IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KENTE, J.A., And MURUKE, J.A.)

CIVIL APPEAL NO. 352 OF 2021

JEROME KESSY..... APPELLANT

VERSUS

ARDHI UNIVERSITY ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, Labour Division at Dar es Salaam)

(Mwipopo, J.)

dated the 21st day of May, 2021

in

Labour Revision No. 179 of 2020

JUDGMENT OF THE COURT

25th August & 23rd October, 2023

KENTE, J.A.:

The appellant herein, Jerome Kessy is a former employee of the respondent, the Ardhi University. Until the occurrence of the facts giving rise to the present labour dispute, the appellant was employed by the respondent in the position of an Assistant Lecturer. However, on 21st July, 2015 his contract of service was terminated following the allegations of absenteeism, gross dishonesty, contravention of the Code of Ethics and insubordination. More in particular, the appellant was alleged to have left

the country for studies in Germany without seeking and obtaining permission from his employer and to have misused research founds.

Deeply aggrieved by the termination of his contract of service, the appellant successfully referred his grievances to the Commission for Mediation and Arbitration (hereinafter the CMA). On 9th October, 2019 the CMA ruled in his favour holding unanimously that, the termination of his contract of service was both substantively and procedurally unfair. The respondent was as a result, ordered to reinstate him.

Dissatisfied with the decision of the CMA, the respondent University applied to the Labour Division of the High Court to have the award by the CMA revised. Its case was inter alia that, the CMA had acted without jurisdiction inasmuch as it (the respondent University) had its own internal mechanisms established for dealing authoritatively with labour related disputes and appeals involving its workers as a forum of first instance. It is pertinent to observe at this earliest opportunity that, the appellant had right away referred his complaints to the CMA without recourse to the respondent's dispute settlement mechanisms.

After hearing the parties and reviewing the applicable law, the Labour Division of the High Court (Mwipopo, J) granted the application in the following terms, thus:

> *"... I am of the opinion that the applicant was supposed to exhaust the internal remedies availabie which is to refer the appeal to the Staff Appeals Disciplinary Committee before referring the same to the CMA. As a result the Commission and the Court have no jurisdiction to entertain the matter."*

It is against the above stated background that the appellant has preferred the present appeal citing only one ground of complaint. In essence, the appellant is faulting the learned judge of the first appellate court for quashing and setting aside the award by the CMA on the grounds that the CMA had no jurisdiction to entertain the labour dispute between the parties herein as the appellant had not exhausted the internal remedies available under the respondent's disciplinary machinery.

Before us the appellant who was present in Court was advocated for by Mr. Andrew Miraa learned Advocate while the respondent University was represented by Mr. Stanley Kalokola, assisted by Ms. Ester Meiludie, Mr. Boaz Msoffe and Ms. Caroline Lyimo learned State Attorneys.

In summary, the appellant's case as presented before us by Mr. Miraa is that, indeed the appellant's employment contract with the respondent was governed by the Ardhi University Charter of 2007 and the Ardhi University Rules 2007 (made under Article 26 of the Charter). In terms of rule 25 (1) of the Staff Disciplinary Appeals Committee which is mandated to deal with appeals by the academic, administrative and technical staff, the appellant was required to refer his grievances to the said Committee. However, Mr. Miraa was firm that, it was not necessary for the appellant to refer his complaint to the Disciplinary Committee before he could resort to the judicial remedies. In his written submissions which he had earlier on filed in terms of Rule 106 of the Tanzania Court of Appeal Rules, 2009, together with his oral submissions before us, Mr. Miraa was emphatic that the provisions of the respondent's Rules do not bar an aggrieved employee in the category of an academic, administrative or technical staff to make use of some other laws as provided for under the proviso to Rule 25 (6) of the respondent's Rules. The learned counsel added that, for this reason, the appellant was not barred from invoking the provisions of the Labour Institutions (Mediation and Arbitration) Rules GN No. 64 of 2007 as he did.

Mr. Miraa sought to circumvent the mandatory requirements of section 31(1) of the Public Service Act (Cap 298 R.E. 2019) which requires servants in the executive agencies and Government Institutions such as the appellant in the instant case to be governed by the laws establishing their respective executive agencies or institutions by relying on section 2(1) of the Employment and Labour Relations Act (Cap. 366 R.E 2019) which provides, inter alia that, the said Act applies to all employees including those in the public service of the Government of Tanzania in Mainland Tanzania.

Moving forward, the learned counsel contended further that, the appellant had lost faith in the respondent's disciplinary machineries after they had spent an inordinate period of five months to rule on his relatively simple disciplinary matter. Mr. Miraa implored us to seek inspiration from the decision by the High Court in the case of **Jeremiah Mwandi V. Tanzania Post Corporation,** Labour Revision No. 6 of 2019 in which it was held, among others that, a staff who in one way or another has no confidence with the Corporation's internal disciplinary machinery, should not be restricted from seeking remedies outside the Corporation.

On the other hand, Mr. Kalokola submitted in response to Mr. Miraa's arguments that, although Rule (10) (1) of the Labour Institutions (Mediation and Arbitration) Rules generally allows an aggrieved employee to refer his grievances to the CMA, there must be in the first place, a final determination of one's complaint by the employer. The learned State Attorney sought to reinforce his argument by referring us to the case of **Parin A.A. Jaffer and Others V. Abdalla Ahmed Jaffer and Two Others** [1996] TLR 110 from which he beseeched us to seek inspiration and subsequently hold, as did the High Court, that:

> *"Where the law provides extra-judicial machinery alongside a judicial one for resolving a certain dispute, the extra-judicial machinery should in general be exhausted before recourse is had to the judicial process."*

With regard to the holding by the High Court in the case of **Jeremiah Mwandi** (supra) from which Mr. Miraa entreated us to seek inspiration, Mr. Kalokola submitted briefly and correctly so that, the position taken by the, High Court was recently overruled by this Court through our decision in which we pronounced ourselves in no uncertain terms that, the CMA had no jurisdiction to entertain the respondent's (Jeremiah Mwandi) case as it was incumbent upon him to, lodge his

appeal with his employer's (Tanzania Post Corporation) Board of Directors so as to exhaust the internal remedies available to him before he could resort to the procedure prescribed under the Public Service Act. (see **Tanzania Post Corporation v. Jeremiah Mwandi,** Civil Appeal No. 474 of 2020 and **Tanzania Post Corporation v. Dominick Kalangi,** Civil Appeal No. 12 of 2022).

We have gone through the record of proceedings before the CMA and the first appellate court that culminated in the judgment which is the subject of the present appeal. We also have in mind the arguments both written and oral that Mr. Miraa presented before us with the aim of convincing us that indeed, the appellant was not bound to refer his complaints to the respondent's Disciplinary Committee before he could seek a judicial remedy.

We would like at the outset and as part of our housekeeping, to correct the wrong impression that may be conveyed to the legal fraternity and the public in general that, the Disciplinary Committees, Councils or Boards that are charged with the examination of alleged breaches of discipline within an organization or profession and adjudicating on them are, more often than not biased against the employee or member of the

profession who is accused of any misconduct. If we understood Mr. Miraa well as we reckon we did, that is what he himself and his submissions on that aspect appear to suggest.

The correct position however is that, such internal mechanisms for disputes resolution at workplaces have proved efficacious in conducting proper and detailed disciplinary inquiries to justify the employer's or the body's action be it a dismissal, suspension, fine, stoppage of membership or annual increment or deduction in rank. But the most important point is that, it is not true that in every case between an employer and employee, the disciplinary body will always rule against the employee and for this reason, a careful examination of the contention by Mr. Miraa that the appellant had to refer his grievances right away to the CMA because of fear that the respondent's Disciplinary Committee would not accord him a free and impartial treatment, exposes the contention by the learned counsel as fallacious.

Coming to the specifics of the instant appeal, in our view, a mere fact that it took the respondent five months to rule on the appellant's disciplinary matter, does not *ipso facto* translate into the appellant having acted unfairly, with prejudice and bias against the appellant as Mr. Miraa

would want us to believe so as to justify the appellant's decision to circumvent his employer's machinery for dispute resolution. As far as we are concerned, that was a serious allegation the proof of which required more than such unsubstantiated allegations and on this, point, we say no more.

Considering the appeal as a whole, we agree with Mr. Kalokola and to that end, our short conclusion is that, indeed the decision by the appellant to refer his complaints right away to the CMA without exhausting the remedies available under the respondent's disputes resolution machinery was, for all purposes and intents, procedurally improper. For it is now the stance of this Court and therefore the law that, where as in the case now under review, a given law provides for a specific forum to first deal with a given dispute, resort to such a forum is quite indispensable before one can have recourse to the judicial remedy. (See **Salim O. Kabora v. Tanesco Ltd and Two Others,** Civil Appeal No. 55 of 2014 and **Tanzania Revenue Authority v. Tango Transport Company Limited,** Civil Appeal No. 84 of 2009). As might be expected, the decisions in the abovementioned two cases have complementary goals with the decisions in the two Tanzania Post Corporation cases to which

we were ably referred by Mr. Kalokola and, into whose strand, the facts of the case at hand, fit squarely.

In the ultimate event, we are satisfied that the learned judge of the High Court had adequately and correctly addressed himself to the facts of this case and the applicable law. We therefore, find no merit in the appeal which we accordingly dismiss in its entirety. We make no order as to costs, this being a labour dispute.

DATED at **DAR ES SALAAM** this 20th day of October, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

Z. G. MURUKE
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of October, 2023 in presence of the Appellant in person and Mr. Lukelo Samwel, Principal State Attorney for the Respondent, is hereby certified as a true copy of the original.

A.L. Kalegeya
DEPUTY REGISTRAR
COURT OF APPEAL