THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: RAMADHANI J. A.; NSEKELA, J. A.; And KAJI, J. A.) CIVIL APPEAL NO. 72 OF 2002

BETWEEN

STELLA TEMU ... APPELLANT

AND

TANZANIA REVENUE AUTHORITY ... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Arusha) (Rutakanqwa, J.) dated the 22th day of November, 2001 in Civil Appeal No. 1 of 1999

JUDGMENT OF THE COURT

RAMADHANI J.A.:

The appellant, Stella Temu, is a lawyer by training and was employed by the Ministry of Finance (hereinafter referred to in short as MOF) in the taxation department. Some time in 1996 the Tanzania Revenue Authority (TRA) became fully operational and was charged with the collection of taxes. Stella, like others, was taken to TRA from MOF. She was given by TRA a letter, Exh. P 1, of 17th June, 1996, titled "Kuajiriwa na Mamlaka ya Mapato Tanzania", which reads, in relevant parts, as follows:

2. ... Hivyo wafanyakazi wote wa sasa wa Idara za Kodi chini ya Wizara ya Fedha wanatakiwa kuajiriwa upya kwa masharti ya Mamlaka ya Mapato.

3. Kwa kuzingatia maelezo chini ya aya ya pili hapo juu, nafurahi kukujulisha kuwa imeamuliwa uajiriwe katika Mamlaka ya

> Mapato tangu tarehe 1 Julai, 1996.
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> Hata hivyo utakuwa katika kipindi cha majaribio (probation) kwa muda wa mwaka mmoja tangu tarehe ya kukubali ajira hii. Endapo utendaji wako wa kazi na tabia yako vitaonekena kukidhi matakwa ya ajira ndani ya Mamlaka, utathibitishwa kazini.

Stella accepted the offer by her letter dated 16th July, 1996, Exh. P. 3, which reads in the relevant part:

> Nachukua fursa hii kukuarifu kuwa nimekubali uteuzi huo kwa masharti yaliyoelezwa na mengine yatakayoamuliwa na Bodi ya Wakurugenzi.

On 16 June, 1997 she was given another letter, Exh. P 5, titled "Kutokuthibitishwa Kazini Katika Mamlaka ya Mapato Tanzania" and reads, in relevant parts, as follows:

> ... Katika barua hiyo tulikueleza pamoja na mambo mengine kuwa utakuwa katika kipindi cha majaribio kwa muda wa mwaka mmoja kuanzia tarehe 1 Julai, 1996 hadi tarehe 30 Juni, 1997. Kutokana na tathmini tuliyofanya katika kipindi cha majaribio, tunasikitika kukujulisha kuwa hautathibitishwa kazini.
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> Kufuatana na maelekezo na uamuzi wa Serikali, TRA inakurudisha Wizara ya Fedha kuanzia tarehe 1/7/1997. Tafadhali wasiliana na Katibu Mkuu kwa maelekezo zaidi.

Stella decided not to report to MOF but over a year later, on 6tn January, 1999, she filed a suit against TRA alleging wrongful termination of employment, that the termination was not done by a competent authority, that she was not given the right to be heard, that the letter of termination, Exh. P. 5, was defamatory, and that no reasons were given to her for the termination.

The matter landed before RUTAKANGWA, J. who framed five issues

for trial and we paraphrase them as follows:

> Was there termination of employment? Was Stella given a hearing before she was terminated? iii. Was the termination ordered by a competent authority?
> iv. Was Stella entitled to be given reasons for the termination?
> v. What reliefs are the parties entitled to?

RUTAKANGWA, J. found that Stella's employment was terminated by a competent authority but that she was not given a hearing before the decision was taken and that she was entitled to know the reasons for the termination but that was not done. However, the learned judge was of the decided opinion, based on the evidence of Patience Minga, DW 2, who was the immediate boss of Stella, that she would not have been confirmed in the employment even if she had been heard because of her irresponsible attitude. For the same reason the learned judge found that Stella was not defamed and, therefore, declined to grant her damages instead he gave her general damages of shs. 2,000,000/= "for the wrongful termination of her probationary employment".

Stella is aggrieved with that judgment and has preferred this appeal having four grounds. Before us she was represented by Mr. Malamsha, learned counsel, while TRA had the services of Mr. Rugaiya, learned advocate. Briefly the four grounds were that the learned trial judge erred by:

i. Not annulling the termination and ordering reinstatement.
ii. Framing new issues *suo motu* for which there were neither

evidence nor submissions.

iii. Granting reliefs not prayed for.
iv. Subjecting the appellant to double jeopardy of wrongful termination by the respondent and termination by the court.

