IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., KOROSSO, J.A., And MAKUNGU, J.A.)

CIVIL APPEAL NO. 170 OF 2020

MICHAEL DAVID NUNGU ..... APPELLANT

VERSUS

INSTITUTE OF FINANCE MANAGEMENT ..... RESPONDENT

(Appeal from the Ruling and Order of the High Court of Tanzania at Dar es Salaam)

(Masoud, J.)

Dated the 23rd day of March, 2020

In

Miscellaneous Cause No. 16 of 2019

.....

JUDGMENT OF THE COURT

21st March & 12th September, 2023

KOROSSO, J.A.:

In this appeal, Michael David Nungu is challenging the dismissal of his application Misc. Cause No. 16 of 2019 by the High Court which sought judicial review of the decision of the Industrial Court in Revisional Application No. 14 of 2003. A brief background giving rise to the instant appeal as discerned from the record of the application is that the applicant was employed by the respondent as a Lecturer rising to the level of Senior Lecturer from 1/7/1988 to 6/4/1999 when he was summarily dismissed.

His dismissal was after an inquiry was conducted related to charges leveled against him based on claims of having malevolently failed an ADA II student of the respondent.

The charges leveled against the appellant were essentially: victimizing a student contrary to regulation 8.24 of the IFM Staff Regulations and Conditions of Service, 1997 (IFM Regulations); tempering with student's marks contrary to regulation 8.24 of the IFM Regulations; dishonesty contrary to regulation 8.8 of the IFM Regulations; and fraudulent procurement of employment with the respondent contrary to sections 17 and 18 of the Law of Contract Act (the LCA).

The inquiry of the charges ended with the appellant's dismissal from employment as stated above. Aggrieved by the dismissal, the appellant complained to the Labour Commissioner urging to be reinstated in his office. The Labour Commissioner on 8/1/2003 referred the complaint to the defunct Industrial Court of Tanzania by way of Inquiry No. 4 of 2003. The Industrial Court chaired by Hon. Mwaipopo J. (as he then was) deliberated on the complaint and on 11/7/2003 dismissed it. Dissatisfied, the appellant undertook a revisional recourse before the Industrial Court of Tanzania in Revision Application No. 14 of 2003. The hearing of the application for the application for revision was before a panel of Hon.

Mwipopo, J., as Chairman, and two Deputy Chairmen, Hon. Mipawa, and Hon. Sambo.

At the inception of the hearing of Revision No. 14 of 2003, the Industrial Court commenced by hearing and determining a preliminary objection raised by the appellant which implored the Chairman of the panel to disqualify himself from the conduct of the proceedings since he had presided and determined Inquiry No. 4 of 2003. The appellant argued that the presence of the Chairman in the proceedings flouted the provision of section 28(2) of the Act. Having heard the rival submissions on the same, the Industrial Court overruled the objection and proceeded to hear the application for revision on merit, only to also end up dismissed finding it to be unmerited. Undaunted, the appellant lodged an application for judicial review in the High Court of Tanzania challenging the decision pursuant to section 17(2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, rules 8(1)(a) and (b), 8(2) and 17 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees), Rules, GN No. 324 of 2014 (Judicial Review Rules).

In its determination of the application for judicial review in Misc. Civil Cause No. 16 of 2019, the High Court found that the grounds that

found the application prompted a review and evaluation of evidence, a task not envisaged in judicial reviews but in appeals. Furthermore, the High Court observed that there was another remedy available for the appellant to pursue, that of an appeal to the full bench of the High Court and not the undertaken process of judicial review. In the end, the High Court dismissed the application for lack of merit, hence the instant appeal.

The appeal has been filed by way of memorandum of appeal premised on five grounds of appeal as follows:

1. *The learned Judge erred in law when he misconstrued the mandatory provisions of sections 18(2) [formerly section 27(1A) of the Industrial Court of Tanzania Act, 1967, Cap 60, thereby upholding the same misconstruction of the said law given by the Industrial Court of Tanzania in Revision Application No. 14 of 2003.*
2. *The learned Judge erred in law when he failed/omitted to consider the violation of the rule against bias (Nemo Judex in Causa Sua) by the Industrial Court of Tanzania while he knew the Revision Application No. 14 of 2003 was chaired and heard by the same chairman who had first chaired and heard the original industrial dispute in Inquiry No. 1 of 2003.*

