

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MZIRAY, J.A., NDIKA, J.A., And MWAMBEGELE, J.A.)

CIVIL APPEAL NO. 40 OF 2016

HAMAD KOSHUMA APPELLANT

VERSUS

TANZANIA PORTS AUTHORITY RESPONDENT

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

(Aboud, J.)

dated the 1st day of December, 2015

in

Revision No. 272 of 2014

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JUDGMENT OF THE COURT

8th & 30th July, 2019

NDIKA, J.A.:

Hamadi Koshuma, the appellant herein, was an employee of the respondent, Tanzania Ports Authority, as its Deputy Director General (Corporate Services) but was dismissed on 11th January, 2013 in a manner that he alleged to be both procedurally and substantively unfair. He unsuccessfully challenged the dismissal, at the first instance, before the Commission for Mediation and Arbitration ("the CMA") and then, on revision, before the High Court, Labour Division at Dar es Salaam. Still undaunted, he now appeals to this Court.

The essential facts of the case are mostly undisputed and straightforward. The appellant was employed by the respondent on 15th June, 1993 and that on 24th February, 1999 he assumed the position of Assistant Secretary and Legal Officer. On 22nd September, 2008 he was elevated to the rank of Executive Assistant to the Director General, the position that he held until his appointment as the Deputy Director General – Corporate Services on 28th May, 2012.

On 23rd August, 2012 the appellant was suspended from office pending investigations into certain allegations against him. Subsequently, disciplinary proceedings were instituted against him for abuse of office, gross misconduct, gross inefficiency and gross dishonesty. In the end, he was dismissed from office as alluded to earlier.

Aggrieved, the appellant referred the matter to the CMA, claiming reliefs for unfair dismissal as follows: first, twenty-four months' remuneration as compensation for unfair termination of employment at the monthly rate of TZS. 12,128,451.20 amounting to TZS. 291,082,828.89; secondly, payment of monthly salary at TZS. 12,128,451.20 from the date of unfair termination (i.e., 9th January, 2013) to the date of full payment of compensation for unfair termination; and finally, payment of TZS. 316,687,336.89 being terminal benefits known as "Tuzo ya Kilimo Kwanza"

pursuant to the Tanzania Ports Authority Collective Bargaining Agreement as per the agreed formula.

The aforesaid action was barren of fruit, hence the appellant, as stated earlier, instituted revision proceedings in the High Court raising five grounds of complaint. One of the contested issues in both the CMA and the High Court was his complaint that the termination was made by a certain Mr. P.D. Gawile (DW.3), the respondent's Acting Director of Human Resources ("Ag. DHR"), who had no authority to do so and hence the dismissal was made unfairly.

In her decision, the learned High Court Judge (Aboud, J.) upheld the CMA's holding that the dismissal complained of was not made by a wrong authority. While acknowledging that by virtue of his office the appellant's disciplinary authority was the respondent's Board of Directors ("the Board") and that the Ag. DHR had not been delegated any disciplinary power by the Board, the learned Judge confirmed that the dismissal was made by the Board. For clarity, we wish to excerpt the relevant concluding part of that decision thus:

"the applicant [appellant herein] was orally informed of the decision of the Board by the Board itself. This fact was not disputed by the applicant

[appellant herein] which implies that he knew the intention and the final decision of the Board even before he received the letter to that effect authored by DW3. On the basis of the above discussion, I am of the view that the content of the letter of termination clearly reflects that the writer reported the decision of the Board to terminate the applicant [appellant herein] and he was not the one who decided to terminate the appellant I, therefore, see no reason to fault the CMA's decision."

The thrust of the present appeal is an attack on the above excerpted finding as is evident from the only ground of appeal raised by the appellant in his Memorandum of Appeal as hereunder:

"1. The Honourable Judge erred in law in holding that the termination of the contract of employment of the appellant, who was the Deputy Director General, done by the Acting Director for Human Resources without delegated authority was proper."

At the hearing before us, Messrs. Frank Mwalongo and Evod Mushi, both learned counsel, appeared for the appellant and respondent respectively.

