IN THE COURT OF APPEAL OF TANZANIA

AT MBEYA

(CORAM: MWAMBEGELE, J.A., MWANDAMBO, J.A., And MASHAKA, J.A.)

CIVIL APPEAL NO. 126 OF 2019

JOSEPH KHENANI ..... APPELLANT

VERSUS

NKASI DISTRIC COUNCIL ..... RESPONDENT

[Appeal from the Judgment of the High Court of Tanzania (Labour Division), at Sumbawanga]

(Mrango, J.)

dated the 26th day of October, 2018
in
Consolidated Labour Revisions No. 1 & 2 of 2018

.....

JUDGMENT OF THE COURT

29th November, 2021 & 1st January, 2022

MWAMBEGELE, J.A.:

The appellant Joseph Khenani was employed by the respondent Nkasi District Council as a Watchman on 01.07.1996 and later; on 01.04.1999, he was promoted to the position of a Ward Executive Officer, a position he held until 15.09.2008 when he was terminated at his instance. His termination was confirmed by the President on 16.04.2015 who ordered that the respondent should pay the appellant terminal benefits, if any.

Following the President's order, the appellant claimed from the respondent terminal benefits of Tshs. 57,654,107/= through Exh. D7. On

09.09.2016 the respondent communicated to the appellant in writing telling him that his entitlements were calculated basing on Regulation 40 (1) of the Public Service Regulations, 2003 read together with Regulation 49 (1-5) of the Public Service Regulations, 2009. Based on those calculations, the appellant was told that he was entitled to be paid a total of Tshs. 4,943,056/= only.

The appellant was not happy with the respondent's calculations. Thus, on 21.09.2016 he filed a complaint before the Commission for Mediation and Arbitration (the CMA) claiming for terminal benefits that included repatriation costs, subsistence allowance and arrears in terms of salary and leave payment. The claims were partly denied by the respondent. As result, the matter went for hearing. After hearing of both parties, the CMA award was entered in favour of the appellant that he was entitled to be paid subsistence allowance in addition to the repatriation expenses from September, 2015 to February 2018 a total of 29 months at a rate of Tshs. 434,000/= per month totaling Tshs. 12,856,000/=. It was also the finding of the CMA that the appellant was entitled to severance pay under section 42 (1) of the Employment and Labour Relations Act, Cap. 366 of the Laws of Tanzania (henceforth the Employment and Labour

Relations Act). In total the respondent was ordered by the CMA to pay the appellant a sum of Tshs. 18,530,671/=.

Both parties were aggrieved by the CMA award thus, they preferred separate applications for revision before the High Court of Tanzania, at Sumbawanga. When the two applications were called on for hearing, they were consolidated and heard together. Consequently, the High Court decided in favour of the respondent to the extent that the CMA award was reversed save for the severance pay. The High Court had the view that, the appellant was not entitled to repatriation costs and the subsistence allowance on the ground that termination of his employment was done at his instance. However, the High Court found that, the appellant was entitled to be paid a severance pay as per section 42 (1) and (2) of the Employment and Labour Relations Act. The appellant's application was allowed to that extent. Undeterred, the appellant preferred the present appeal on several grounds of complaint which, for reasons that will come to light shortly, we shall not reproduce.

When the appeal was called on for hearing before us, the appellant had the services of Mr. Benedict Sahwi, learned advocate. Mr. Deodatus Nyoni, learned Principal State Attorney, Mr. Joseph Tibaijuka, Mr. Stanley

Mahenge and Mr. Julius Tinga, learned State Attorneys, joined forces to represent the respondent. Before we could go into the hearing of the appeal in earnest, there arose a point of law which, as our practice founded upon prudence has it, we thought it apposite to first address it before proceeding to hearing of the appeal on its merits. The point of law raised hinged on jurisdiction; whether the CMA had jurisdiction to entertain and hear the matter.

It was the submission of the learned Principal State Attorney that the matter was entertained and held by the CMA in blatant disregard of the provisions of section 32A of the Public Service Act, Cap. 298 of the Revised Edition, 2002 (now 2019, henceforth the Public Service Act). He argued that, having been dissatisfied by the calculations by the respondent of his terminal benefits, the appellant ought to have exhausted the mechanism under the Public Service Act in terms of section 32A of the Act. The learned Principal State Attorney submitted that the appellant ought to have exhausted the procedure up to President and then if he would still be aggrieved by the decision of the President, he would challenge the decision of the President by judicial review; not by going to the CMA. Mr. Nyoni, however, readily conceded that the provisions of section 32A of the Public Service Act brought in confusion ever since its inception in that its gist is

that the CMA may be resorted to even when the President has finally determined the matter. That was incorrect as the decision of the President is final, he argued. The learned Principal State Attorney urged us to use our good sense to remedy the situation by reading in words which were intended by Parliament when enacting the provision as was stated by the Court in **Goodluck Kyando v. Republic** [2006] TLR 363, at 372. The learned Principal State Attorney cited to us **Attorney General v. Lohay Akonaay and Joseph Lohay** [1995] T.L.R. 80, at 96 and **Sanai Murumbe and Another v. Muhere Chacha** [1990] T.L.R. 54 (CA) to buttress the point that the CMA had no jurisdiction to entertain and hear a matter which has been finally determined by the President. He also cited decisions of the High Court depicting the confusion referred to above. He contended that in the High Court, there are decisions which hold that the CMA has jurisdiction to determine labour disputes for public servants. Cases falling in this basket are **Asselli Shewally v. Muheza District Council**, Revision No. 6 of 2018, **Deogratias John Lyakwipa & Another v. Tanzania Zambia Railway Authority**, Revision No. 68 of 2019, **Jeremiah Mwandi v. Tanzania Posts Corporation**, Labour Revision No. 6 of 2019 and **The Board of Trustees of National Social Security Fund v. Ludovick Mrosso**, Revision No. 570 of 2018 (all

unreported). On the other hand, decisions of the High Court which hold a contrary view include **Bariadi Town Council v. Donald Ndaki**, Revision No. 3 of 2020 and **Alex Gabriel Kazungu & 2 Others v. TANESCO**, Revision No. 40 of 2020 (also unreported).

On the other hand, Mr. Sahwi strenuously resisted the contention that the CMA entertained the matter without jurisdiction. He argued that the provision under reference was not applicable to the case at hand in that section 32A was introduced by section 26 of the Written Laws (Miscellaneous Amendments) Act, 2016 - Act No. 13 of 2016 (hereinafter Act No. 13 of 2016) which was and published in the Government Gazette on 18.11.2016. The matter the subject of the appeal was filed in the CMA on 21.09.2016, well before the promulgation of Act No. 13 of 2016 came into force. Before the coming into force of section 32A of the Public Service Act, there was no such restriction as to exhaust the procedure under the Public Service Act, he argued. As such, he went on, the appellant could not be subjected to the law which was not in force when his cause of action accrued.

Mr. Sahwi submitted further that the foregoing notwithstanding, section 32A was not enacted to oust the jurisdiction of the CMA over

matters relating to public servants as provided for by section 2 (1) of the Employment and Labour Relations Act. He contended that after all, the appellant did not challenge the decision of the President in the CMA. What the President decided was that the appellant should be paid terminal benefits and the complaint in the CMA was with regard to the quantum of those terminal benefits. In the circumstances, he argued, the cases cited by the learned Principal State Attorney were not applicable to the present appeal.

Prompted, Mr. Sahwi was not sure if the CMA was an appellate authority on the amount to be paid to the appellant. Be that as it may, the learned counsel prayed that the Court should make a decision on this rather controversial issue and settle the position on the confusion obtaining in the High Court.

Rejoining, Mr. Nyoni submitted that section 32A of the Public Services Act enacts a rule of procedure which is applicable retrospectively. He cited our unreported decision in **Lala Wino v. Karatu District Council**, Civil Application No. 132/02 of 2018 to buttress this proposition. In the premises, he submitted, after the enactment of section 32A of the Public Service Act, the appellant ought to have withdrawn the matter in the CMA

and comply with section 32A of the Public Service Act. He added that section 25 (1) (d) of the Act provides that the decision of the President is final. The learned Principal State Attorney reiterated that the CMA had no jurisdiction to entertain and hear the matter. He thus implored us to engage section 4 (2) of the Appellate Jurisdiction to nullify the proceedings in the CMA and the High Court.

Having heard the opposing submissions of the trained minds for the parties to this appeal, we think the basic issue for our determination is whether the complaint on terminal benefits before the CMA was prematurely entertained in contravention of the provisions of section 32A of the Public Service Act. Put differently ...

We start our determination by stating the obvious; that vide Act No. 13 of 2016, the Public Service Act was amended by adding section 32A immediately after section 32. This new provision provided for a mandatory requirement to public servants to exhaust all remedies provided for under the Public Service Act before seeking remedies provided for in labour laws. For easy reference we take the liberty to reproduce the section hereunder:

> *"A public servant shall, prior to seeking remedies provided for in labour laws, exhaust all remedies as provided for under this Act."*

The issue on which the trained minds for the parties have locked horns, as already stated above, is whether the CMA erred in entertaining and hearing the complaint on terminal benefits before exhausting the procedure provided for by the Public Service Act. From the look of things, the provision does not seem to be ambiguous at all. However, as Mr. Nyoni rightly submitted, the section has brought about different interpretations by the High Court thereby bringing in two schools of thought.

We would have gone straight away into the determination of the nagging issue and address the confusion with a view to settling the dusk if it were not for Mr. Sahwi beig emphatic that the provision could not be applicable to the present case as the moment the matter the subject of this appeal was lodged in the CMA, it was not in place. Mr. Nyoni conceded that the provision came into force after the matter was already in the CMA but was quick to submit that the section was one of retrospective application as it was about procedural law and cited our decision in **Lala Wino** (supra) to support his argument. We pondered over this issue for some considerable time during our deliberations. Admittedly, the appellant lodged his complaint over the computations of his terminal benefits in the CMA on 21.09.2016 while Act No. 13 of 2016 which brought the

amendment into being came into force on 18.11.2016; the date of its publication. The issue which comes to the fore at this juncture is whether the amendment had a retrospective effect to cover the appellant as Mr. Nyoni would have us hold.

As good luck would have it, we, on several occasions, have discussed elsewhere on retrospective application of statutes. As such, there is no dearth of decisions on the point. Apart from **Lala Wino** (supra) cited to us by Mr. Nyoni, there are a lot more. They include **Freeman Aikaeli Mbowe & Another v. Alex O. Lema,** Civil Appeal No. 84 of 2001, **The Director of Public Prosecutions v. Jackson Sifael Mtares and 3 Others**, Criminal Appeal No. 2 of 2018, **Raymond Costa v. Mantrac Tanzania Limited**, Civil Application No. 42/08 of 2018, **Henry Bubinza (the administrator of the estate of the late Mathias Njile Bubinza v. Agricultural Inputs Trust Fund & 3 Others**, Civil Application No. 114/11 of 2019 (all unreported) and **Makorongo v. Consigilio** [2005] 1 EA 247. In the last case, for instance, we subscribed to the position taken by the erstwhile Court of Appeal of East Africa in **Municipality of Mombasa v. Nyali Limited** [1963] EA 371 that:

> *"Whether or not legislation operates retrospectively depends on the intention of the enacting body as*

manifested by legislation. In seeking to ascertain the intention behind the legislation the Courts are guided by certain rules of construction. One of these rules is that if the legislation affects substantive rights it will not be construed to have retrospective operation unless a clear intention to that effect is manifested; whereas if it affects procedure only, prima facie it operates retrospectively unless there is good reason to the contrary. But in the last resort it is the intention behind the legislation which has to be ascertained and a rule of construction is only one of the factors to which regard must be had in order to ascertain that intention."

We were also persuaded by the principle as laid down in the decision of the Privy Council in **Yew Bon Tew v. Kendaraan Bas Mara** [1983] 1 AC 553 in the following terms:

"Apart from the provisions of the interpretation statutes, there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used. A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new

obligation, or imposes a new duty, or attaches a new disability in regard to events already past. There is, however, said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed."

We followed this principle in **Makorongo** in all the cases cited above.

Flowing from the above, the question that we are called to consider and determine, we think, is whether the provisions of section 32A of the Public Service Act took away the vested right of the appellant to refer his complaint to the CMA which right he had at the time of referring his complaint to the CMA. We have already observed above that this right would be inhibited by a subsequent enactment if it so provides expressly or by necessary intendment of Parliament or if it is purely procedural.

In the case at hand, it is apparent that the appellant filed the complaint before the CMA when it was quite in order to do so without exhausting the remedies provided for in the Public Service Act. That was the law then. The requirement to exhaust all remedies under the Public

Service Act came later; when the matter the subject of this appeal was already in the CMA. Was the enactment meant to apply retrospectively? We have serious doubt, for, Parliament did not state so in clear terms. Was the requirement purely procedural? We equally have serious doubts. Having deliberated on the matter at some considerable length, we think to hold that the appellant ought to have withdrawn his matter before the CMA with a view to complying with section of section 32A of the Public Service will be too much an overstatement and will, in our considered view, leave justice crying. The appellant will certainly be prejudiced. We were confronted with an akin predicament in **Raymond Costa** (supra). In that case, we hesitated to hold that a procedural amendment to the law applied retrospective because that course of action would occasion injustice on the adversary party. We stated:

> *"In the case at hand, we are positive that if the principle stated above is applied, the respondent will certainly be prejudiced. In the premises, we find the present case as falling within the scope and purview of the phrase "unless there is good reason to the contrary" in the case of* ***Consigilio*** *(supra). That is to say, there exist in the present case good reason not to adhere to the retrospective*

application of the procedural amendment under consideration."

We are minded to take the same standpoint in this appeal. That is, we do find in the interest of justice to subject the appellant to the dictates of section 32A of the Public Service Act which was inexistent the time he filed his complaint. We therefore find merit in Mr. Sahwi's contention that the provision was not applicable to the appellant and hence the authorities cited by the respondent are not applicable as well. We thus hold that the CMA had jurisdiction to entertain and hear the matter filed by the appellant before it.

The foregoing discussion and verdict disposed of the preliminary points raised when the matter was called on for hearing. With this finding, we see no dire need to go into the determination of other arguments of the parties. Much as we agree with the learned advocate for the appellant and the learned Principal State Attorney for the respondent that the other issues they addressed needed serious attention of the Court, but given the finding, the discussion and determination of them will not only be a mere academic endeavour but also *obiter dicta*. That discussion and determination is better, and hereby, reserved for some other opportune moment.

In the final analysis, we find and hold that the CMA had jurisdiction to entertain and hear the matter the subject of this appeal. As this a rather old dispute, we direct the Registrar of the Court to fix the appeal for hearing as soon as practicable or in the next convenient sessions of the Court, whichever is earlier.

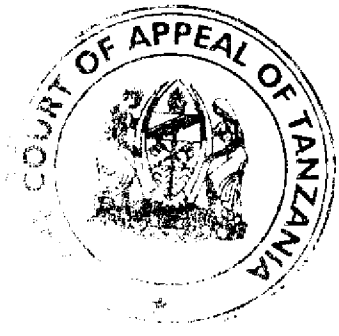
DATED at **DAR ES SALAAM** this 23rd day of February, 2022.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered this 1st day of March, 2022 in the presence of Mr. Benedict Sahwi, learned counsel for the Appellant and Mr. Joseph Tibaijuka, learned State Attorney for the respondent.



D. R. Lyimo
DEPUTY REGISTRAR
COURT OF APPEAL