3. *The learned Judge erred in law in considering /treating the grounds stated in paragraphs 11(b), (c), (d), (e), (f), (g) and (h) in the appellant's statement had to be verified in the affidavit in order to be considered in determining whether the prerogative orders should in the circumstances issue.*
4. *The learned Judge erred in law in considering/treating the grounds in paragraphs 11(b), (c), (d), (e), (f), (g) and (h) in the appellant's statement as matters of evidence, rather than as apparent errors of law on the face of the record.*
5. *The learned Judge erred in law in holding that the grounds stated in paragraphs 11(b), (c), (d), (e), (f), (g) and (h) in the appellant's statement challenge the correctness/merits of the decisions of the Industrial Court in Revision Application No. 14 of 2003 and Inquiry No. 4 of 2003, while he knew or ought to know that the said paragraphs challenge the illegality and procedural impropriety of the said decisions.*

When the appeal came for hearing before us, Dr. Lucas Charles Kamanija, learned counsel entered appearance for the appellant whereas, the respondent had the services of Ms. Jacquiline Kinyasi, Ms. Narindwa Sekimanga and Mr. Rashid Mohamed, learned State Attorneys.

Before the hearing of the appeal started in earnest, Ms. Kinyasi sought and was granted leave to address the Court on a point of law. We directed the parties to submit both the preliminary objection raised and the substance of the appeal. The learned State Attorney informed the Court that in terms of Act No. 11 of 2003 and taking into account the grounds of appeal raised, the appeal is incompetent because it arises from incompetent proceedings of the High Court in Misc. Cause No. 16 of 2019, since the Court had no jurisdiction to entertain the judicial review application. She argued that upon being aggrieved by the decision of the Industrial Court in Revision Application No. 14 of 2003, the option to appeal against that decision was available for the appellant instead of the judicial review process he proceeded to pursue. According to the learned State Attorney, at the time the Industrial Court delivered its decision in Revision Application No. 4 of 2003 on 11/4/2005, there was in operation an amendment to the provisions of section 27 (1C) of the Act which limited an appeal remedy from the Industrial Court to the High Court, which came about by the Written Laws Miscellaneous Amendment Act, No. 11 of 2003.

Ms. Kinyasi argued further that with the amendment to the said provision, the avenue available for the aggrieved appellant was to appeal to a full bench of the High Court instead of the approach he took of

pursuing judicial review before a single judge of the High Court. According to the learned State Attorney the amendment came after the decisions of the High Court in **OTTU (on behalf of PP Mugasha) v. Attorney General and Another** [1997] T.L.R. 30.

Expounding further, Ms. Kinyasi contended that the import of the said amendment was extensively discussed in a High Court case of **OTTU (on behalf of Mwanaisha Juma and others) v. Ubungo Garments**, Civil Appeal No. 194 of 2005 (unreported) which observed that:

> *"When the Industrial Court of Tanzania Act was enacted in 1967, Parliament did not as well incorporate any provision for appeal from the decisions of the Industrial Court of Tanzania to the High Court of Tanzania. The provision which was incorporated for appeal from the Industrial Court of Tanzania to the High Court is S.27 which provided for appeals from the Industrial Court to the High Court.... Later, the legal provision in the ...(stated provision) was changed by the legislature to allow appeals from the decisions of the Industrial Court to the High Court by a full bench. The change was brought about through the amendment that was effected in the Industrial Court of Tanzania Act, No. 41 of 1967 by the Written Laws (Miscellaneous Amendments) Act No. 11 of 2003".*

The learned State Attorney concluded arguing that with the said amendments, the High Court lacked jurisdiction to entertain the application for judicial review since the appellant had another avenue available for him in justice discourse by way of appeal to a full bench of the High Court. She implored the Court to invoke its revisional powers in terms of section 4(3) of the Appellate Jurisdiction Act (the AJA) and nullify the proceedings of the single judge of the High Court in Misc. Civil Cause No. 16 of 2019.

Dr. Kamanija on his part adamantly objected to the preliminary point of objection raised contending that it was misconceived since what was before the single judge of the High Court was an application for judicial review against the illegalities, irregular procedure and the impropriety of the decision of the Industrial Court in Revision Application No. 14 of 2003. According to the learned counsel, the application for judicial review is a right under Article 13 of the Constitution of the United Republic of Tanzania, 1977 (the Constitution) since the said provision allows a person dissatisfied by any decision, to appeal or to pursue any other legal remedy, and judicial review, being one of those available remedies. According to him, this position has been deliberated in various decisions of the Court including **Francis Ndyanabo v. Attorney General** [2004]

T.L.R. 14, at page 33 where the Court insisted on the unconstitutionality of those laws denying or interfering with access to justice.

On the import of the amendment to section 27(1C) of the Act, the learned counsel for the appellant argued that at the time of the decision, section 27(1C) of the Industrial Court Act had not closed doors for judicial review processes for those aggrieved by decisions of the Industrial Court, and in any case, he argued, in the application of review, the appellant's challenge was on the propriety of the conduct of the Revision application and not its merits. He further argued that under the circumstances, the High Court's jurisdiction to entertain the judicial review was intact and that the High Court Judge was mandated to hear and quash the decision of the Industrial Court. He implored us to overrule the preliminary objection and proceed to hear and determine the appeal on merit.

Ms. Kinyasi's rejoinder was brief, reiterating her submission in chief on the preliminary objection point raised. However, she disputed the argument by the learned counsel for the appellant that what was sought in the judicial review was only to challenge the process of reaching at the impugned decision. She argued that this was not the case especially when the grounds founding the application for judicial review are considered. According to her, as discerned from the affidavit supporting the

application for judicial review, certainly, the appellant was aggrieved by matters related to the merits of the case.

Expounding further, the learned State Attorney contended that the amendment of section 27(1C) provided a way forward to challenge a decision of the Industrial Court where one is aggrieved. She argued that most of the grounds set forth in the judicial review application sought consideration and determination of rules of evidence, which were in essence, grounds for appeal and not for judicial review. She thus implored us to find the appeal not to have any legs to stand on since it arises from irregular and incompetent proceedings of the High Court and therefore grant the prayer sought earlier.

Having heard the submissions from the learned counsel for the appellant and the learned State Attorney, we find it pertinent to begin by presenting matters relevant to the issue under scrutiny and not contested. One, the complaint on unfair termination by the respondent from the appellant to the Labour Commissioner was referred to the Industrial Court and registered as Inquiry No. 4 of 2003. Two, under the Chairmanship of Hon. Mwipopo, the Industrial Court on 11/7/2003 dismissed the complaint and the appellant proceeded to file an application for Revision at the Industrial Court and registered as Revision Application No. 14 of 2003.

Three, Revision Application No. 14 of 2003 was set for hearing before a panel chaired by Hon. Mwipopo J. Four, the preliminary objection raised by the appellant for Hon. Mwipopo to disqualify himself from presiding the revisional application was overruled in a Ruling by the Industrial Court dated 22/6/2004. Hearing of the Revision Application No. 14 of 2003 proceeded and dismissed the application. Five, aggrieved by the decision of the Industrial Court, the appellant sought judicial review in Misc. Civil Cause No. 16 of 2019.

In Misc. Civil Cause No. 16 of 2019, the appellant sought; one, order of *certiorari* to remove and quash the decision of the Industrial Court in Revision Application No. 14 of 2003 of 11/4/2005. Two, order of *certiorari* to quash the decision of the Industrial Court in Inquiry No. 4 of 2003 dated 11/7/2003 and the decision of the Institute of Finance Management of 6/4/1999. Three, order of *mandamus* compelling and directing that the applicant is still in the employment of the respondent as Senior Lecturer and be paid all his entitlements as such; and four, costs and any other reliefs.

On the other hand, the learned State Attorney in the submission before us challenged the proceedings of the High Court in Misc. Civil Cause No. 16 of 2019 and maintained that the single judge of the High Court

lacked jurisdiction to entertain the same since the law provided the appellant with an avenue to appeal upon being aggrieved by the decision of the Industrial Court instead of the route of judicial review which he had undertaken. Her contention was vehemently disputed by the learned counsel for the appellant who argued that one, judicial review was open for the appellant under the law. Two, the relief sought in the judicial review did not relate to the merits of the case its purpose being to challenge the illegality and procedural impropriety of the decision of the Industrial Court in Inquiry No. 4 of 2003 and Revisional Application No. 14 of 2003. Three, at the time of filing for judicial review, it was the only available remedy for the appellant to challenge impugned decisions, since it was before the amendments to section 27(1C) of the Act.

As correctly stated by the learned counsel for the appellant, the power of judicial review is conferred to the High Court by virtue of Articles 13 together with Articles 107A (2) and 108 of the Constitution of the United Republic of Tanzania and further expounded under section 17(2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act. The issue before us is whether it was proper for the appellant to seek for judicial review in the circumstances of this case.

Indeed, prior to the 2003 amendments, there was a legal impediment for the aggrieved party to appeal from the Industrial Court to the High Court. Section 27(1C) of the Industrial Act provided that:

> *"... every award and decision of the Industrial Court shall be final and not liable to be challenged, reviewed, questioned or called in any court save* ***on the grounds of lack of jurisdiction*** *in which case the matter shall be heard and determined by a full bench of the High Court."* [emphasis added]

Therefore, at that time, the appeal lied to the High Court full bench only on matters related to jurisdiction. Suffice it to say, amendments to section 27 (1C) of the Act steered by the Written Laws (Miscellaneous Amendments) Act, No. 11 of 2003 are:

> *"The Act is amended in subsection (1C) and substituting for it the following:*
>
> *(1C) subject to the provisions of this section, every award and decision of the court shall be* ***called in question on any grounds*** *in which case the matter shall be heard and determined by a full bench of the High Court."* [emphasis added]

Certainly, the said amendment invariably widens the scope of the appeal recourse for those aggrieved by decisions of the Industrial Court like the appellant in the instant appeal. In addition, it is pertinent to

understand that at the time of filing the instant appeal, the above amendments to the Act were already in operation, therefore the avenue to appeal to the High Court for the appellant was open.

Regarding the contention that judicial review can be pursued at any time as a constitutional right and that what the appellant pursued in the judicial review did not go to the merits of the case and only addressed impropriety of the proceedings and determination of Inquiry No. 4 of 2003 and Revision Application No. 14 of 2004, we are of the view that the process of judicial review, though open for anyone feeling aggrieved, one has to properly consider pursuing the remedy especially where there are other available avenues for justice recourse, such as an appeal. We find it pertinent to reiterate what the Court observed in the case of **Attorney General v. Lohay Akonaay and Another** [1995] TLR 80 that:

> *"...courts would not normally entertain a matter for which a special forum has been established unless the aggrieved party can satisfy the court that no appropriate remedy is available in the special forum."*

In the instant appeal, being aggrieved by the decisions of the Industrial Court as stated above, the appellant failed to show us why an appeal which is an avenue provided for and a first instance remedy

available for him under section 27(1C) of the Act was not pursued first. Having considered the grounds for the judicial review application as found in the supporting affidavit thereof, we are not convinced that the appellant's dissatisfaction with the impugned decision did not somewhat also encompass the merits of the case. In the said affidavit, deponed by the appellant himself, we are of the view that paragraphs 5-14 address procedural irregularities in charging the appellant and the conduct of the inquiry by the Governing Council of the respondent; paragraphs 17-19 are averments on dissatisfaction with the inquiry in the appellant complaints by the Labour Commissioner; and paragraphs 22-24 addresses on impropriety of the conduct of proceedings in the Industrial Court. As rightly pointed out by the learned State Attorney we also find that the contents of the complaints supporting the application for judicial review are founded on the appellant's dismissal from employment by the respondent and thus, it cannot be said the judicial review invoked did not address the merits. We therefore find the arguments by the learned counsel for the appellant not to hold much weight.

All said, we firmly believe that pursuing the judicial review process where an appeal right in the same court was available was improper.

The anomaly vitiates the proceedings of the High Court in the judicial review.

In consequence, we are minded to invoke our revisional jurisdiction under the provisions of section 4 (2) of the AJA and nullify the proceedings and decision of the High Court in Misc. Civil Cause No. 16 of 2019.

The incompetent appeal arising therefrom before us is struck out. In the circumstances, having so decided, we need not consider the issues of contention raised in the memorandum of appeal. No order for costs.

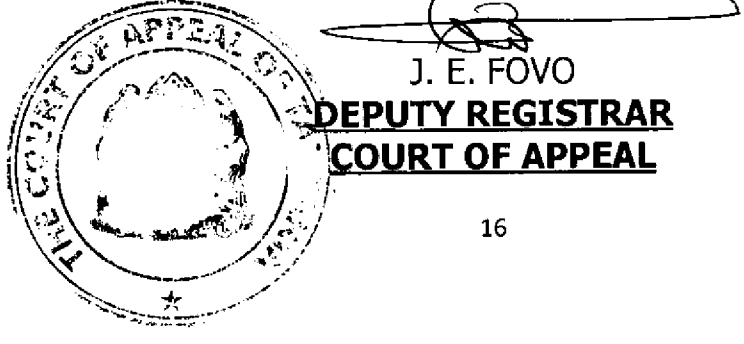
DATED at **DAR ES SALAAM** this 8th day of September, 2023.

S. A. LILA
JUSTICE OF APPEAL

W. B. KOROSSO
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The judgment delivered this 12th day of September, 2023 in the presence of the appellant in person and Ms. Jackline Kinyayi, learned State Attorney for the respondent is hereby certified as a true copy of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL