.

The transportation allowance at the rate €11,900 is also attacked. We are of the settled view that it was erroneously awarded. The stipulation in the contract was that the respondent would be entitled to two tickets to The Netherlands at the completion of the contract plus two return tickets to Europe halfway the contract period for annual leave. It was agreed further that a maximum of €1,200 per ticket would be claimable by the respondent. Since the impugned termination occurred midway the contract, the respondent was entitled to two tickets at the rate of €1,200 per ticket. The two tickets at the completion of the contract remained

contingent at the time of termination and could not be awarded. Thus, we hold that the respondent was entitled to a maximum of €2,400 for the two tickets, not €11,900 for four tickets.

Coming to medical insurance awarded at €14,400, Ms. Eric argues that Exhibit R4 does not particularly provide for it. Mr. Njooka did not specifically address the issue but urged us to uphold the award.

It is notable that Item 4 of Exhibit R4 provides for health insurance, which was to be provided by the appellant company in The Netherlands. Health insurance is a type of insurance that covers medical expenses that arise due to an illness. In our view, if an employer breaches an undertaking to provide such a cover, an employee would be entitled to a reimbursement of eligible medical costs he has incurred. The award of €14,400 for a prospective medical cover was, therefore, arrived at without any foundation and cannot be sustained. Health insurance cover under contract is yet another contingent claim that had not crystallised at the time of the termination. For no proof was led that that he had, at the time, incurred reimbursable medical costs due to the appellant's failure to provide a health insurance cover per the contract.

The sum of €7,400 was awarded for repatriation. Certainly, this was not based on Exhibit R4. However, in terms of sections 43 (1) and 44 (1)

(f) of the ELRA the respondent was entitled to an allowance for transportation to the place of recruitment. It was contended for the appellant that the respondent's place of recruitment was in Arusha where he was working for Kilihortex before he was engaged by the appellant.

In our opinion, however, it must be inferred from Exhibit R4, in the circumstances of this matter, that the respondent's place of recruitment was his home country. For the respondent was recruited from there by the directors of Kilihortex who then transferred him to the appellant company. Moreover, the appellant's undertaking in Exhibit R4 to meet the respondent's costs for air tickets to his home country midway and at the end of the contract is a tacit recognition of the fact that he was recruited from that country, not Arusha. What is more, however, is that we note Ms. Eric's contention, based on RW1's evidence and a bank statement (Exhibit R11), that the appellant paid TZS. 6,168,000.00 on 2nd November 2018 for two air tickets for the respondent and his wife for their repatriation back home. We think that the aforesaid amount of money meets part of the requirement of section 43 (1) (c) of the ELRA.

The last component of the awarded terminal benefits is daily subsistence allowance, which had to be paid in terms of section 43 (1) (c) of the ELRA for the period between the date of termination of the contract

and the date of transporting the employee and his family to the place of recruitment. Pursuant to rule 16 (1) of the Employment and Labour Relations (General) Rules, Government Notice No. 47 of 2017, subsistence expenses under section 43 (1) (c) of the ELRA must be quantified upon a daily basic wage – see also **Juma Akida Seuchago v. SBC (Tanzania) Limited,** Civil Appeal No. 7 of 2019 (unreported).

Ms. Eric submits that subsistence allowance ought to be calculated at the daily wage rate of TZS. 126,923.00 for a total of 35 days between the date of termination and the date of repatriation. Conversely, Mr. Njooka supports the lower courts' computation of the allowance and contends that the allowance has kept on accumulating since 1st November 2019 when the CMA rendered its award. We understand him to mean that the allowance has now accumulated to around TZS. 172,800,000.00.

We respectfully endorse Ms. Eric's submission and hold that the respondent, having been paid the repatriation expenses on 2nd November 2018, was entitled to subsistence allowance for 35 days only at the daily wage rate of TZS. 126,923.00 making an aggregated sum of TZS. 4,442,305.00. On that basis, we vacate the award of TZS. 54,000,000.00 as subsistence allowance and substitute for it the sum of TZS.

4,442,305.00. Accordingly, we answer the third, fourth and fifth issues in favour of the appellant.

In the final analysis, we order that the respondent be paid compensation as follows:

1. Remuneration for 15 months at the rate of TZS. 3,300,000.00 per month amounting to TZS. 49,500,000.00.
2. Transportation allowance in the sum of €2,400.
3. Subsistence allowance amounting to TZS. 4,442,305.00.

In conclusion, we find merit in the appeal and allow it partly to the extent stated. We make no order as to costs.

DATED at **MOSHI** this 7th day of October 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

This Judgment delivered this 7th day of October, 2022 in the presence of Ms. Patricia Eric, learned counsel for the Appellant and holding brief for Mr. George Njooka, learned counsel for the respondent, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL