**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MWAMBEGELE, J.A., KWARIKO, J.A., And MAKUNGU, J.A.)**

**CIVIL APPEAL NO. 114 OF 2016**

**GLORY JOSEPH MAGOMBI (as administratrix of the estate of JOSEPH K. MAGOMBI) ..... APPELLANT**

**VERSUS**

**THE TRUSTEE OF THE TANZANIA NATIONAL PARKS..... RESPONDENT**

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

**(Nyerere, Kalombola and Mashaka, JJ.)**

**dated the 29th day of April, 2016**

**in**

**Revision No. 2 of 2013**

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# JUDGMENT OF THE COURT

*4th & 14th December, 2023*

**MWAMBEGELE, J.A.:**

The late Joseph K. Magombi, now through Glory Joseph Magombi; an administratrix of his estate, is challenging the judgment and decree of the High Court of Tanzania (Labour Division) in Revision No. 2 of 2013 delivered on 29th April 2016. For the sake of convenience, we shall simply refer to the late Joseph Magombi, as the appellant. The appellant had lodged the said revision challenging the decision of the defunct Industrial Court of Tanzania (ICT) in Labour Dispute No. 67 of 2002 which had dismissed his complaint against termination of his

employment by the respondent, Tanzania National Parks (TANAPA) on 30th June, 1997.

For easy appreciation of the sequence of events giving rise to the appeal before us, we find it appropriate to narrate the relevant background facts, as may be gleaned from the record of appeal. The appellant was employed by the respondent on 8th July, 1974 as a Park Cadet in Serengeti National Park (SENAPA). He was promoted to several positions within and outside SENAPA up to the rank of Principal Park Warden before his employment was terminated on 30th June, 1997 on disciplinary grounds.

It all started with the appellant himself, as a Principal Park Warden. He alleged that he observed the top management of SENAPA was not properly carrying out its functions as there was misappropriation of funds, hiking of prices of materials procured in the park and so many other malpractices. Concerned of the malpractice, the appellant decided to nip it in the bud by reporting the same in writing to the Board of Trustees of TANAPA (henceforth the Board). Having received the complaint letter, the Board constituted a probe committee to investigate on it. The Committee commenced its investigation according to the terms of reference and investigated the

allegations by calling and interrogating various SENAPA workers. However, the appellant was never called for inquiry.

In a bizarre twist of things, the SENAPA workers, in the process of being interrogated by the probe committee, implicated the appellant in various malpractices. The Committee thus went further to probe into the allegations raised against the appellant as well. Finally, the committee made findings that all allegations of malpractices raised by the appellant against SENAPA management were unfounded. However, the Committee found against the appellant on such malpractices as misappropriation of Tshs. 1,362,525/= being the value of timbers allegedly taken by him from SENAPA store without permit, personal use of Tshs. 1,100,000/= from SENAPA in the pretext of paying informers, he forced to be paid Tshs. 1,032,000/= as allowances for transfer while he never moved to the new work station, he allegedly took from SENAPA Tshs. 800,000/= for his personal use contrary to the Director's instructions against the I Owe You (I.O.U) practice. The probe committee, after making such findings against the appellant, prepared a report whereby it confirmed all raised malpractices against the appellant and advised the Board to take disciplinary measures against him.

After receiving the report of the probe committee, the Board prepared a formal charge against the appellant who was required to reply. In his reply to the charge, the appellant denied all allegations. The Board directed the Appointment and Disciplinary Committee (ADC) to investigate on the charges against the appellant. The ADC worked on the matter by calling various employees from SENAPA to testify on the allegations against the appellant. However, the appellant was not called to attend the hearing so as to cross-examine the witnesses called by the ADC. The ADC completed its inquiry and was convinced that the evidence given by the witnesses proved the charge levelled against the appellant. In its report, the ADC advised the Board to take appropriate measures against him as evident at p. 358 of the record of appeal.

The appellant was consequently terminated from employment. Believing that his termination was due to bad blood between him and the SENAPA management after he reported its malpractices to the Board, he referred his grievances to the Labour Commissioner in terms of section 8 (a) of the Industrial Court Act, 1967 – Cap. 60 of the Laws of Tanzania via a letter dated 6th January 1998. After inquiry, the Labour Commissioner was satisfied that a trade dispute existed between the employer and the employee and thus referred the matter to the ICT. The ICT (Mkasimongwa, Acting Deputy Chairman, as he then was), after

a full trial, decided that the appellant's termination was based on valid reasons as the allegations of malpractices against him by the respondent were all proved. Thus the appellant lost; his labour dispute was dismissed.

Still dissatisfied, the appellant instituted to the High Court of Tanzania (Labour Division) Revision No. 2 of 2013, the subject of this appeal, challenging the decision of the ICT on several grounds. The first one which disposed of the entire application was that he was not accorded the opportunity to be heard by the ADC before he was terminated. The High Court (Nyerere, Kalombola and Mashaka, JJ.) decided in favour of the appellant. It held that his termination was unfair because he was condemned unheard. It was thus ordered that the respondent pay him twelve months' salary in terms of section 40 of the Security of Employment Act, Cap. 387 of the Laws of Tanzania (the Security of Employment Act) which was applicable then. That decision was reached having considered that the option to reinstate him which would, in the circumstances, be appropriate, was not practicable given the fact that the appellant was terminated twenty years back and thus, at the time, he had already attained the retirement age.

The appellant was still not satisfied with the award. He thus lodged the present appeal challenging the High Court for; **one**, failing to order reinstatement of his employment which was illegally terminated; **two**, failing to make a finding that the remedy available to the appellant in the circumstances of the case was to order a retrial before a competent Disciplinary Committee and; **three**, awarding the appellant twelve months' salary in terms of section 40 of the Security of Employment Act was illegal as it was not applicable because it had been repealed long before the decision.

It is worth noting that the respondent also, on 30th June, 2017 lodged a notice of cross-appeal containing one ground but on 29th April, 2022, Mr. Yohana Maro, the learned State Attorney who appeared for the respondent sought leave of the Court, and was granted, to withdraw it.

At the hearing of the appeal before us, the appellant appeared through his legal representative, Ms. Glory Joseph Magombi and the respondent appeared through Mr. Mukama Musalama and Ms. Grace Lupondo, learned State Attorneys. Both parties had filed written submissions for or against the appeal ahead of the oral hearing which they sought to adopt as part of their oral arguments.

Arguing in support of grounds one and two conjointly, the appellant submitted that the application for Revision before the High Court was governed by section 13 of the Employment and Labour Relations Act, 2004 (the ELRA) as amended by the Written Laws (Miscellaneous Amendments) Act, 2010 - No. 11 of 2010 which provides that "all disputes originating from the repealed laws shall be determined by the substantive laws applicable immediately before the commencement of this Act". These laws include the Employment Act, Cap. 366 of the Laws of Tanzania, the Security of Employment Act and the Industrial Court of Tanzania Act, Cap. 60 of the Laws of Tanzania.

The appellant went on to submit that the High Court found that the decision of the ICT was a nullity and having so found, it had no option but to reinstate the appellant to his former employment. In terms of the provisions of the law applicable, the ICT had only two options; either to dismiss the complaint and uphold the termination of the employment or to uphold the complaint and reinstate the employee to his former employment. The High Court thus erred in holding that the remedy available to the appellant was to send back for retrial before a competent ADC, the appellant argued. The appellant added that the ADC was competent to adjudicate the matter only that it did not afford the appellant a hearing which rendered its proceedings null and void as

rightly heard by the High Court. in the premises, he urged us to allow the two grounds of appeal.

Regarding ground three on the complaint that the High Court used the Security of Employment Act which had been repealed, the appellant argued that the Act was repealed by the ELRA and therefore the High Court should not have applied it. The appellant added that section 40 of the Security of Employment Act deals with statutory compensation which is awardable only by the Board or the Minister under the Act, and not by the Court. Thus, the appellant argued, reference to section 40 by the High Court was a misdirection. The appellant went on to argue that perhaps the High Court meant section 40A (5) of the Act which was brought by the Labour Laws (Miscellaneous Amendments) Act, 1975 – Act No. 1 of 1975, but it was for the employee to choose between reinstatement or compensation, not the employer. We were referred to a decision of the High Court in **Ali Kaziyabure v. Tanzania Telecommunications Cooperation** [1994] T.L.R. 1 on the point. We were also referred to **Paul Solomon Mwaipyana v. NBC Holding Corporation** [2004] T.L.R. 288, at p. 293 on the same point.

Having argued as above, the appellant's counsel, in his written submissions, urged us to allow the appeal with costs by ordering the

reinstatement of the appellant to his employment at his former post with full benefits, his salaries together with adjustments and all other benefits relating to his employment from the date of termination; that is, from 30th June, 1997 to his retirement on 30th June, 2012.

The respondent, in the reply written submissions, argued the three grounds generally. It was submitted very briefly, but to the point, that the appellant, essentially, does not have any qualms with the findings of the High Court, except for the award. It is submitted that the High Court did not err in the findings that the appellant was deprived of his right to be heard and the flanking award in terms of section 40 of the Security of Employment Act.

Ms. Lupondo clarified at the oral hearing that the applicable law in 1997 was the Security of Employment Act as amended by the Labour Laws (Miscellaneous Amendments) Act, 1975 which the High Court correctly applied in terms of section 13 of the ELRA. She argued that the prayer by the appellant for loss of remuneration is not tenable because it is a relief under the current section 40 of the ELRA but not under section 40A of the Security of Employment Act which was applicable. The High Court thus correctly awarded the twelve months' salary as compensation. She referred us to our decision in **Michael**

**Mwinuka & Others v. Tanzania Zambia Railways Authority & Others** (Civil Appeal No. 84 of 2018) [2023] TZCA 17475 (7 August 2023) TANZLII and the decision of the High Court in **Tanzania Breweries Limited v. Herman Bildad Minja** (Misc. Labour Application 37 of 2017) [2020] TZHC 3883 (15 October 2020) TANZLII to buttress this point. The respondent adds that the High Court could not have ordered a retrial because the mechanism and machinery under the repealed laws were no longer in existence. She contended that the cases of **Ali Kaziyabure v. Tanzania Telecommunications Cooperation** and **Paul Solomon Mwaipyana v. NBC Holding Corporation** (supra) relied upon by the appellant are distinguishable and not applicable to the case at hand because they were decided while the repealed laws were still in existence.

The respondent thus urged us to dismiss the appeal.

In a short rejoinder, the appellant did not insist on reinstatement but reiterated that the Court orders that the appellant be paid benefits and salaries as well as salary adjustments and all other benefits relating to his employment from the date of termination to the date of retirement.

Having summarised the contending arguments by the parties, we should now be in a position to decide the issues of contention which, in our view, revolve around the three grounds of appeal. The first one relate to the issue whether the High Court should have ordered the reinstatement of the appellant. This complaint stems from the finding of the High Court at p. 530 of the record of appeal having found and held that the ICT did not afford the appellant a hearing. For easy reference, we reproduce it hereunder:

> *"... the remedy available under such circumstance is to refer back the matter to be retried afresh before a competent disciplinary committee. However, after duly considered the peculiar facts of this case where the applicant was terminated nearly twenty years ago ... that if applicant was in service, he would have been retired by now ... we find the order for retrial would be impracticable ... instead we order respondent to compensate the applicant 12 months' salary ..."*

It is apparent that the appellant was terminated in 1997, so at the time the impugned decision was delivered in 2016, it was about twenty years thereafter. It is also undisputed that the appellant would have been retired as of 30th June, 2012; so the appellant states in the written

submissions. Likewise, with regard to the second issue the subject of the second ground of appeal, it is obvious that the applicable laws having been repealed, the mechanism and machinery for retrial were not in place. That being the case, we agree with the High Court that despite the fact that it made a finding to the effect that he was not afforded a hearing, an order for a retrial could not be made for being impracticable. We also agree with the submission by the respondent that the High Court did not make a finding that the appellant was not guilty of the charges levelled against him. It only nullified the proceedings for the violation of the basic right to be heard. In the circumstances, ordering a reinstatement could not have a backing of law.

The third issue emanates from the third ground of appeal that challenges the High Court for applying a dead law; the Security of Employment Act. We will not be detained much in determining this issue, for the provisions of paragraph 13 (1) of Third Schedule to the ELRA provides point-blankly that:

> *"13.-(1) All disputes originating from the repealed laws shall be determined by the substantive laws applicable immediately before the commencement of this Act."*

Admittedly, at the time of the pronouncement of the impugned decision, the Security of Employment Act had long been repealed by section 103 (1) of the ELRA. However, section 103 (3) of the ELRA read together with paragraph 13 (1) of the Third Schedule thereof, allow the application of the repealed laws which were in force when the relevant labour dispute arose before the enactment of the ELRA. Paragraph 13 (3) (a) of the Third Schedule to ELRA also provides that revision of matters arising from the ICT shall be presided over by a panel of three judges of the Labour Court. That is what happened in the case subject of this appeal.

Flowing from the above reasoning, we agree with the respondent that the High Court correctly applied the Security of Employment Act, despite its being repealed, for its applicability was saved by section 103 (1) of the ELRA as well as paragraph 13 (1) of the Third Schedule thereof.

Before penning off, we agree with the appellant that by pegging on section 40 of the Security of Employment Act the twelve months' salary as compensation, the High Court slipped into error. As rightly put by the appellant, the High Court might have intended to refer to the provisions of section 40A (5) of the Security of Employment Act. Section 40A was added to the Security of Employment Act by the Labour Laws

(Miscellaneous Amendments) Act, 1975 – Act No. 1 of 1975. The relevant part of subsection (5) thereof reads:

> *"(5) Where a re-instatement or re-engagement has been ordered under this section and the employer refuses or fails to comply with the order-*
>
> *(a) ...*
>
> *(b) ...*
>
> *(i) ...*
>
> *(ii) a sum equal to twelve months' wages at the rate of wages to which the employee was entitled immediately before the termination of his employment or, as the case may be, his dismissal, and such compensation shall be recoverable in the same manner as statutory compensation the payment of which has been ordered under section 39."*

However, we do not agree with the appellant that the order must be given at the option of the employer. Our interpretation of the subsection does not lead us to such interpretation. This being the case, we read askance the decision of the High Court in **Ali Kaziyabure v. Tanzania Telecommunications Cooperation** (supra). The correct application of the letter and spirit of section 40A of the Security of Employment Act, we respectfully think, is as we stated in **Paul**

**Solomon Mwaipyana v. NBC Holding Corporation** (supra). We are of the well-considered view that, except for the slip of using section 40 of the Security of Employment Act instead of section 40A of the same Act, the High Court order was the most pragmatic one in the peculiar circumstances of the case and the interest of justice.

For the reasons we have endeavoured to assign, we find this appeal devoid of merit and dismiss it. Given that this appeal stems from a labour dispute, we make no order as to costs.

**DATED** at **DAR ES SALAAM** this 12th day of December, 2023.

J. C. M. MWAMBEGELE
**JUSTICE OF APPEAL**

M. A. KWARIKO
**JUSTICE OF APPEAL**

O. O. MAKUNGU
**JUSTICE OF APPEAL**

The Judgment delivered this 14th day of December, 2023 in the Absence of the Appellant and Ms. Frida Peter Mollel learned State Attorney 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**