Mr. Malamsha decided to combine grounds one and three and argued grounds two and four separately.

Before we go into the grounds of appeal and the submissions of the learned counsel, we think we need to appraise the evidence which is on record and make up our own findings on certain important issues.

We do this under Rule 34 (1) which provides as follows:

> (l)On any appeal from the decision of the High Court acting in the exercise of its original jurisdiction, the Court may -
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> (a) re-appraise the evidence and draw inferences of fact;

There are two matters of fact which we want to make findings on: One, what was the status of Stella vis a vis TRA: was she employed by TRA or was she seconded by MOF pending confirmation by TRA? Two, and following from one, what did Exh. 5 do: did it terminate the employment of Stella with TRA or did it decline to confirm Stella? Most of our questions to the two counsel revolved around these two points of fact.

We have no doubts in our minds that Stella was an employee of MOF and that it was Exh P 1 which moved her to TRA. The question is what was the nature of

this movement? Was she seconded to TRA or was she now an employee of TRA and that she had severed all relations with MOF? Admittedly, the word "seconded" was not used in Exh. P 1 or Exh. P 5.

However, Mr. Rugaiya referred us to Exh. D. 2, "Waraka wa Utumishi Na. 7 wa Mwaka 1995", that is, "Establishment Circular No. 7 of 1995", issued on 01 December, 1995. That Circular prescribes three categories of services under which a Government employee could work for a parastatal or a Government Agency: There is secondment under paragraph 3. Then there is attachment under paragraph 8, and thirdly, there is what we will refer to as "departmental transfer" or as is termed in the Circular "uhamisho wa moja kwa moja". The second mode, attachment, that is, assigning an employee to a parastatal for a specified period of time after which the officer goes back to the parent ministry, does not concern us here. The other two types are relevant here and we shall reproduce the applicable portions in Kiswahili.

Secondment is provided in paragraph 3 as follows:

> 3. **Utaratibu wa Kuazimwa (Secondment):**
> Pale inapokusudiwa na inapoamliwa kumpeleka mtumishi wa Serikali kwenye Shirika la Umma kwa minajili ya kumhamishia huko moja kwa moja, mtumishi huyo baada ya kufuata utaratibu wa Waraka huu atahamishiwa kwenye Shirika moja kwa moja. Hata hivyo mtumishi huyo atapaswa kuwa katika muda wa majaribio (trial period) kwa kipindi cha miezi kumi na miwili **(12).** Kipindi hicho kitakapokwisha, Shirika litapaswa kuamua kama litamchukua mhusika kama mtumishi wake wa kudumu au la. Ikiwa atachukuliwa, basi atafuata masharti yaliyomo katika Waraka huu. Iwapo Shirika litaamua kutomchukuwa, mhusika atarejeshwa alikotoka bila ya kuchelewa. Endapo kipindi hicho kitakuwa kimepita na Shirika

> halikuchukua hatua zozote za kumchukua au kumrejesha, na kama mhusika hatakuwa ameomba kurudi alikotoka, itachukuliwa kwamba ameingia katika utumishi wa kudumu wa Shirika.

Two things are obvious to us here: One, the initiative of moving an employee from a ministry to a parastatal is of the parastatal itself, which under paragraph 4 is required to make an application to the Central Establishment. There was no such application here and we think it was because all employees connected with taxation and custom duties were seconded to TRA from MOF. Nevertheless, the initiative in this case came from TRA who wrote Exh. P 1 offering employment to Stella in TRA. The second thing is that an employee so seconded is taken on probation for one year. This is what was contained in Exh. P 1.

The import of paragraph 3 is driven home by the provisions of paragraph 11 which gives the third category of service, that is, departmental transfer or "uhamisho wa moja kwa moja":

> 11. **Utaratibu wa Uhamisho wa Moja kwa Moja:**
> Uhamisho wa moja kwa moja kutoka Serikalini kwenda Shirika la Umma hufanyika baada ya mtumishi aliyeazimwa kumaliza muda wake wa kuazimwa kama ilivyoelezwa katika ibara ya [3] hapo juu. Aidha mtumishi anapojiunga na Shirika la Umma kutokana na uteuzi wa Serikali, mtumishi huyo hujiunga na Shirika linalohusika moja kwa moja bila ya kuwa na muda wa majaribio kwanza. Kwa madhumuni ya Waraka huu, uteuzi wa Serikali ni pamoja na:-
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> 11.1 Uteuzi unaotokana na Idara ya Serikali kuwa Shirika la Umma.

It is abundantly plain to us that in this "uhamisho wa moja kwa moja" the initiative is from the Government and then there is no probation period. As we

have already observed, Exh. P 1 was written to Stella by TRA and not by the Government and then Stella's engagement with TRA was prefaced by probation of one year. Therefore, Stella's engagement with TRA was NOT "uhamisho wa moja kwa moja" but was secondment. After the one year period of probation TRA could retain Stella, that is, confirm her engagement or TRA could decide not to confirm her engagement, which is what it did vide Exh. P 5. In that case Stella was to report back to her former employer, MOF. Likewise, Stella could have decided, after the expiry of the probation period, not to work for TRA and in that case, too, she would have returned to MOF.

The position explained above is confirmed by Exh. D. 3, a letter from the Central Establishment to TRA dated 11th November, 1998, which said in relevant parts as follows:

> Napenda kukutaarifu kuwa utaratibu ambao umekuwa unatumika katika kuwahamisha watumishi wa Serikali, katika Idara ambazo zimebadilishwa kuwa Wakala wa Serikali (Agencies) ni kuwapa kibali cha kuazimwa katika kipindi cha mwaka mmoja na katika kipindi hicho mwajiri anawajibika kulipa Hazina asilimia 25 ya mishahara yao kwa madhumuni ya kuhifadhi pensheni zao. Baada ya kipindi cha mwaka mmoja kumalizika inabidi waajiriwa hao pamoja na mwajiri kufanya uamuzi wa kuendelea au kutokuendelea na kazi katika Taasisi hiyo. Watumishi ambao hawapendelei kuendelea na kazi au wameshindwa kutimiza masharti inabidi warudishwe kwa mwajiri wao kutafutiwa nafasi nyingine ya kazi kama ipo au kupungunzwa kazini.

The final piece of evidence supporting the fact that Stella was seconded to TRA was the fact that she was on 19th August, 1996, promoted from Finance

Management Officer Grade III to Finance Management Officer Grade I according to the letter to her from MOF, Exh. P. 2. At that time Stella was with TRA where her engagement started from 01st July, 1996. We asked Mr. Malamsha how could that happen if Stella was a permanent employee of TRA. How could MOF promote a person who is not their employee? Mr. Malamsha merely said that the process of promotion was in the pipeline when Stella was transferred to TRA. That is not a satisfactory answer. Even if that were so, MOF knew that she was no longer their employee. The letter was sent to her through TRA. Our interpretation of that fact is that MOF promoted Stella because she was still their employee, that she was merely seconded to TRA, and that her continued stay there depended on confirmation after the probation period.

So, our conclusion is that Stella was seconded to TRA and that she continued being an employee of MOF. So, Exh. P. 5, did not terminate her employment but did not confirm her engagement with TRA and that she was to go back to MOF. So, grounds one and three which were consolidated and which sought to fault the learned judge for not ordering the reinstatement of Stella is dismissed. We agree with Mr. Rugaiya that if there was no termination there could not be reinstatement. Equally, ground four of appeal that Stella was subject to double jeopardy of termination TRA and also by the court order is misconceived and is dismissed as was properly submitted by Mr. Rugaiya.

What remains now is ground two that the learned judge *suo motu* framed issues

at the time of composing the judgment and thereby denied Stella the opportunity to call evidence in rebuttal. Mr. Malamsha complained of the discussion of defamation by the learned judge. We agree with Mr. Rugaiya entirely that though defamation was not framed as an issue, and that was the fault of both advocates at the trial, the pleadings contained defamation. Even Stella in her examination-in-chief said:

> When I received this letter of non-confirmation, I believed that I had failed to perform my duties efficiently and I was defamed thereby as a trained lawyer. My employment record as well as my reputation were tarnished. Because of that I am praying for damages to clear my name and record. I am therefore praying to be paid Tshs. 50,000,000/= as general damages.

Surely, the learned judge could not pretend that the question of defamation was not before him just because no issue was framed on defamation. In fact this Court has decided in one appeal, following a decision of the former East African Court of Appeal, that a court must decide a matter which it has allowed to be argued before it even if the matter is not contained in the pleadings. We dismiss this ground.

The learned judge found that Stella had a right to be heard but that she was not. Also he made a finding that she was entitled to know the reasons for the non-confirmation which again she was not given. Was the learned judge right? These two matters could not be subject to the appeal, and there was also no cross-appeal. However, we intend to use section 4 (2) of the Appellate Jurisdiction Act,

1979, as amended by Act No. 17 of 1993, and revise the proceedings. That section provides as follows:

> For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred upon it by this Act, the Court of Appeal shall, in addition to any other power, authority and jurisdiction conferred by this Act, have the power of revision and the power, authority and jurisdiction vested in the Court from which the appeal is brought.

The learned judge followed a number of authorities in arriving at those two holdings. The main authority relied upon is of the High Court of Australia in O'Rourke v. Miller [1980] LRC (Const.) 654. Unfortunately it has not been possible for us to lay our hands on that law report in Arusha. However, that decision, in turn, relied on Chief Constable of Northern Wales Police v. Evans [1982] 3 All ER 141, which we have been able to obtain. In both of these cases a police constable was employed but was placed under probation during which time the constable was dismissed without being heard and without being given reasons.

At page 151 Lord BRIGHTMAN said:

> My Lords, before I conclude this unhappy story, I must turn to the statutory provision. Regulation 16 of the Police Regulations 1971, which I need not quote 'erbatim, provides that during his period of probation the force, the services of a constable may be dispensed with at any time if the chief officer of police considers: (1) that he is not fitted, physically or mentally, to perform the duties of his office; or (2) that he is not likely to become an efficient constable; or (3) that he is not likely to become a well conducted constable.

> It is plain from the wording of the regulation that the power of a chief officer of police to dispense with the services of a person accepted as a probationer constable is to be exercised, and exercised only, after due consideration and determination of the specified questions. It is not a discretion that may be exercised arbitrarily and without accountability.

The present case is distinguishable. In the case cited there was a specific provision of law spelling out the "checklist", as it were, for dismissing. In the present case there is no such provision at all. Stella referred to performance appraisal forms but on cross-examination she answered Mr. Rugaiya that "I do not know if these forms were not in existence when I was in the service of TRA". It was up to Stella to show that the forms were in use at her time and that in her case they were not used when considering her confirmation. In any case the forms are for employees and we have already made a finding that Stella was not an employee of TRA.

Lord BRIGHTMAN observed further on page 154 that

> I turn secondly to the proper purpose of the remedy of judicial review, what it is and what it is not. In my opinion the law was correctly stated in the speech of Lord Evershed ([1963] 2 All ER 66 at 91, [1964] AC 40 at 96). His was a dissenting judgment but the dissent was not concerned with this point. Lord Evershed referred to-
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> > 'a danger of usurpation of power on the part of the courts ... under the pretext of having regard to the principles of natural justice ... I do observe again that it is not the decision as such which is liable to review; it is only the circumstances in which the decision was reached, and particularly in such a case as the present the need for giving to the party dismissed an opportunity

for putting his case.'

That was the case of Ridge v. Baldwin and Others where the appellant had been a police constable since 1925 and rose to the rank of Chief Constable. He was prosecuted together with two others for some offences but he was acquitted. However, the trial judge made some comments which prompted the watch committee to discuss him and unanimously dismissed him in March 1958 without giving him a hearing. Lord EVERSHED held that the chief constable was entitled to a hearing. But Stella here was not an employee of TRA.

Lord BRIGHTMAN had the same holding when he said on page 154:

> Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.
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> I leave these preliminary observations in order to consider the judgments in the Court of Appeal. It was accepted by each member of the court that the case fell within the third of Lord Reid's categories; that the respondent was entitled to a fair hearing; and that he had not had one.

In the present case, however, we are of the opinion that there was no right of a hearing because there was no termination but it was merely a non-confirmation while Stella remained in the employment of the MOF. It is our decided opinion that probation is a practical interview. We do not think that the right to be heard and to be given reasons extends even where a person is told that he/she has failed an interview.

With that finding then comes the question of remedies: is Stella

entitled to any damages? The learned judge said this:

> I will accordingly award the plaintiff two million (2 million) Tanzanian shillings as nominal general damages for the wrongful termination of her probationary employment with the defendant.

The wrongful termination was because of "the breach of the *audi alteram* rule and failure to give reasons for the non-confirmation by the committee". As we are of the decided view that those two requirements do not apply, we, therefore, quash the decision of the learned judge of granting two million shillings.

We wish to make two observations before we conclude this judgment. One, Exh. D. 2, "Waraka wa Utumishi Na. 7 wa Mwaka 1995", that is, "Establishment Circular No. 7 of 1995", was in existence when TRA wrote the letter to Stella, Exh. P. 1, offering her probationary service, TRA should have referred to that Circular in that letter and should have used the terminology contained therein, we would have been saved all this problem. Two, Stella ought to have reported to MOF as directed and matters would have been different. In fact by not reporting she absconded from work.

So, the appeal is dismissed with costs.

At this 27th day of October 2004.

A. S. L. RAMADHANI

JUSTICE OF APPEAL

H. R. NSEKELA

JUSTICE OF APPEAL

S. N. KAJI

JUSTICE OF APPEAL