Having adopted the written submissions and the authorities he had lodged in advance in support of the appeal, Mr. Mwalongo contends that

both the CMA and the High Court were concurrent that the Ag. DHR terminated the appellant from his employment and that he had no power to do so. However, he swiftly acknowledged that while the CMA ultimately took the view that the appellant suffered no injustice thereby, the High Court held that the said Ag. DHR's letter basically served to communicate in writing to the appellant his dismissal by the Board, which by then had already been communicated to him orally by the Board.

Citing sections 34 (1) and 38 of the Ports Act No. 17 of 2004 ("the Act") on appointment of the respondent's Director General and other employees of the respondent, Mr. Mwalongo argues that the disciplinary authority for the appellant, in his position at the material time as the Deputy Director General, was the Board. That even though the Board could have delegated its powers under section 8 (2) of the Act, it never passed over any such powers to the Ag. DHR. The learned counsel further claims that the letter written and signed by the Ag. DHR purporting to communicate to the appellant his dismissal from office by the Board was unauthentic and unlawful for flouting the mandatory provisions of Paragraph 9 (1), (2) and (3) of the First Schedule to the Act. Elaborating, he says that the said letter bore no signature of any authorized officials mentioned in the aforesaid provisions, namely, the Board Chairman, a

member of the Board, the Director General or some other authorized employee of the respondent. On that score, he argues, the Ag. DHR's letter was not an official communication from the respondent's Board. It was an unauthorized act that amounted to unfair termination of the appellant's employment.

To bolster his argument, the learned counsel cites a decision of the High Court, Labour Division at Dar es Salaam in **International Medical and Technological University v. Eliwangu Ngowi**, Revision No. 54 of 2008 (unreported). In that case, the Manager of Human Resources of the applicant University assumed the powers he did not have and proceeded to issue a letter purportedly terminating the respondent's employment. The University's Vice Chancellor being the Chief Executive Officer roundly scolded the manager but did not have the aforesaid letter withdrawn or cancelled. On that evidence, the High Court held that in law the termination, having been made by a wrong authority, was unfair. Accordingly, the learned counsel urged us to allow the appeal and award the compensation prayed for.

Conversely, Mr. Mushi stoutly argues that the appellant was dismissed by the Board and that the Ag. DHR's letter complained of constituted a formal notification to the appellant of the Board's decision,

which had already been communicated to him orally. Referring to the appellant's own testimony as shown at pages 664 and 665 of the record of appeal, Mr. Mushi says that the appellant acknowledged having appeared, once again, before the Board on 9th January, 2013 after his disciplinary hearing and that he was then informed orally of the dismissal by the Board. He was further notified that the said decision would be communicated to him in writing.

Mr. Mushi denies that the dismissal letter was unauthentic for non-compliance with Paragraph 9 of the First Schedule to the Act. He contends that Paragraph 9 is inapplicable and irrelevant; for it only governs execution of contracts, instruments or documents intended to bind the respondent. He claims further that the Board does not handle day-to-day management issues and that its decisions are invariably communicated by the Management.

Reacting to the decision in **International Medical and Technological University** (supra), Mr. Mushi submits that this decision is distinguishable in that in the instant case the letter of dismissal was authentic; that it was never denied by the respondent's Chief Executive Officer (the Director General) in his testimony before the CMA; and that the Ag. DHR did not assume any disciplinary powers over the appellant

that he did not have. In the premises, the learned counsel implored us to endorse the finding by the courts below that the termination of the appellant's employment was made by the proper authority; the Board and so, the appeal be dismissed.

Rejoining, Mr. Mwalongo maintains that the dismissal letter was unauthentic and illegal for non-compliance with mandatory terms of Paragraph 9.

We have dispassionately considered the opposing learned submissions and examined the record of appeal. The sticking point for our determination is whether the appellant's dismissal from office was made by the proper authority.

It was common ground before the CMA that the disciplinary authority for the appellant, in his former position as the Deputy Director General, was the Board and that at no point in time was such authority ever delegated to any other organ or official of the respondent. Moreover, it is uncontroverted that the disciplinary proceedings against appellant were conducted by the Board itself. As rightly argued by Mr. Mushi, the appellant acknowledged before the CMA to have appeared before the Board on 9th January, 2013 after his disciplinary hearing on 4th January, 2013 and that

he was then informed orally of his dismissal by the Board. He was further notified by the Board that the said decision would be communicated to him in writing, which was certainly in line with the respondent's peremptory obligation as the employer under Rule 13 (8) and (10) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007, G.N. No. 42 of 2007 proving as follows:

"(8) After the hearing, the employer shall communicate the decision taken, and preferably furnish the employee with written notification of the decision, together with brief reasons.

(9) [Omitted]

(10) Where employment is terminated, the employee shall be given the reason for termination and reminded of any rights to refer a dispute concerning the fairness of the termination under a collective agreement or to the Commission for Mediation and Arbitration under the Act."

As undertaken, the appellant was subsequently served with the letter of termination, dated 11th January, 2013 and signed by the Ag. DHR. The relevant parts thereof read in Swahili as hereunder:

"Kumb. Na. S/HR/DISC/93575

Tarehe: 11 Januari, 2013

Bw. Hamadi Koshuma

C/No: 93575

Naibu Mkurugenzi Mkuu (Huduma) – TPSS 3

KUACHISHWA KAZI

Tafadhali rejea Kikao cha Nidhamu baina yako na Bodi ya Wakurugenzi katika kikao chake cha faragha cha 48 (A) kilichofanyika katika Ukumbi wa Mikutano wa Pius Msekwa kwenye Ofisi Ndogo za Bunge Dar es Salaam, tarehe 4 na 9 Januari, 2013 ambapo ulipewa nafasi ya kujitetea dhidi ya tuhuma mbalimbali za kinidhamu zilizokuwa zinakukabili kwenye hati yako ya mashitaka.

Bodi baada ya kupitia ushahidi dhidi yako na utetezi na ushahidi wako iliridhika kuwa una hatia kwa makosa yafuatayo:

1. Kuthibitika kuwepo kwa matumizi mabaya ya madaraka kwa kutumia utaratibu ulioanzishwa kinyume cha sheria ya manunuzi katika kuingia zabuni bila ya kufuata utaratibu kwa kisingizio cha miradi mikubwa.
2. Kuthibitika kwa kukosa uaminifu kulikopindukia kwa kuipotosha Bodi kufikia uamuzi wa kuanzisha utaratibu wa manunuzi nje ya utaratibu wa sheria, kisha kutumia utaratibu huo kuingia zabuni bila kufuata utaratibu kwa kisingizio cha miradi mikubwa ambayo imekuwa haina tija zaidi ya matumizi mabaya ya fedha za umma.
3. Kuthibitika kuwepo kwa ufanisi duni kwa:
 - i) Ukiwa kama mjumbe wa Bodi ya Zabuni, ulishindwa kuijulisha Mamlaka ya Ruffa ya Manunuzi ya Umma (PPRA) kuhusu ukiukwaji wa Sheria ya Manunuzi kwa mujibu wa kifungu cha 31 kifungu kidogo cha 4 cha Sheria hiyo kwa mfano; kuingiwa kwa mkataba wa kibiashara na kampuni ya China Communications Construction Company (CCCC) bila kushirikisha Bodi ya Zabuni kinyume cha matakwa ya sheria ya manunuzi ya umma.
 - ii) Kushindwa kutoa ushauri wa kitaalam kwa Mkurugenzi Mkuu wa Mamlaka katika kudhibiti na uendeshaji wa Mamlaka.

4. Kuthibitika kuwepo kwa ukiukwaji wa sheria na taratibu kwa kukiuka taratibu za manunuzi ya umma kwa mfano; kuingiwa kwa mkataba na kampuni ya China Communications Constructins Company (CCCC) bila kushirikisha Bodi ya Zabuni kinyume na matakwa ya Sheria ya Manunuzi ya Umma.

Kwa makosa hayo Bodi imefikia uamuzi wa kukuachisha kazi kuanzia tarehe 9 Januari, 2013.

Hivyo utalipwa mafao yafuatayo: [Omitted]

Unatakiwa kukabidhi nyenzo/kifaa chochote ulichokabidhiwa kwa ufanisi wa kazi za Mamlaka ikiwa ni pamoja na kurejesha kitambulisho cha Mamlaka katika Ofisi ya Mkuu wa Ulinzi.

Ninakutakia kila la kheri.

P.D. Gawile

KAIMU MKURUGENZI WA UTUMISHI"

[Underlining added]

The above underlined text leaves no shred of doubt that the said letter notified the appellant of the Board's decision to dismiss him from office with effect from 9th January, 2013. Apart from stating that the dismissal was reached by the Board at the end of the disciplinary hearing conducted on 4th and 9th January, 2013, the said letter enumerates the offences which the appellant was charged with and convicted of and provides a synopsis of the evidence and findings against him. In this context, the respondent's attempt to impute the dismissal to the author of that letter (that is the Ag. DHR) as an act of unilateral and unlawful

assumption of disciplinary powers is, with respect, implausible and disingenuous. We thus uphold the concurrent finding by the courts below that it was not the Ag. DHR but the Board that terminated the appellant's employment with the respondent.

It was not lost on us that in furtherance of his main submission, Mr. Mwalongo also assailed the dismissal letter for being unauthentic and illegal, having not been signed by authorized officers contrary to the mandatory provisions of Paragraph 9 (1), (2) and (3) of the First Schedule to the Act. We are, with respect, unpersuaded by this submission. As rightly argued by Mr. Mushi, the provision cited by Mr. Mwalongo is not only inapplicable but also irrelevant to the instant matter. To demonstrate that view, we wish to examine the said provision, which we reproduce hereunder in full:

"9. – (1) The application of the official seal of the Authority shall be authenticated by two signatures, namely-

(a) the signature of the Chairman of the Board or some other member of the Board authorized by the Board in that behalf; and

(b) the signature of the Director General or some other employee of the Authority authorized by the

Board to act for that purpose in place of the Director General.

(2) Any instrument or contract which, if executed or entered into by a person other than a body corporate, would not be required to be under seal, may be executed or entered into on behalf of the Authority by the Director General or any other member of the Board if that member has previously been authorized, either specifically or generally by resolution of the Board, to execute or enter into that particular instrument or contract or that class of instruments or contracts.

(3) Every document purporting to be a document executed or issued by or on behalf of the Authority and to be-

(a) sealed with the official seal of the Authority authenticated in the manner provided by subparagraph (1); or

(b) signed by the Director General or by a member of the Board authorized in accordance with subparagraph (2) to act for that purpose,

shall be deemed to be so executed or issued until the contrary is proved."

We think there is no ambiguity or abstruseness in the above provision, and so we are compelled to read and interpret it literally. On a plain and ordinary meaning, the said provision unmistakably governs execution of instruments, contracts and documents between the respondent Authority, on the one hand, and other persons, be they natural or juristic, on the other. It lays down the law and procedure for authenticating such instruments, contracts and documents so as to assure or guarantee their bindingness on the respondent. It is our decided view that all internal correspondences including administrative communications such as the dismissal letter complained of are not contemplated within the tenour and spirit of that provision. Mr. Mushi correctly argued that the Board, being the supreme organ of the respondent, does not handle day-to-day management issues and that its decisions are invariably communicated by the Management as was the case with the appellant's termination from employment.

To extend the argument further, we wish to comment, albeit briefly, on Mr. Mwalongo's reliance on the High Court, Labour Division's decision in **International Medical and Technological University** (supra) for the proposition that a termination from employment by a wrong or improper authority amounts to unfair termination. Much as we approve the

statement of principle enunciated in that case, we are unconvinced that this decision is of any help to the appellant's cause. We think Mr. Mushi rightly distinguished it from the instant matter in that in the instant case the letter of dismissal was authentic and unblemished; that it was never denied by the respondent's Chief Executive Officer (the Director General) in his testimony before the CMA; and that, overall, there was no proof that the Ag. DHR usurped any disciplinary powers over the appellant. In conclusion, we hold the sole ground in this appeal unmerited.

That said and done, we dismiss the appeal as it is bereft of substance. This dispute being a labour matter, there shall be no order as to costs.

DATED at DAR ES SALAAM this 18th day of July, 2019

R. E. S. MZIRAY
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



S. J. Kainda
S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL