IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., FIKIRINI, J.A. And KIHWELO, J.A.)

CIVIL APPEAL NO. 26 OF 2021

JONATHAN ERNEST MGONGORO ..... APPELLANT

VERSUS

1. **JUDICIAL OFFICERS ETHICS COMMITTEE ..... 1ST RESPONDENT**
2. **JUDICIAL SERVICE COMMISSION ..... 2ND RESPONDENT**
3. **THE ATTORNEY GENERAL ..... 3RD RESPONDENT**

(Appeal from the decision of the High Court of Tanzania, at Dar es Salaam)

(Masoud, J.)

dated the 28th day of April, 2020
in
Miscellaneous Cause No. 28 OF 2019

.....

JUDGMENT OF THE COURT

29th October, 2021 & 21st March, 2022

MWARIJA, J.A.:

The appellant, Jonathan Ernest Mgongoro was an employee of the Judiciary of Tanzania. Until on 17/7/2019 when his employment was terminated, he was a Senior Resident Magistrate stationed at Kalambo District Court in Rukwa Region. He was terminated by the 2nd respondent, the Judicial Service Commission after the inquiry conducted by the 1st respondent, the Judicial Officers Ethics Committee following a complaint raised against him by the Director General of the Prevention and Combating of Corruption Bureau (PCCB).

In his letter Ref. No. PCCB/C/4/15/VOL.IX/46 of 14/3/2017, the Director General of the PCCB informed the then Ag. Chief Justice about the conduct of the appellant which indicated that he received bribes from two of the accused persons in Criminal Case No. 43 of 2016; Simon Baltazar Swai and Filbert Florence Kombe (the 1st and 3rd accused persons respectively). According to the letter, it was from the outcome of the case that the PCCB suspected that the appellant was involved in corrupt practices. The case was decided in favour of the 1st and 3rd accused persons while the 2nd accused person who was jointly charged with them was convicted. The PCCB carried out investigation and found that the appellant who presided over that case had on different dates, received, through his mobile phone's M-Pesa account No. 0764616013, TZS 810,000.00 from the 1st accused person's mobile phone No. 0759166186 and TZS 800,000.00 from the 3rd accused person's mobile phone No. 0752966388, the money which was suspected to be bribe.

On the direction of the 2nd respondent, vide a letter Ref. No. SAB/126/220/01/18 of 5/7/2017, the complaint was dealt with by the 1st respondent. It charged the appellant with two disciplinary counts under s. 35 (2) (a) (i) of the Judiciary Administration Act No. 4 of 2011 (the Act) and rule 1 of the Code of Conduct for Judicial Officers of Tanzania (the Judicial Code of Ethics), that is; misconduct incompatible with the

holding of a judicial office. The particulars of the two disciplinary offences were that; while the case which he was presiding over was pending in court, the appellant received from the 1st and 3rd accused persons the said amounts of TZS 810,000.00 and 800,000.00 respectively, the conduct which was likely to cause an impression that the money which was received by him from the two accused persons and later decided the case in their favour in the ruling dated 16/2/2017 and judgment delivered on 23/3/2017, was a bribe. It was contended that the said conduct is incompatible with the holding of a judicial office. The 1st count was in respect of the act of receiving money from the 3rd accused and 2nd count related to the money received from the 1st accused person.

In his defence, the appellant admitted that he received the amounts of TZS 810,000.00 and 800,000.00 from the 1st and 3rd accused persons respectively while they were, at the material time, standing charged before him in the said criminal case. The appellant did not also deny that he later on decided the case in favour of the two named accused persons. His defence was that the money was paid to him as a refund after the 1st and 3rd accused persons had breached two separate agreements entered between him and each of the said accused persons.

Having conducted inquiry, the 1st respondent was satisfied that the two disciplinary counts had been established against the appellant. It found that the appellant had breached the provisions of s. 35 (2) (a) (i) of the Act and rule 1 of the Judicial Code of Ethics. It consequently sent the report of its inquiry to the 2nd respondent for decision. At its meeting held on 3/7/2019, the 2nd respondent deliberated on the 1st respondent's inquiry report and upon being satisfied with the findings thereof, decided to terminate the appellant's employment. That decision was communicated to him vide a letter Ref. No. PCF. M.2101/55 of 17/7/2017.

The appellant was aggrieved by the decision of the 2nd respondent and thus decided to challenge it by way of judicial review. He filed an application in the High Court (Main Registry, at Dar es Salaam); Miscellaneous Civil Cause No. 28 of 2019 against the 1st and 2nd respondents as well as the Attorney General (the 3rd respondent). In the application, the appellant sought the following orders:

> *"1. Certiorari quashing the decision of the 2nd respondent (Judicial Service Commission) contained and communicated to the applicant through a letter with Ref. No. PCF M. 2101/55 dated 17th July, 2019 (Annexture marked 'E'*

collectively to the affidavit) terminating the applicant's employment as Resident Magistrate.

2. Costs of the application.

3. Any other or further order(s) which the Honourable court shall deem just to grant in favour of the applicant."

The application which was made by way of chamber summons under s. 17 (2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions Act, [Cap. 310 R.E. 2002, now R.E. 2019] and rules 8 (1) (a), (2), (3) and 15 (a) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Provisions and Fees) Rules, 2014 GN No. 324 of 2014 was supported by an affidavit sworn by the appellant. The grounds upon which the orders were sought are stated in narrative form as follows:

(i) *That, the applicant was not given opportunity to be heard and defend before his employment as a resident magistrate was terminated as required by Article 13 (6) (a) of the Constitution of the United Republic of Tanzania of 1977 Cap 2 RE 2002 and section 35 (2) (b) and (c) of the Judicial Administration Act, 2011 [Act No. 4 of 2011].*

(ii) *The complaint of bribe being of grave nature there was no inquiry conducted by the 2nd respondent as required by section 35 (2) (c) and 47 (2) of the Judicial Administration*

Act, 2011 [Act No. 4 of 2011] and the applicant was not served with a complaint in accordance with and as required by section 41 (1) & (2), read together with section 49 of the Judicial Administration Act, 2011 [Act No. 4 of 2011].

(iii) The 1st respondent received the complaint against the applicant and decided to inquire into it under section 47 (1) (a) and (b) of the Judicial Administration Act, 2011 [Act No. 4 of 2011] instead of forwarding it to the 2nd respondent under section 47 (1) (c) of the Judicial Administration Act, 2011 [Act No. 4 of 2011] to be dealt under section s. 35 (2) (c) and 47 (2) of the Judicial Administration Act, 2011 [Act No. 4 of 2011] as such the applicant was entitled to be notified of the decision and findings and upon request to be supplied with proceedings and decision of the 1st respondent before the 2nd respondent could act on them.

(iv) The 1st respondent referred its findings and decisions on the applicant's inquiry to the 2nd respondent without notifying the applicant of [the same] so that the applicant is made aware and for him to prepare to defend. The 2nd respondent did not hold inquiry instead it deliberated to terminate the employment of the applicant. The 2nd respondent did not avail the applicant and applicant is not aware of the materials upon which the 1st respondent based its decision to terminate the employment of the applicant.

(v) The Prevention and Combating of Corruption Bureau (PCCB) has statutory powers of investigation and interrogation of complaints and allegations of corruption under the Prevention

and Combating of Corruption Act, 2007. The applicant was not informed and interrogated by the PCCB before the complaints were submitted to the 1st respondent and/or to the 2nd respondent. So the complaints were referred to the Judicial Officers Ethics Committee and/or to the Judicial Service Commission for inquiry prematurely.

(vi) The disciplinary hearing was conducted on 29th November, 2017 in which an investigation officer from the PCCB testified and informed the 1st respondent that the prosecutors from PCCB reported that the applicant had been bribed by the accused in Criminal Case No. 43 of 2016 which was presided over by the applicant. The applicant denied allegations and the charges both in writing and orally before the Committee.

(vii) The prosecutors in Criminal Case No. 43 of 2016 who had reported and could produce adequate evidence of the alleged complaint of bribe did not testify before the 1st respondent and the prosecutors were not informers whose identity were to be withheld. The persons alleged to have bribed the applicant denied the allegation before the 1st respondent. The prosecutors were key and crucial witnesses which the body in the place of the 1st respondent and the 2nd respondent would have required to hear them (PCCB prosecutors) taking into account the grave, damaging and devastating nature of the complaint. No tribunal would have acted the way the 1st respondent and the 2nd respondent have acted and conducted in the present case against the applicant.

(viii) The 1st respondent and the 2nd respondent acted in bad faith, violated applicant's statutory and constitutional rights, breached all the procedures and disregarded all safeguards against abuse of the powers and procedures. Taking the seriousness, devastating and grave nature of the complaints and allegations no tribunal or body would have acted the way the 1st respondent and the 2nd respondent have acted and conducted in the present case against the applicant.

(ix) The 1st and 2nd respondents' action and acts have injured and continues to injure the applicant, deprive the applicant his constitutional and statutory rights, and the 1st and 2nd respondents have violated their constitutional and statutory obligation and duty".

Having heard the application, the learned High Court Judge (Masoud, J.) found that the appellant's complaint that he was wrongly terminated by the 2nd respondent on account of having been denied the right to be heard, lacked merit. According to the learned Judge, the appellant was afforded that opportunity by the 1st respondent. He found further that, by virtue of the provisions of s. 48 (c) of the Act, the 2nd respondent, who is vested with discretion to remit a complaint against a judicial officer to the 1st respondent, exercised that discretion and after it had received the complaint, the 1st respondent proceeded to conduct inquiry under s. 47 (1) (d) of the Act and thereafter, sent the report of

its findings to the former for its decision in terms of s. 29 (i) (d) of the Act.

The High Court did not therefore, find merit in the appellant's complaint that the 2nd respondent ought to have afforded him the opportunity of being heard before it decided to terminate his employment. On that finding the learned High Court Judge dismissed the application for want of merit.

The appellant was further aggrieved by the decision of the High Court hence this appeal which is predicated on three grounds, that:

> *"1. The High Court erred in law and fact when it held that the 2nd respondent was not required to conduct inquiry before terminating the appellant's employment and that the inquiry conducted by the 1st respondent was sufficient.*
>
> *2. The High Court erred in law and fact when it held that the appellant was afforded a hearing before termination of his employment by the 2nd respondent.*
>
> *3. The High Court erred in law and fact when it dismissed the application before it for lack of merit."*

In compliance with Rule 106 (1) of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules), on 1/3/2021 the appellant filed his written submission in support of the appeal and later on 15/10/2021, he filed a list of authorities. On the other hand, written submission in reply was filed by the respondents on 26/10/2021 in compliance with Rule 106 (7) of the Rules, followed by a list of authorities which was filed on 1/4/2021.

At the hearing of the appeal on 29/10/2021, Mr. Daimu Halfani, learned counsel appeared for the appellant while Ms. Angela Lushagara, learned Principal State Attorney who was being assisted by Mr. Stanley Mahenge, learned State Attorney, represented the respondents. Both Mr. Daimu and Ms. Lushagara adopted their respective written submissions and did not have any oral arguments to make with a view of giving clarification thereon in terms of Rule 106 (10) of the Rules.

Submitting in support of the 1st ground of appeal, in his written submission, Mr. Daimu started by arguing that the appellant was not informed that the 2nd respondent had delegated to the 1st respondent, its function of conducting inquiry into the complaint. In the circumstances, he argued, the appellant was not aware that the 1st respondent was acting under the powers delegated to it by the 2nd

respondent under s. 33 (2) of the Act. The learned counsel went on to challenge the holding by the High Court that the function of conducting inquiry into the complaint was not delegated to the 1st respondent but that such function was performed by it after the complaint had been remitted to it by the 2nd respondent in terms of s. 48 (d) of the Act. The learned counsel argued further that the delegation was invalid because, according to s. 33 (1) of the Act, the 2nd respondent may only delegate its functions in accordance with the regulations which, at the material time, had not been made.

Mr. Daimu challenged also the letter dated 5/6/2017 (the letter) which referred the complaint to the 1st respondent for it to conduct inquiry into it. According to the learned counsel, the letter which he considered to be a document upon which the 2nd respondent delegated the function of conducting inquiry against the appellant, was invalid. This, he said, is because it was signed on behalf of the Secretary of the 2nd respondent by an unauthorized person thus contravening the provisions of clause 6 of the First Schedule to the Act which requires that all orders, directions, notices or other instruments made or issued on behalf of the 2nd respondent must be signed by the Chief Justice, the Secretary or any other member of the 2nd respondent who has been authorized to do so by the Chief Justice.

The learned counsel raised yet another argument, that the appellant was not properly informed of the facts constituting a disciplinary breach under rules 1 and 2 of the Judicial Code of Ethics. According to his submission, this is because those rules were neither reproduced nor were the details of the breach explained to the appellant.

The appellant's counsel argued further, in the alternative that, even if it is to be found that the 2nd respondent's function of conducting inquiry was properly delegated to the 1st respondent, the scope of the delegated function was confined to conducting inquiry into the breach of s. 35 (2) (a) (i) of the Act and thus, the learned High Court Judge erred in failing to find that the 2nd respondent wrongly terminated the appellant's employment for having breached the provisions of s. 35 (2) (a) (iii) of the Act and rule 2 of the Judicial Code of Ethics while the appellant was not charged and found guilty of any disciplinary offence under those provisions. It was his further argument that, the learned High Court Judge erred in failing to find that the 2nd respondent had wrongly terminated the appellant's employment on the ground of breach of rule 2 of the Judicial Code of Ethics because it did so without affording him the right to be heard. Citing the case of **Mbeya Rukwa Autoparts and Transport Ltd. v. Jestina George Mwakyoma**

[2003] T.L.R 251, Mr. Daimu submitted that the decision of the High Court should be reversed.

The appellant's counsel also challenged the finding of the High Court contending that, from the nature of the complaint, the 2nd respondent should not have terminated the appellant's employment. He argued that, even if the appellant had breached rule 1 of the Judicial Code of Ethics by hearing the case which involved the persons having pecuniary relationship with him, the remedy on the part of the prosecution was to seek the appellant's recusal from continuing to preside over the case or appeal against his decision. The case of **Ealing London Borough Council v. The Audit Commission for Local Authorities & Another** [2005] EWHC 195 (Admin) was cited in support of that argument. The learned counsel went on to state that, since the PCCB did not charge the appellant with a criminal offence, the disciplinary proceedings before the 1st respondent ought to have merely observed the principle of being substantially and procedurally fair and the outcome should not have attracted termination of the appellant's employment.

On the basis of the foregoing arguments, Mr. Daimu submitted in the 3rd ground of appeal, that the High Court erred in dismissing the application. He prayed that the appeal be allowed.

In response to the submission of the learned counsel for the appellant, Ms. Lushagara made a brief but focused reply submission. She started by contending that, some of the issues which arise from the arguments of the appellant's counsel, were not canvassed in the nine grounds upon which the judicial review application was predicated. Thus relying on the case of **Elisa Moses Msaki v. Yahaya Ngateu Matee** [1990] T.L.R 90, the learned Principal State Attorney urged us to find that those arguments are untenable. Ms. Lushagara went on to counter the argument made by the appellant's counsel that the 1st respondent held inquiry into the complaint against the appellant under the powers delegated to it by the 2nd respondent. It was her submission that, the 1st respondent is vested with the function of investigating and holding inquiry into complaints raised against judicial officers.

On the contention that the 2nd respondent should have conducted inquiry into the complaint before it terminated the appellant's employment, Ms. Lushagara opposed that argument. According to the learned Principal State Attorney, holding of inquiry into complaints raised

against judicial officers is not the function of the 2nd respondent. She stressed that, the said respondent's function is to deal with complaints after receiving reports of inquiry conducted by the 1st respondent and later forward its findings to the former under s. 47 (1) (c) and (2) of the Act. She went on to argue that, the 2nd respondent was not required to conduct a second inquiry into the complaint but was instead, justified to act on the 1st respondent's report of inquiry and take action against the appellant.

On those arguments, the learned Principal State Attorney urged the Court to dismiss the appeal for want of merit.

Having duly considered the submissions of the learned counsel for the parties, we find it instructive to observe, at the outset, that both the 1st and 2nd grounds are based on the principle of the right to be heard, the elements of which are adequate notice, fair hearing and absence of bias. Although worded differently, the gravamen of the appellant's complaint in the two grounds above is that the 2nd respondent did not afford him the opportunity to be heard on the alleged breach found by the 1st respondent's to have been established, the finding which was acted upon by the 2nd respondent to terminate the appellant's employment. In both grounds, the appellant challenges the decision of

the learned High Court Judge contending; **first**, that the 2nd respondent was not required to conduct inquiry into the complaint and **secondly**, that the said respondent was justified to terminate the appellant's employment by acting on the 1st respondent's inquiry report.

It is true, as submitted by Ms. Lushagara that, in his written submission, the appellant's counsel has raised matters which were not canvassed in the High Court. These are matters relating to the validity or otherwise of the letter in which the 2nd respondent referred the complaint to the 1st respondent and the complaint that the appellant was not duly notified of the particulars of the disciplinary breach. The other matter is one concerning the propriety or otherwise of charging the appellant with the disciplinary offences for his act of presiding over a case involving the persons who had pecuniary relationship with him. It was submitted that the prosecution could have remedied the situation by seeking the appellant's recusal or appeal against his decision.

In the case of **Elisa Mosses Msaki** (supra) cited by Ms. Lushagara, the Court had this to say on the effect of raising before this court, matters which were not heard and decided by the lower court:

> *"The Court of Appeal will only look into matters which came up in the lower court and were decided; not on matters which were not*

considered nor decided by either the trial court or the High Court"

Guided by the above stated principle, we find that the three matters raised by the appellant's counsel are not worth consideration by the Court in this appeal.

Having said so, we now proceed to answer the issue whether or not the 2nd respondent ought to have afforded the appellant the opportunity to be heard before it terminated his employment. We find it apposite to begin with Mr. Daimu's argument that, in conducting inquiry into the complaint against the appellant, the 1st respondent exercised the function delegated to it by the 2nd respondent vide its letter dated 5/7/2017. As pointed out above, it was the learned counsel's submission that the learned High Court Judge erred in failing to find that such delegation was invalid because until the material time, the regulations stipulated under s. 33 (1) of the Act had not been made.

With respect to the learned counsel, that argument is, in our view, devoid of merit. We agree with Ms. Lushagara that the 1st respondent did not act under delegated function. Under s. 47 (1) (d) of the Act, the 1st respondent is vested with the function of inquiring into the complaints raised against judicial officers (other that Judges and the

Registrars of the Court of Appeal and the High Court). That provision states as follows:

> *"47- (1) The functions of the Judicial Officers Ethics Committee shall be to-*
> *(a) – (c) ....*
> *(d) inquire into the complaint."*

The 1st respondent did not therefore, require to be delegated the function of inquiring into the complaint for its proceedings and findings to be valid. As shown above, the complaint was not directly lodged with the 1st respondent. The persons from whom a complaint against a judicial officer may be received are specified under s. 48 of the Act which states that:

> *"48. A complaint against a judicial officer may be raised by-*
>
> *(a) the Judicial Officers Ethics Committee on its own motion or*
> *(b) any one of the complainants stipulated in section 40 (1) or*
> *(c)* ***may be remitted to it by the Commission."***
>
> [Emphasis added]

In this case, the complaint was remitted to the 1st respondent by the 2nd respondent for the former to conduct inquiry into it. After it had

conducted inquiry, the 1st respondent forwarded its findings to the 2nd respondent which under, Article 113 (4) of the Constitution read together with s. 135 of the Act, is vested with the power of terminating employment of judicial officers. In that regard, the learned High Court Judge was correct in holding; **first**, that the 1st respondent did not act under the function delegated to it by the 2nd respondent and **secondly**, that the 2nd respondent was justified to terminate the employment of the appellant by acting on the report of the inquiry held by the 1st respondent. Under s. 35 (2) (a) – (c) of the Act, the 2nd respondent is vested with the power of terminating a judicial officer if it is satisfied that:

> *"(a) a disciplinary charge has been made and proved on a balance of probability against such officer on any or all of the following grounds-*
>
> *(i) misconduct incompatible with the holding of judicial officer;*
>
> *(ii) gross negligence in the discharge of judicial duties;*
>
> *(iii) breach of the Code of Judicial Ethics; and*
>
> *(iv) bad reputation incompatible with the holding of judicial office;*
>
> *(b) such officer has had an opportunity to answer the charge under paragraph (a); and*
>
> *(c) an inquiry has been held into the charge."*

From the letter dated 17/9/2019, signed by 2nd respondent's Secretary, the said respondent was satisfied with the findings of the 1st respondent that the disciplinary charges had been proved against the appellant. He was thus informed that the 2nd respondent had, as a result, dismissed him from employment. As intimated above, the fact that after having been charged with the two disciplinary counts before the 1st respondent, the appellant was afforded the opportunity to answer the charges and later heard, was not disputed. In the circumstances, the findings of the learned High Court Judge on those grounds cannot be faulted.

The learned counsel has also submitted that, although the appellant was charged with disciplinary charges under s. 35 (2) (a) (i) of the Act and rule 1 of the Judicial Code of Ethics, it is shown in the 2nd respondent's letter that he was dismissed for having breached s. 35 (2) (a) (iii) of the Act and rules 1 and 2 of the Judicial Code of Ethics. He contended thus that, since from the said letter, the appellant's dismissal was also based on the breach of the provisions of rule 2 of the Judicial Code of Ethics, he was wrongly dismissed because he was neither charged nor heard on the allegation that he breached that rule.

It is a correct position that the appellant was not charged with a disciplinary offence relating to breach of rule 2 of the Judicial Code of Ethics. It is shown however, that the 2nd respondent had decided to dismiss him from employment after being satisfied by the findings of the 1st respondent that he had breached the provisions of s. 35 (2) (a) (iii) of the Act and rules 1 and 2 of the Judicial Code of Ethics.

In our considered view, the fact that the 2nd respondent's letter has in addition, referred to rule 2 of the Judicial Code of Ethics, the breach of which was not the subject of inquiry by the 1st respondent and s. 35 (2) (a) (iii) instead of s. 35 (2) (a) (ii) of the Act under which the appellant was charged, does not invalidate the 2nd respondent's decision to terminate the appellant's employment. The appellant was found guilty of having breached rule 1 of the Judicial Code of Ethics which is also a breach of s. 35 (2) (a) (iii) of the Act cited in the said letter as well as s. 35 (2) (a) (i) of the Act, that is; a misconduct incompatible with the holding of a judicial office. Under s. 35 (2) of the Act, each of the two breaches constitutes a disciplinary offence warranting termination of employment. The citation of rule 2 of the Judicial Code of Ethics in the 2nd respondent's letter and the omission to cite s. 35 (2) (a) (i) of the Act did not, in our view, have the effect of invalidating the appellant's termination from employment.

As found above, he was charged before the 1st respondent with two counts of misconduct incompatible with the holding of a judicial office, given the opportunity to answer the charges and later given the opportunity to be heard orally. It was on the basis of the findings made by the 1st respondent that the misconduct charged had been proved, and after having been satisfied with that finding, that the 2nd respondent decided to dismiss the appellant from employment.

On the basis of the foregoing reasons, we find that this appeal has been brought without sufficient reasons. In the event, the same is hereby dismissed in its entirety.

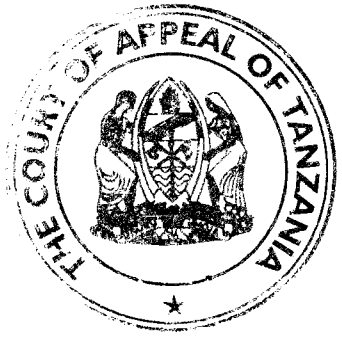
DATED at **DAR ES SALAAM** this 4th day of March, 2022.

A. G. MWARIJA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The judgment delivered this 21st day of March, 2022 in the presence of Mr. Daimu Halfani & Ms. Loveness Denis, learned counsel for the appellant and Mr. Stanley Mahenge, learned State Attorney for the respondent, is hereby certified as a true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL