IN THE COURT OF APPEAL OF TANZANIA
AT MWANZA

(CORAM: NDIKA, J.A., KWARIKO, J.A., And FIKIRINI, J.A.)

CIVIL APPEAL NO. 34 OF 2019

PENDO MASASI ..... APPELLANT

VERSUS

1. **THE MINISTER FOR LABOUR AND YOUTH DEVELOPMENT**
2. **THE ATTORNEY GENERAL**
3. **TANZANIA BREWERIES LIMITED**

..... RESPONDENTS

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

(Sumari, J.)

dated the 13th day of November, 2013
in
Miscellaneous Civil Application No. 28 of 2009

.....

JUDGMENT OF THE COURT

2nd & 28th July, 2021

NDIKA, J.A.:

The appellant, Pendo Masasi, seeks the reversal of the ruling of the High Court of Tanzania (Sumari, J.) dated 13th November, 2013 granting the third respondent's application for prerogative orders of *certiorari* and *mandamus*. By that ruling, the High Court vacated the decision of the first respondent, the Minister for Labour and Youth Development ("the Minister"), which had confirmed the decision of the Conciliation Board ("the Board") to

reinstate the appellant in his employment with the third respondent, Tanzania Breweries Limited, following his dismissal from employment summarily.

The appeal is predicated on six grounds of appeal. In the first ground, it is contended that the High Court wrongly observed that the relationship between the appellant and the third respondent was a troubled one. The contention in the second ground is that the High Court erroneously considered the opinions and notes of the Board's Chairperson dated 11th August, 2000 as the Board's formal decision and order. In the third ground, the complaint is that the High Court erroneously held that the Minister's decision in confirming the Board's decision was unreasonable and irrational. The High Court is faulted in the fourth ground for failing to hold that the circumstances attending the breach in question and the record of the appellant in his employment allowed the imposition of a lesser disciplinary penalty than summary dismissal. In the fifth ground, it is asserted that the High Court erred in sustaining the appellant's summary dismissal when the decision of the Board was still intact against the same summary dismissal. Finally, in the sixth ground it is posited that the High Court erroneously treated the application for prerogative orders as an appeal from the Minister's decision.

For the appreciation of the context in which the appeal has arisen, we provide a brief background to it as follows: the appellant was employed by the third respondent as a driver on 1st January, 1996. Sometime in June, 2000, the appellant, while on duty, entrusted to his assistant (driver's mate) the company's motor vehicle he was driving without any authorisation. It was in evidence that the said assistant was found driving the vehicle to deliver a consignment of beer to a certain destination. Consequently, the appellant was charged with the disciplinary offence of endangering his employer's property and, at the end of the disciplinary process, he was dismissed summarily with effect from 24th June, 2000.

Resenting the dismissal, the appellant referred the matter to the Board in consonance with terms of the applicable law at the time, the Security of Employment Act, 1964 (which later became Cap. 574 R.E. 2002) ("the SEA"). The Board found the dismissal improper and ordered that the appellant be reinstated in his position of employment but that he be issued with a severe reprimand.

With the foregoing outcome, the third respondent referred the matter, in terms of the SEA, to the Minister who, then, by his decision dated 22nd July, 2003 confirmed the Board's decision in terms of section 27 (2) of the

SEA. Accordingly, he ordered that the appellant be reinstated in his employment and issued with a severe reprimand. He viewed the summary dismissal unjustified because the disciplinary offence committed was not severe bearing in mind that the appellant had a fairly long service.

As hinted at the beginning, the third respondent applied to the High Court for the prerogative orders of *certiorari* and *mandamus* vide Miscellaneous Civil Application No. 28 of 2009 for the Minister's decision to be quashed and set aside. In her disposition of the matter, as shown at page 205 of the record of appeal, Sumari, J. not only quashed the Minister's decision but also sustained the third respondent's summary dismissal of the appellant. Curiously, there was no mention whether the relief of *mandamus* sought by the third respondent was granted or not.

In her ruling, the learned Judge properly directed herself that the application before her for *certiorari* required her to investigate whether the Minister's impugned decision was proper on the face of the record. She was alert that in any application for judicial review, the impugned decision can only be examined upon any of the grounds succinctly stated by this Court in **Sanai Murumbe & Another v. Muhere Chacha** [1990] TLR 54 as follows:

> *"One, that the subordinate court or tribunal or public authority has taken into account matters which it ought not to have taken into account. Two, that the court or tribunal or public authority has not taken into account matters which it ought to have taken into account. Three, lack or excess of jurisdiction by the lower court.* ***Four, that the conclusion arrived at is so unreasonable that no reasonable authority could ever come to it.*** *Five, rules of natural justice have been violated. Six, illegality of procedure or decision. (****Associated Provincial Picture Houses, Ltd. v Wednesbury Corp****. [1947] 2 All E.R. 680 and* ***Council of Civil Service Unions v Minister for the Civil Service*** *[1984] 3 All E.R. 935)."* [Emphasis added]

Having heard the learned counsel for the parties and reviewed the record of proceedings before the Board and the Minister's decision, the learned Judge took the view that the Minister's decision was so unreasonable and irrational that it could not be left to stand. We wish to let the record of appeal, at page 201, speak for itself:

> *"I may say without hesitation that the conclusion reached by the Minister in sustaining the decision of the Conciliation Board was* ***not only unreasonable but irrational one****. I venture to think that the*

Minister did not give himself enough attention, addressed or directed himself to the true nature of the fundamental breach done by the 3rd respondent [the appellant herein] thus arriving to an unreasonable decision ...." [Emphasis added]

It is pertinent to note that in rationalizing her decision, the learned Judge stated, as shown at page 204, that:

> *"**The law, as it is, categorically provides for an outright summary dismissal for a first breach without the need of issuing a warning or reprimand as the Conciliation Board and the Minister presupposed**, item (h) made under the 2nd schedule to the Security of Employment Act (supra) provides that 'where an employee neglects or fails to carry out his duties so as to endanger himself or others or property or neglects or fails to comply with any instructions relating to safety or welfare the permissible penalty is summary dismissal.'"* [Emphasis added]

At the hearing of the appeal before us, the appellant was self-represented while Mr. David Kakwaya, learned Principal State Attorney, joined forces with Mses. Subira Mwandambo and Jacqueline Kinyasi, learned

State Attorneys, to represent the first and second respondents. Ms. Marina Mashimba, learned counsel, stood for the third respondent.

In his argument on the appeal, the appellant adopted his copious written submissions along with the list of authorities he had filed. He then highlighted his submission on the fifth ground of appeal, contending that after the High Court had issued *certiorari* vacating the Minister's decision, it had to issue an order of *mandamus* to the Minister to command his action according to the law instead of sustaining the summary dismissal against the appellant. All things considered, he urged us to allow the appeal.

Mr. Kakwaya supported the appeal. He forcefully contended that the Minister's decision was neither unreasonable nor irrational because he had discretion in terms of section 27 of the SEA to determine an appropriate penalty to be imposed on the appellant for the disciplinary offence of which he was convicted. He faulted the High Court for anchoring its decision on the reasoning that summary dismissal was the mandatory penalty in the circumstances of the matter. In his elaboration, the learned Principal State Attorney, referring us to section 21 (1) and (2) of the SEA, argued that while in terms of the said provisions an employer had the power to dismiss his employee summarily for a breach of the Disciplinary Code for which such

penalty is permissible, in terms of subsection (2) (a) the employer was directed to levy a lesser penalty for the first breach and that summary dismissal could only be imposed on a subsequent breach. He added that in terms of subsection (2) (b) any particular disciplinary penalty specified (such as summary dismissal) could be imposed only for a second or subsequent breach of the same provision of the Disciplinary Code. However, no previous breach should be taken into account if the employee had not committed a breach of the same provision of the Disciplinary Code, being a breach which had been the subject of a reference or report as aforesaid, within a period of six months immediately preceding the breach under consideration.

It was Mr. Kakwaya's further submission that it is on record that the breach of the Disciplinary Code by the appellant was the first one; that he had not committed any breach within a period of six months immediately preceding the breach under consideration that was the subject of a reference or report to a Labour Officer; and that the Board, at page 152 of the record of appeal, found no proof that the appellant's breach endangered his own safety or that of others. In conclusion, the learned Principal State Attorney urged us to allow the appeal on the basis of the third and fourth ground of appeal.

For the third respondent, Ms. Mashimba stoutly opposed the appeal. After submitting that the first and second grounds of appeal were not dispositive of the appeal, she rightly focused her argument on the third and fourth grounds upon which the appeal turns. At first she revisited **Sanai Murumbe** (*supra*) to underline that the unreasonableness or irrationality of the decision the subject of judicial review is one of the grounds upon which such decision can be overturned. Then, she posited that in the instant case the summary dismissal was merited as the appellant's act of placing an unlicensed assistant at the wheel of a company motor vehicle without authorisation endangered life and property. Referring to the ruling of the High Court, at pages 202 to 204 of the record of appeal, she submitted that the learned Judge rightly took into account the circumstances in which the disciplinary offence was committed and that in terms of item (h) of the Second Schedule to the SEA summary dismissal was the mandatory penalty. She was emphatic that the learned Judge was justified to quash the Minister's decision, which, she submitted, was contrary to the law.

As regards the fifth ground of appeal, Ms. Mashimba supported the course taken by the learned Judge to sustain the summary dismissal. She contended that upon the issue of *certiorari* vacating the Minister's decision, the Board's decision dissipated naturally. Rounding off on the complaint in

the sixth ground, the learned counsel submitted, briefly, that there was no appellate meddling by the High Court as the court reviewed the Board's proceedings and the Minister's decision conscious of the guidance in **Sanai Murumbe** (*supra*). Accordingly, she moved us to dismiss the appeal in its entirety.

In a brief rejoinder, the appellant maintained that after the order of *certiorari* was issued, it should have been followed up by the order of *mandamus* to direct the Minister's action.

We have examined the record of appeal and taken consideration of the contending submissions of the parties. As rightly submitted by both Mr. Kakwaya and Ms. Mashimba, the appeal turns on the third and fourth grounds, the sticking issue being whether the Minister's decision was unreasonable and irrational. Ahead of dealing with this issue, we wish to address the fifth ground, which we think is less engaging.

The gravamen in the fifth ground is the complaint that the High Court erred in sustaining the appellant's summary dismissal after it quashed the Minister's decision. It was the appellant's argument that the High Court had to issue a *mandamus* to the Minister instead of sustaining the third respondent's summary dismissal. Mr. Kakwaya did not offer any argument on

this aspect. On her part, Ms. Mashimba supported the course taken by the learned Judge, contending that the Board's decision dissipated naturally upon the order of *certiorari* being made.

At the forefront, it should be recalled that what was decided by the Minister by his decision dated 22nd July, 2003 was the reference made by the third respondent challenging the decision of the Board that vacated the summary dismissal imposed on the appellant. The order of *certiorari* that the High Court issued quashed and set aside the aforesaid decision of the Minister. Its effect was only limited to the aforesaid impugned decision but not the reference itself. It means, therefore, that the third respondent's reference to the Minister was yet to be decided by the Minister – see page 10 of the typed judgment of **John Bosco Kazinduki v. The Minister for Labour and Another**, Civil Appeal No. 29 of 2001 (unreported). On this basis, we do not agree with Ms. Mashimba, with respect, that the Board's decision dissipated naturally once the order of *certiorari* was issued. As rightly argued by the appellant, after the High Court had issued *certiorari*, it ought, in the circumstances of this case, to issue an order of *mandamus* to command the Minister to determine the third respondent's reference in accordance with

the provisions of the law. As we hinted earlier, the High Court made no mention whether the relief of *mandamus* sought by the third respondent was granted or not. Accordingly, we find merit in the fifth ground of appeal.

Adverting to the main issue of contention whether the Minister's decision was unreasonable and irrational, it needs to be recalled that the learned Judge rationalized her finding on the reason that summary dismissal was the only penalty imposable on the appellant for a first breach with no need of issuing a warning or a reprimand as the Board and the Minister presupposed. In order to determine the tenability or otherwise of this reasoning, we need to examine section 21 of the SEA, which stipulated and governed the imposition of penalties on employees at the material time. For the sake of clarity, we extract the entire text of the said provision:

> *"21. -(1) Subject to the following provisions of this Part and to any decision of a Board or the Minister on a reference, an employer may –*
>
> *(a)* ***dismiss an employee summarily;***
>
> *(b) impose a fine of an amount not exceeding one day's pay of the employee and recover such fine by deduction from the wages of the employee:*

Provided that the fine imposed by the employer may exceed the employee's one day's pay in any case in which the Second Schedule provides for a fine of such greater amount;

(c) impose a formal severe reprimand, reprimand or written warning on an employee,

for breaches of the Disciplinary Code in the cases in which those disciplinary penalties may be imposed in accordance with the Second Schedule.

(2) Where, in accordance with the Second Schedule –
(a) ***any particular disciplinary penalty may be imposed, the employer may instead impose a lesser penalty but****, in the event of a subsequent breach of the Disciplinary Code, the imposition of a lesser penalty on a previous occasion or occasions shall not preclude the employer from imposing the disciplinary penalty which may, in accordance with the Second Schedule, be imposed for such subsequent breach;*

(b) any particular disciplinary penalty may be imposed only for a second or subsequent breach of the same provision of the Disciplinary Code, only such previous breaches shall be taken into account as have been the subject of a report to the Committee or the local representative of the Union under section 22, or the subject of a report to a labour officer under section 23; and no previous breach shall be

taken into account if the employee has not committed a breach of the same provision of the Code, being a breach which has been the subject of a reference or report as aforesaid, within a period of six months immediately preceding the breach under consideration:

Provided that where an employee is absent from work without reasonable cause for two or more consecutive days, each day's absence shall constitute a separate breach of paragraph (c) of the Disciplinary Code and the employer may take all such breaches into account and impose the appropriate penalty notwithstanding that no earlier or separate report shall have been made in accordance with section 22 or 23, and a report made on the imposition of a penalty in such a case shall be deemed to be a separate report of every such breach." [Emphasis added]

Briefly, the above provision governed penalties that an employer could impose on an employee for a disciplinary offence. For our present purposes, section 21 (1) (a) empowered an employer to dismiss an employee summarily for a breach of the Disciplinary Code in a case in which such penalty could be imposed in accordance with the Second Schedule. Certainly, whatever penalty an employer could impose, it was subject to the provisions of Part III of the SEA and to any decision of the Board or the Minister.

So far as it is relevant to the instant appeal, the breach of the Disciplinary Code which the appellant was convicted of was laid under Item (h) concerning *"where the employee neglects or fails to carry out his duties so as to endanger himself or others or property or neglects or fails to comply with the instructions relating to safety and welfare."* The permissible penalty for any such breach is summary dismissal. The disagreement between the parties is whether, in the circumstances of this case, summary dismissal was the mandatory penalty.

Having reflected on the above issue and examined the provisions of law, we endorse Mr. Kakwaya's submission that summary dismissal was not the mandatory penalty in the circumstances of the case. First and foremost, Mr. Kakwaya is right that in terms of section 21 (2) (a) of the SEA even though the permissible penalty for the appellant's breach under Item (h) was summary dismissal, the employer was directed to levy a lesser penalty for the first breach and that summary dismissal could only be imposed on a subsequent breach. We also agree with his formulation that in terms of section 21 (2) (b) of the SEA any particular disciplinary penalty specified (such as summary dismissal) could be imposed only for a second or subsequent breach of the same provision of the Disciplinary Code. That no previous breach should be taken into account if the employee had not committed a

breach of the same provision of the Code, being a breach which had been the subject of a reference or report as aforesaid, within a period of six months immediately preceding the breach under consideration.

Given the foregoing position, it is patent that the learned Judge erred in assuming that summary dismissal was mandatory even *"for a first breach without the need of issuing a warning or reprimand"*, as she put it, and, consequently, her finding that both the Board and the Minister wrongly imposed a penalty other than summary dismissal was erroneous. Indeed, it is in the evidence that the breach by the appellant was the first one and that he had not committed any breach within a period of six months immediately preceding the breach under consideration which was the subject of a reference or report to a Labour Officer.

In dealing with the reference, the Minister had discretion in terms of section 27 (2) of the SEA to determine an appropriate penalty to be imposed on the appellant for the disciplinary offence of which he was convicted. The said provision stipulated:

> *"(2) Where any matter is referred to the Minister under this section, the Minister shall, as soon as is practicable, give a decision thereon and, in the performance of his functions under this section, the Minister may exercise the powers conferred on a*

Board by section 25; in so far as they are applicable to the reference to him; and the provisions of section 26 shall apply to and in respect of the decisions of the Minister as they apply to and in respect of the decisions of the Board."

The powers under section 25 referred to above include the authority under subsection (1) (a) when determining a reference to decide whether, among others, a summary dismissal or any other penalty for a breach of the Disciplinary Code is justified and appropriate in view of the circumstances of the case. The said jurisdiction also includes the power to confirm, reverse or vary any imposition of a disciplinary penalty as well as the authority to make consequential orders and directions. Moreover, subsection (1) (b) provided the power on a reference to order re-engagement or re-instatement or lesser punishment in case of an employee who had been dismissed.

In conclusion, the Minister's decision affirming the Board's decision to impose a penalty other than summary dismissal was neither unreasonable nor irrational because summary dismissal was not the mandatory penalty in the circumstances of the case. The Minister had discretion under the law to determine an appropriate penalty. In the premises, we find merit in the third and fourth grounds of appeal.

As the above determination is sufficient to dispose of the appeal, we find no pressing need to address the rest of the grounds of appeal.

In the upshot, we allow the appeal. Consequently, we quash and set aside the High Court's decision. This matter being a labour dispute not attracting an award of costs, we order each party to bear its own costs.

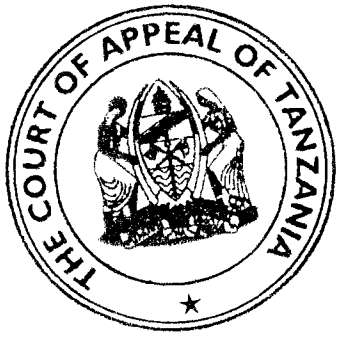
DATED at **DAR ES SALAAM** this 27th day of July, 2021.

G. A. M. NDIKA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 28th day of July, 2021 in the presence of the parties linked to the Court from Mwanza High Court through video link. The appellant was present in person unrepresented. Ms. Subira Mwandambo, learned State Attorney represented the 1st and 2nd respondents while Mr. Silwati Galati Mwantembe, learned advocate appeared for the 3rd respondent is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL