

IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

(CORAM: MUGASHA, J.A., KITUSI, J.A., And RUMANYIKA, J.A.)

CIVIL APPEAL NO. 251 OF 2019

MAGRETH METHOD MAPUNDA APPELLANT

VERSUS

NATIONAL MUSEUMS OF TANZANIA RESPONDENT

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

(Mzuna, J.)

dated the 26th day of July, 2019

in

Revision No. 488 of 2018

JUDGMENT OF THE COURT

31st October, & 9th November, 2022

MUGASHA, J.A.:

This is an appeal against the decision of the High Court which allowed an application for revision and reversed the decision of the Commission for Mediation and Arbitration (the CMA).

The background underlying this appeal is briefly as follows: The appellant, Magreth Method Mapunda was employed by the respondent, the National Museum of Tanzania as a Curator History Grade II on 27/9/2005 until her termination on 30/4/2012. She was terminated on accusations of committing several disciplinary offences. This prompted the appellant to refer the matter to the CMA claiming that the

termination was procedurally and substantively unfair and prayed to be paid compensation from the date of termination or reinstatement without loss of remuneration. The respondent denied the allegations, contending that termination was justified because the appellant had breached the disciplinary code and processes and the respective procedures were complied with to the letter.

After a full trial, the arbitrator was satisfied that, the appellant was unfairly terminated both substantively and procedurally in the absence of valid grounds to warrant the termination; denial of the right to be heard; absence of proof on the violation of the procurement procedures warranting termination on account of the occurrence of the disciplinary offence within six (6) months of an earlier reprimand; the appellant's failure to utilise official communication procedures; and using abusive language to the Acting Director General of the respondent. As a result of the said unfair termination, the CMA awarded the appellant reinstatement to the employment without loss of remuneration from the date of termination to date of the award upon payment of a total sum of TZS. 59,187,800.00

Undaunted, the respondent successfully lodged an application to the High Court seeking to have the CMA decision revised. As earlier

stated, the CMA's award was reversed and it was confirmed that the termination was substantively and procedurally fair. According to the learned High Court Judge, upon being notified, the appellant entered appearance before the disciplinary committee presented her defence which upon consideration by the disciplinary committee it concluded that the appellant had committed a gross misconduct based on negligence and dishonesty. That apart, the learned High Court Judge concluded that, the termination was justified as the appellant had committed a disciplinary offence within six months of the reprimand for flouting the tender procedures.

Aggrieved, the appellant has preferred this appeal fronting four grounds of complaint namely: -

- 1. That, the learned High Court Judge erred in law by failing to realise that the appellant was terminated without being afforded the right to be heard.*
- 2. That, the learned High Court Judge erred in law by disregarding that there were no reasons for termination as well as procedure for termination were not followed as provided by law.*

3. That the High Court Judge erred in law and fact by admitting new evidence which was not tendered at the Commission for Mediation and Arbitration.

4. That, the High Court Judge erred in law and fact by holding that there was fair termination

The respective parties filed written submissions which were adopted at the hearing of the appeal. In appearance was advocate Sosten Mbedule for the appellant and Messrs. Daniel Nyakiha and Fortunatus Mwandu, learned State Attorneys for the respondent.

The appellant's counsel argued the 1st, 2nd, and 4th grounds together and the 3rd ground separately. In the first three grounds, the appellant's complaint is mainly that the termination was both procedurally and substantively unfair because she was not afforded a right to be heard prior to the termination; the accusations against her were not proved and the disciplinary procedure was not complied with as per the dictates of the law. It was submitted that, whereas no charge was preferred against the appellant in respect of the alleged disciplinary offences, yet what resulted into her termination was not transacted in the disciplinary committee and instead, it was the leadership committee of the respondent which was not properly constituted as the disciplinary committee. This was contended to have contravened Rule 13 (1), (2),

(3), (4), (5), (8) and 12 of the Employment and Labour Relations (Code of Good Practice) G.N. 42 of 2007 and thus, it was argued that, as the requisite procedures were not followed it cannot be safely vouched that the termination was valid.

The learned High Court Judge was as well faulted for admitting new evidence which was not earlier on presented before the CMA regarding the payment of the terminal dues to the appellant. This was argued to be irregular as the respondent had departed from what was earlier pleaded before the CMA. With this submission, Mr. Mbedule urged the Court to allow the appeal and confirm the decision of the CMA.

In the reply submissions, the respondent opposed the appeal arguing that the termination of the appellant was substantively and procedurally fair because: **one**, the disciplinary committee was properly constituted; **two**, the appellant was accorded a right to be heard regardless of the absence of the charge which is immaterial; and **three**, the investigation was conducted prior to the termination which was transacted in a meeting which was attended by the appellant and the representative of Workers' Organisation.

As to the additional evidence it was submitted that, the terminal dues were in fact paid to the appellant as per the evidence of PW1 who effected payment to the appellant.

Having considered the contending oral and written submissions of the parties and the record before us, they all boil down to one major issue namely, whether the appellant's termination was substantively and procedurally fair.

According to the provisions of section 37 of the Employment and Labour Relations Act [CAP 366 R.E. 2019] the termination of an employee from employment will be rendered invalid if the employer fails to substantiate the same and if the requisite procedures were not followed to the letter. The follow up question is whether the termination of the appellant from the employment was valid.

We begin with the charge which is a foundation of the disciplinary proceedings whereby an employee must be informed about the nature of the disciplinary offence and the contravened provision so as to enable the employee to prepare his/her defence prior to the hearing and determination of his/her fate. This is embraced under Rule 12 (1) of the Employment and Labour Relations Act (Code of Good Practice) G.N 42 of

2007 and it takes us to the letter at page 91 of the record of appeal authored by the respondent and addressed to the appellant:

" NMT/MHC/CPF.346/...

27 Machi, 2012

*Bi Magreth Method Mapunda,
Mhifadhi,
Makumbusho na Nyumba ya Utamaduni
S.L.P 511
Dar es Salaam*

*K.k Mkuu wa Idara ya Mikusanyo
Makumbusho na Nyumba ya Utamaduni
Dar es Salaam*

**YAH: KUTOA MAELEZO KUHUSU KUTOKABIDHI FUNGUO ZA
STOO WAKATI UKIWA LIKIZO**

Tarehe 23/03/2012 mbali ya kuwa ulikuwa likizo uliingia stoo za Sanaa na Historia kitendo kinachodhihirisha kuwa ukiwa likizo hukukabidhi funguo (3LC, 6LC na 7LC)

Ofisi inakutaka utoe maelezo yako kwamba hukukabidhi funguo tajwa huku ukijua uko likizo? Maelezo yako niyapate katika muda was siku mbili baada ya kupokea barua hii.

*Imesalniwa
Paul Msemwa
MKURUGENZI*

*Nakala: Afisa Utumishi na Utawaia Mwandamizi,
Makumbusho na Nyumba ya Utamaduni.
DAR-ES-SALAAM."*

In the said letter, the appellant was merely required to avail explanation as why she did not hand over the office keys while being aware that she was proceeding on leave the reason for accessing the

office on 23/3/2012 while she was on vacation. Nothing was mentioned about the disciplinary offence alleged to have been committed and the contravened provision. In this regard, we decline the respondent's argument that the absence of the charge was immaterial considering that, the right to be informed on the charges one faces is among the tenets of a fair trial constituting a fundamental and basic right under article 13 of the Constitution of the United Republic of Tanzania, 1977 (the Constitution).

For the sake of argument and without prejudice, assuming that a proper charge was in place, was the appellant availed opportunity to be heard? This takes us to page 89 of the record of appeal whereby in response to the purported charge, the appellant intimated about attending her father in law who was ill who later passed away and that, she had to access the office so as to collect the health insurance card. She as well, mentioned one Kweka as a person who saw her in the office. However, this was perceived by the respondent as appellant's admission and she was required to appear before the leadership Committee where her employment was terminated for reasons stated in the extract of the minutes of the respective meeting as reflected at page 85 of the record of appeal:

" Bi Magreth Mapunda

Wajumbe walijulishwa kuwa pamoja na mfanyakazi Bi. Magreth Mapunda kuwa katika uangalizi miezi sita 6 lakini ameonekana kuwa na makosa mengine ambayo yamekuwa yakijirudia kama

- 1. Kurudia makosa akiwa bado kwenye uangalizi wa karipio kali.*
- 2. Kuondoka na Funguo za Ofisi kwenda nazo likizo na kutumia ofisi kinyume na taratibu za kazi na hivyo kupelekea shughuli za ofisi kusimama hadi mikusanyo kuharibika.*

Pamoja na hayo Uongozi uliarifiwa kuwa mfanyakazi huyo ameshindwa kujirekebisha hasa historia inavyojionyesha kama:

- 1. Kutokutumia Lugha ya staha kwa Kaimu Mkurugenzi Mkuu.*
- 2. Kujihusisha na mambo ya rushwa akiwa Katibu wa Kamati ya manunuzi.*
- 3. Kuwa na tuhuma ya kupokea mishahara miwili na hivyo mafaili yake yapo **TAKUKURU**.*
- 4. Kutokuwa na mahusiano mazuri na viongozi wake.*

Hivyo basi, Kamati ya Uongozi imeamua kumuachisha kazi na alipwe stahili zake.

Baada ya maelezo hayo, Bi Magreth aiipewa nafasi ya kujieleza Bi Magreth alikana tuhuma zote zilizoелеkezwa kwake. Kwa upande wa RAAWU aiiridhika kuwa mfanyakazi ametenda makosa na siyo jukumu la RAAWU kutetea wazembe.

MAAMUZI

Wajumbe kwa kauli moja waiikubaliana Bi Magreth Mapunda aachiswhe kazi kwa hoja zilizotajwa hapo juu na hivyo basi Kamati ya Uongozi imeamua kumwachisha kazi na alipwe stahili zake."

The reproduced extract of unconfirmed minutes departs from what was brought to the attention of the appellant in the purported charge listing the reasons for termination as: **one**, committing a disciplinary offence within six months of the reprimand; **two**, proceeding on leave with office keys contrary to work procedures which resulted to a halt of the office operations and destruction of historical collections; **three**, using abusive language against the Director; **four**, engaging in corrupt practices as a secretary to the tender Board; **five**, receiving two salaries and her files being at the Prevention and Combating of Corruption Bureau (the PCCB); and **six**, lack of cordial relationship with her superiors.

Yet, what was deliberated by the leadership committee as grounds for termination appear to be at cross roads with purported charge and the termination letter at Page 22 of the record of appeal which notified the appellant on the reasons surrounding the termination as hereunder reproduced:

"Kumb. Na. NMT

30th April, 2012

*Bi. Magreth Mapunda,
Mhifadhi,
Makumbusho na Nyumba ya Utamaduni
S.L.P. 511,
DAR ES SALAAM*

*K.k: Mkurugenzi,
Makumbusho na Nyumba ya Utamaduni,*

YAH: KUACHISHWA KAZI

Kichwa cha habari hapo juu cha husika.

Rejea barua ya Uongozi ya tarehe 7 Desemba, 2011 ambapo ulipewa Karipio kali ambayo ilikutaka kutokutenda makossa ndani ya miezi sita (6) ambayo yangepelekea kuachishwa kazi.

*Kwa masikitiko makubwa ukiwa chini ya uangalizi, tarehe 27/4/2012 Uongozi ulibaini mambo mengi na hatimaye ulikuita kwenye kikao cha Kamati ya Uongozi kwa ajiji ya kutoa maelezo ya kwanini usichukuliwe hatua za kinidhamu kwa kosa la **UZEMBE KAZINI** kwa mujibu wa kifungu cha Ajira na mahusiano kazini ya mwaka 2004 (No. 6 ya 2004) Sheria namba 12 (3/d).*

Zifuatazo ni sababu, zilizopelekea Uongozi wa Makumbusho ya Taifa kukuachisha kazi:-

- 1. Wakati unakwenda likizo kwa uzembe na kwa makusudi ulishindwa kukabidhi funguo za stoo ya historia na hivyo kukwamisha baadhi ya shughuli zilizokuwa zinatakiwa kukamilika kipindi hicho.*
- 2. Kwa uzembe wako umeshindwa kurekodi mikusanyo ya historia wakati wa kupisha ujenzi na hivyo kusababisha taasisi kukosa kumbukumbu sahihi za mikusanyo ya kihistoria iliyopo.*
- 3. Kwa uzembe wako umeshindwa kuhakiki na kutoa idadi kamili ya mikusanyo wakati wa uhamishaji kupeleka kwenye stoo husika huku ukitambua fika kuwa wewe ni Mhifadhi husika wa shughuli hiyo.*
- 4. Kwa uzembe wako umeshindwa kutoa maelezo ni hatua gani umechukua kuhusu "Roles of Honour" (kumbukumbu ya Mashujaa wa Vita vya Dunia), mikusanyo ambayo bado*

umeitelekeza chumba 2LC bila kujali kuwa ni mikusanyo ya kihistoria.

- 5. Katika hali ya kuonyesha uzembe wako, imebainika kuwa mikusanyo iliyopo stoo ya Historia imerundikana vibaya hivyo kuonekana ni mingi kushinda ukubwa wa chumba na picha nyingi bado zimerundikana ovyo. Pamoja na kuelezwa kwa hayo yote kwa mdomo na barua ya tarehe 23/4/2012, hakuna jitihada zozote ulizozionyesha za kuondoa uzembe huo.*
- 6. Kwa Zaidi ya miezi nane (8) umeshindwa kukamilisha onyesho la historia, au kutoa ushirikiano katika kukamilisha zoezi hilo pamoja na Shirika kuajiri mtu wa mkataba katika kukusaidia kazi hiyo zoezi hilo halikuwepo kutokana na wewe kutolipa kipaumbele na ushirikiano unaostahili, kwa uzembe huo umesababishia Shirika hasara na kushindwa kufika malengo yake.*
- 7. Katika kikao cha Kamari ya Uongozi kilichokaa tarehe 27/4/2012 kilibaini tena kuwa kwa uzembe wako na sababu unazozijua wewe binafsi ukiwa likizo uliingia stoo za Sanaa na historia kitendo kinachodhihirisha kuwa ukiwa likizo hukukabidhi funguo (3LC, 6LC na 7LC). Kitendo cha kuingia sehemu nyeti kama ile hakitavumiliwa hata kidogo na Uongozi wa Shirika. Bila idhini ya kiongozi (intrusion) ni makosa makubwa na ni kinyume cha taratibu za sehemu yako ya kazi.*

Hivyo basi, kutokana na mtiririko wa uzembe ulioonyeshwa na hitimisho la tukio la tarehe 23/3/2012 kwa kutumia kifungu cha Sheria za Ajira na mahusiano kazini kupengeie 12 (3) d cha Uzembe kazini, Uongozi wa Makumbusho ya Taifa unakuachisha kazi kuanzia tarehe ya barua hii.

Imesainiwa

KAIMU MKURUGENZI MKUU

*Nakala: Mhasibu Mkuu,
Makumbusho ya Taifa,
S.L.P. 511,
DAR ES SALAAM*

*" Afisa Utumishi na Utawala Mkuu,
Makumbusho ya Taifa,
S.L.P. 511
DAR ES SALAAM*

*" Katibu,
RAAWU tawi la Makumbusho ya Taifa,
S.L.P. 511
DAR ES SALAAM"*

Briefly, the unofficial English rendering is to the effect that, the reasons for termination were: **One**, negligently and intentionally proceeding on leave without handing over store keys resulting to failure to accomplish the activities within specified period. **Two**, negligence and failure to record collections of history during construction which made the institution to loose proper historical collections; **three**, negligence and failure to verify proper account of the collections during transferring to the store; **four**, negligence on roles of honour, without regard to historical collections neglected in room 2LC; **five**, improper storage of historical collections; **six**, failure to conduct historical exhibition or cooperate in the respective accomplishment which is a manifestation of negligence; and **seven**, accessing the office while on vacation which proved that the appellant proceeded on leave with the office keys.

It is glaring that what is contained in the termination letter and the extract of minutes of the leadership committee on the reasons of termination, is not in the purported charge in which the appellant was initially notified about having proceeded on vacation with the office keys. Thus, besides what is contained in the purported charge, the appellant was not accorded a right to be heard on the nature of accusations as contained in the extract of the minutes of the leadership committee and the termination letter. In the circumstances, we agree with Mr. Mbedule that the appellant was condemned without being accorded a right to be heard which is a violation of the fundamental and basic right as enshrined under article 13 of the Constitution.

Furthermore, without prejudice, the employer did not substantiate the allegation on the office being inaccessible on account of the appellant having left with the office keys. We are fortified in that regard having considered the uncontested appellant's account that the two other keys were held by the Acting Director General and the Head of Department which tells that the office was indeed accessible. Thus, it cannot be safely vouched that the historical collections in the office were destroyed and there was no tangible proof in that regard. In a nutshell, in terms of section 110 (1) of the Evidence Act [CAP 6 R.E.2019], the respondent did not discharge the required burden to establish that the

appellant had committed a disciplinary offence. In the premises, we find the 1st, 2nd and 4th grounds of appeal merited.

Thus, in view of the above we are satisfied that, the termination was both substantively and procedurally unfair. Since it is settled that the termination was not valid, the respondent's reliance on the offence being committed within six months of the reprimand does not arise at any stretch of imagination.

In view of what we have endeavoured to discuss, we are satisfied that, apart from the termination being procedurally unfair, it was as well, substantively unfair which attracts a heavier penalty as opposed to procedural unfairness. See: **VENERANDA MARO AND TWO OTHERS VS ARUSHA INTERNATIONAL CONFERENCE CENTRE**, Civil Appeal No. 322 of 2020 and **PANGEA MINERALS LIMITED VS GWANDU MAJALI**, Civil Appeal No. 504 of 2020 (both unreported).

Finally, on account of both procedural and substantive unfairness, it is deserving that the appellant be paid compensation. On this, we are satisfied that reinstatement will serve no useful purpose considering that the appellant has been out of office for the past seven years. We thus order the appellant to be paid compensation for 18 months' salary and other lawful terminal dues which are yet to be paid. Since the

determination of the 1st, 2nd and 4th grounds suffice to dispose of the appeal, we shall not embark on the determination of the 3rd ground of appeal.

All said and done we allow the appeal to the extent stated and set aside the decision of the High Court.

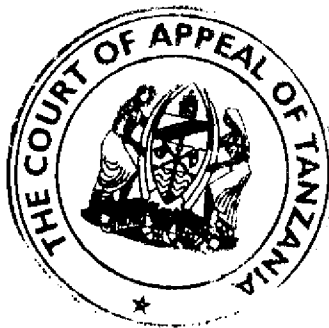
DATED at DAR ES SALAAM this 4th day of November, 2022.

S. E. A. MUGASHA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 9th November, 2022 in the presence of Mr. Sosten Mbedule, learned counsel for the Appellant and Mr. Daniel Nyakiha, learned State Attorney for the Respondent, is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL