

<p><b>CIVIL APPEAL NO.86 OF 2002 COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM CORAM: MUNUO, J.A MSOFFE, J.A AND KAJI, J.A)</b></p>	<p>1. ATTORNEY GENERAL 2. THE TREASURY REGISTRAR 3. THE CARETAKER COMMITTEE FRIENDSHIP TEXTILE MILL LTD UNDER DISSOLUTION... . APPELLANTS VS ELIGI EDWARD MASSAWE AND 104 OTHERS.. RESPONDENTS Appeal from the judgment of the High Court of Tanzania at Dar es Salaam) Kyando J. Civil Case No. 394 of 1998.</p>	<p>The issue of subsistence allowance is payable upon repatriation, following termination of employment to the former employees place of engagement or place of domicile and there should be credible evidence see Section 110 and 111 of Law of Evidence Act, Cap 6, that the employees (appellants) were taken on at places other than the place of work or that there was a contract obliging the employer to transport the employees to their place of domicile. See Nicholaus Hamis Versus Tanzania Shoe Company Ltd and the Tanzania leather Association Industries, Civil Appeal No. 62 of 2000 C.A (Unreported).</p>
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**IN THE COURT OF APPEAL OF TANZANIA  
AT DAR ES SALAAM**

**(CORAM: MUNUO, J.A., MSOFFE, J.A., And KAJI, J.A.)**

**CIVIL APPEAL NO. 86 OF 2002**

<p><b>1. ATTORNEY GENERAL 2. THE TREASURY REGISTRAR 3. THE CARETAKER COMMITTEE FRIENDSHIP TEXTILE MILL LTD.</b></p>	<p>} ..... <b>APPELLANTS</b></p>
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**UNDER DISSOLUTION**

**VERSUS**

**ELIGI EDWARD MASSAWE AND 104 OTHERS ..... RESPONDENTS**

**(Appeal from the judgment of the High Court  
of Tanzania at Dar es Salaam)**

**(Kyando, J.)**

**dated the 12<sup>th</sup> day of July, 2002**

**in**

**Civil Case No. 394 of 1998**

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**JUDGEMENT OF THE COURT**

**19 & 30 May 2006**

**MUNUO, J.A.:**

In Civil Case No. 394 of 1998 in the High Court of Tanzania at Dar es Salaam, 108 plaintiffs, now the respondents, sued the appellants for terminal benefits and other entitlements following the Friendship Textile Mill Limited's dissolution. The claim totalled Sh. 318,977,935/= subsistence allowance at a rate of Sh. 6,400/= daily for each employee from the date of termination on the 31<sup>st</sup> March, 1997 to the date of the High Court judgement on the 12<sup>th</sup> July, 2002. The plaintiffs also sued for interest on the decretal amount at the court rate from the date of judgement to the date of final payment plus costs of the suit. The High Court entered judgement for the

plaintiffs in the sum of Sh. 318,977,936/= subsistence allowance plus costs. Dissatisfied with the decision of the learned trial judge, the defendants lodged the present appeal to challenge the said decision.

The parties concede that when the Friendship Textile Mill Limited was dissolved under Government Notice No. 82 of the 21<sup>st</sup> March, 1997, and No. 119 of the 18<sup>th</sup> April, 1997, employment liabilities had to be paid by the 1<sup>st</sup> and 2<sup>nd</sup> appellants. The parties further conceded that all the terminal benefits were settled amicably except for the claimed subsistence allowance totaling Sh. 318,977,935/=, the subject of this appeal.

Mr. Mallaba, learned Principal State Attorney represented the appellants. The respondents were represented by Mr. Kalunga, learned advocate. As reflected in the Memorandum of Appeal, there are 3 grounds of appeal namely that:—

- (i) the trial judge erred in law in finding that the government is liable to pay subsistence allowances to the respondents without a proper consideration to Government Notice No. 82 of

1997 read together with Treasury Circular No. 4 of 1993.

- (ii) Alternatively, the trial judge erred in law in finding that the government is liable to pay the claimed subsistence allowance under the Parastatal Service Regulations, 1984 and the Employment Ordinance, Cap. 366. While the Friendship Textile Mill Limited was under dissolution.
- (iii) The trial judge erred in law in not finding that the respondents' services were terminated by operation of law and they were duly paid their statutory benefits as stipulated in the Treasury Circular No. 4 of 1993.

In his submission, Mr. Mallaba, learned Principal State Attorney, observed that the respondents were paid their due terminal benefits on the 31<sup>st</sup> March, 1997 and on the 18<sup>th</sup> April, 1997. Urging us to reverse the decision of the High Court the learned Principal State Attorney maintained that the government discharged the statutory benefits of the appellants so they are not entitled to any other payment. He faulted the learned judge for allowing the claimed

subsistence allowance which is not a terminal statutory benefit under the provisions of Section 59 (3) of the Employment Act, Cap. 366 of the Revised Laws, Edition 2002. He cited the case of **Nicholas Hamisi versus Tanzania Shoe Company Limited and the Tanzania Leather Association Industries**, Civil Appeal No. 62 of 2000, Court of Appeal of Tanzania (unreported) in which the Court considered the issue of subsistence allowance and stated:–

What has bothered us considerably is the question of subsistence allowance. Subsistence allowance is payable upon repatriation, following termination of employment, to the former employees place of engagement or place of domicile.

The Court further observed that:–

There should have been credible evidence that the appellants were taken on at places other than Dar es Salaam or that there was a contract obliging the employer to transport the employees to their places of domicile for the first respondent to be responsible for their repatriation and with that subsistence allowance during the journey; in terms of

Section 53 [59(3)] of the Employment Ordinance Cap 366 or any other relevant law.

The Court continued:—

From that one could conceivably argue that some form of allowance would be payable for detention for the number of days appellants say they were forced to remain in Dar es Salaam awaiting their being paid their transport charges. The same argument would apply even if one applied the Parastatal Service Regulations, in our view. The evidence on record would not support the appellants' claim for subsistence allowance. Between them the four appellants who testified said nothing that would support the claim.

Although counsel for the respondents vehemently contended that the above case is distinguishable from the present case, we are settled in our minds that the above case is similar and hence applicable to the present appeal. It is so because like in the above case, no evidence was adduced at the trial to establish the mode of recruitment of the respondent ex-employees of Friendship Textile Mill Limited. Such evidence would have shown whether the respondents were recruited

from places other than Dar es Salaam which would entitle them to repatriation and subsistence allowance. Besides, even the pleadings do not reflect particulars of places of domicile for purposes of repatriation. Under the circumstances we find that the award of Sh. 318, 977,935/= was neither proved nor substantiated by the pleadings. We are fortified in our view by the provisions of Sections 110 and 111 of the Law of Evidence Act, Cap. 6 R.E. 2002 which state *inter alia*:

110. Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist.
111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side.

We are satisfied that the plaintiffs did not establish the claim of subsistence allowance on the balance of probabilities because they adduced no evidence at all to substantiate the same at the trial.

The issue before us is whether the respondents are entitled to subsistence allowance in law.

We have already held that there is no evidence on record to support the claim of subsistence allowance because the claimants, now the respondents, did not make any attempt to discharge the burden of proving their case on the balance of probabilities in compliance with the provisions of Sections 110 and 111 of the Law of Evidence Act, 1967, Cap. 6 of the R.E. 2002. That being the case, the respondents are not covered by the provisions of Section 59 (3) which requires employers to repatriate employees to their places of domicile on termination of employment or upon the expiry of the contract of service. We think the appellants' assertion that the respondents were employed at the gate of Friendship Textile Mill Limited in Dar es Salaam is probable because the plaint is silent on the particulars of the recruitment of the 108 respondents and their places of domicile.

The learned Principal State Attorney submitted, and counsel for the respondents conceded, that since the claim of subsistence

allowance was not proved by evidence at the trial, the respondents would be entitled to subsistence expenses during the period they had to wait for the payment of their terminal benefits. During the said waiting period they would be entitled to their monthly salaries to cover their subsistence expenses. We are of the view that this equitable approach is logical. We accordingly reverse the decision of the High Court and order that the respondents whose employment at the Friendship Textile Mill Limited was:—

- (a) terminated on the 31.3.1997 and they were paid their terminal benefits on the 30.4.1997 are entitled to a month's salary cum subsistence expense for the waiting period;
- (b) those terminated on the 31.3.1997 and paid their due benefits on the 31.5.1997 are entitled to their April and May monthly salaries as subsistence expense; and
- (c) those terminated on the 31.3.1997 and were paid on the 31.7.1997 are entitled to monthly salaries for April, May, June and July, 1997 as subsistence expense.

These three phases of payment are reflected at Page 35 paragraph 3 of the record of appeal.

In the result we allow the appeal to the above extent. Considering that the respondents lost their jobs when the factory was dissolved, we make no order for costs.

DATED at DAR ES SALAAM this 30<sup>th</sup> day of May, 2006.

E. N. MUNUO  
**JUSTICE OF APPEAL**

J. H. MSOFFE  
**JUSTICE OF APPEAL**

S. N. KAJI  
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.

(S. M. RUMANYIKA)  
**DEPUTY REGISTRAR**