

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
LABOUR DIVISION
AT DAR ES SALAAM

REVISION APPLICATION NO. 140 OF 2023

BETWEEN

TANZANIA RAILWAYS CORPORATION..... APPLICANT

VERSUS

SILVESTER MWANTELA RESPONDENT

JUDGEMENT

Date of last Order: *04/09/2023*

Date of Judgement: *25/09/2023*

MLYAMBINA, J

The Respondent herein was the employee of the Applicant since 1981. It is alleged that sometimes on 9th April, 2016 the Respondent was involved in a road accident at Kamazima Road within the Municipality of Tabora. From such accident, the Respondent absconded from his duty station. The Applicant traced his whereabouts but it was in vain. It is further alleged that on 14th August, 2016 the Respondent was charged with an offence of absconding from work where he appeared to the disciplinary committee and defended himself. Unfortunately, his defense did not exonerate him from the disciplinary liability. He was therefore terminated from employment with effect from 8th May, 2016.

The Applicant requested its Senior Appointment Committee to approve the termination of the Respondent's employment on 24th December, 2018. The termination decision was upheld with effect from 8th May, 2016. Aggrieved by the termination the Respondent referred the dispute of unfair termination at the Commission for Mediation and Arbitration (herein CMA). The matter was decided ex-parte in which the Award was delivered on 8th July, 2021 in favour of the Respondent. Being aware of the Award, the Applicant herein successful filed an application for extension of time to set aside the ex-parte Award. Thereafter, the Applicant proceeded to file an application to set aside ex-parte Award. It is very unfortunate, such application was dismissed for non-appearance.

Again, the Applicant unsuccessfully filed an application to set aside the dismissal order and restoration of his application to set aside ex-parte Award. Once more, the Applicant was unhappy with the CMA's decision. He therefore filed the present application urging the Court to revise and set aside the same on only one ground:

Whether the Arbitrator was right to dismiss the application No. CMA/DSM/KIN/453/17/551/2022 basing on the application No. CMA/DSM/KIN/159/2019 for non-appearance while the Applicant

*was never in any material time notified of the date of appearance
(issued with summons to appear)*

The application proceeded orally. Before the Court, the Applicant was represented by Ms. Rose Kashamba, Learned State Attorney. On the other hand, Mr. Hemedi Omary, Personal Representative appeared for the Respondent.

During hearing of the application, Ms. Kashamba raised a point of law to be considered by the Court before going to the merit of the application. She submitted that the CMA had no jurisdiction to entertain this matter. She went on to submit that the Respondent filed his complaint at CMA on February, 2019. She argued that there is no dispute that TRC is a Public Entity. To support her submission, she cited the case of **Benjamin T. Mangula & 20 Others v. TAZARA & Attorney General**, Revision No. 418 of 2022 High Court of Tanzania Labour Division at Dar es Salaam (unreported). That the application was supposed to be filed pursuant to *Section 32A of Public Service Act*. Also, she referred the Court to *Article 107A of the Constitution of the United Republic of Tanzania, 1977*. She therefore urged the Court to revise and set aside the CMA's decision.

In response, Mr. Hemed argued that, as per the Constitution, the organ empowered to administer justice is the Court. Therefore, CMA had jurisdiction to hear and determine the matter as per *Section 14 of the Labour Institutions Act [Cap 300 R.E. 2019] (herein LIA)*. He was of the view that since the CMA has been mandated to mediate and arbitrate any matter, it had jurisdiction to do so. Therefore, according to Mr. Hemed, the ground of lack of jurisdiction lacks merits.

With regards to *Section 32A of the Public Service Act (supra)*, Mr. Hemed argued that it concerns with government employees. It is about those who are appointed by the President or employed by the Public Service Commission. He maintained that the Respondent was employed by the Public Corporation. The representative added that *Section 2 of the ELRA* defines group of people who are not required to appear before CMA and this Court whereas the Respondent is not touched straight by that provision. The representative urged the Court to be guided by the case of **Tanzania Teachers Union v. The Chief Secretary & 3 Others**, Civil Appeal No. 96 of 2012 Court of Appeal of Tanzania at Dar es Salaam (unreported), which lays a position that where there are conflicting decisions, the law/legislation prevails.

It was the submission of Mr. Hemed that *the Public Service Act (supra)* defines a Public Servant as; a person holding or acting in a Public Service Office. *The Amendment of the Public Service Act (supra)* brought by *Section 32A* was of 2019 and the Respondent was terminated on 31/12/2018. Mr. Hemed strongly submitted that, by the time the Respondent was terminated and filed this case, the amendment of the Public Service Act was not effective. To support his arguments, he cited the case of **EFC Tanzania Microfinance Bank Ltd v. MDK Legal**, Civil Appeal No. 82 of 2020 High Court of Tanzania at Dar es Salaam (unreported).

Mr. Hemed insisted that; the CMA had jurisdiction to entertain the matter. He urged the Court to dismiss this application because *the Public Service Act* became effective from 31/11/2019. He further urged the Court to uphold the CMA Award issued on 24/03/2023.

I have dully considered the submissions of the parties. As pointed out above, the issue of jurisdiction to entertain the matter is verry crucial and needs to be considered first before determining the merit of the application. This is also the Court's position in the case of **Mwananchi Communications Limited & Others v. Joshua K. Kajula and 2**

Others, Civ. Appl. No. 126/01 of 2016, Court of Appeal of Tanzania at Dar es Salaam (unreported) where it was held that:

Jurisdiction is the bedrock on which Court's authority and competence to entertain and decide matters rests.

Again, in the case of **Tanzania Revenue Authority v. Tango Transport Company Ltd**, Civil Appeal No. 84 of 2009 (unreported), it was held that:

The law is well settled and Mr. Bundala is perfectly correct that a question of jurisdiction can be belatedly raised and canvassed even on appeal by the parties or the Court suo moto, as it goes to the root of the trial (See, **Michael Leseni Kweka; Kotra Company Ltd; New Musoma Textiles Ltd. cases, supra**). Jurisdiction is the bedrock on which the Court's authority and competence to entertain and decide matters rests.

The Applicant's Counsel argued that TRC is a public entity the submission which was not contested by the Respondent. It is my view that the issue as to whether TRC is a public entity or private should not detain us because such issue has long been determined in the case of **Benjamin T. Mangula (supra)**. In the referred case, after thorough discussion and critical analysis, I came to the conclusion that TAZARA is a public entity. That is stated so under page 29 of the referred decision where it was held:

In the light of the above discussions and principles, I have no hesitation to hold that TAZARA is a public entity.

Just like in the referred decision, in this case, I maintain my decision that TRC is a public entity unless it is decided otherwise by the Court of Appeal. It is Ms. Kashamba's view that TRC being a public entity, the CMA had no jurisdiction to entertain the matter following the enactment of *Section 32A*. The referred provision is to the effect that:

A public servant shall, prior to seeking remedies provided for in labour laws, exhaust all remedies as provided for under this Act.

The Court of Appeal interpreted the above provision in the case of **Tanzania Posts Corporations v. Dominic A. Kalangi**, Civil Appeal No. 12 of 2022, Court of Appeal, Mtwara Registry where it was held that:

Going by the wording of the above-quoted provision, it is unambiguously clear that all disciplinary matters or disputes involving public servants are exclusively within the domain of the Public Service Commission whose decision is appellable to the President. As correctly submitted and as amply demonstrated above, the CMA has no jurisdiction to adjudicate upon such matters.

Therefore, TRC being a public entity, it is my view that the CMA had no jurisdiction to entertain this matter. I have noted Mr. Hemed's argument that a Public Service Act became effective from 31/11/2019. Such submission lacks legal basis in the light of the decision of the Court of Appeal of Tanzania in the case **Joseph Khenani v. Nkasi District Council**, Civil Appeal No. 126 of 2019, Court of Appeal of Tanzania, Mbeya in which the Court held that:

Admittedly, the appellant lodged his complaint over the computations of his terminal benefits in the CMA on 21.09.2016 while Act No. 13 of 2016 which brought the amendment into being came into force on 18.11.2016; the date of its publication.

In the matter at hand, the Respondent was terminated from employment on 31/12.2018. But the dispute was referred to CMA on 2019. Therefore, since the Applicant was terminated and the dispute was referred to the CMA after the amendment of the *Public Service Act (supra)*, 2016 which brought in Section 32A (*supra*), the CMA had no jurisdiction to entertain the matter.

In the result, I find the application has merit. Consequently, the CMA's proceedings and the subsequent Award are quashed and set aside.

It is so ordered.



Y.J. MLYAMBINA

JUDGE

25/09/2023

Judgement pronounced and dated 25th September, 2023 in the presence of learned State Attorney Rose Kashamba and Emmanuel Massawe Principal Legal Officer for the Applicant and the Respondent in person.



Y.J. MLYAMBINA

JUDGE

25/09/2023