

IN THE HIGH COURT OF TANZANIA

AT ARUSHA

CIVIL CASE NO. 15 OF 2002

CHRISTINA Y. KIMALE PLAINTIFF

VERSUS

1. THE PRINCIPAL SECRETARY ...1ST DEFENDANT
MINISTRY OF FINANCE

2. THE ATTORNEY GENERAL].....2ND DEFENDANT

JUDGEMENT

R.SHEIKH, J.

The plaintiff a qualified lawyer was employed by the Ministry of Finance Planning and Economic affairs as a Finance Management Officer grade III with effect from 6th December 1986 according to a letter of appointment/placement which was tendered by her in evidence. She was posted at the Regional Customs and Sales Tax Office at Arusha. Later she was confirmed in her post with effect from 1/07/1989 as evidenced by the letter dated 21/12/1991 (exhibit P 2 dated 21/12/91). Subsequent thereto by letter with Reference No.

PC/24736/12 dated 26/01/1995 (Exhibit P3) the plaintiff was promoted to the position of Finance Management Officer, Grade I, with effect from 1/04/1995 the post she was holding at the material time. Her services were abruptly terminated by a letter with Ref TYC/C/115/34 dated 30/04/1996 from the Ministry of Finance (exhibit P4) notifying her that the President of the United Republic of Tanzania had retired her in the public interest with effect from 30/06/1996 in terms of article 36(2) of the Constitution of the United Republic of Tanzania 1995 edition and S.19 (3) of the Civil Service Act No. 16/1989 and the Civil Service Regulations and Government Standing Orders specified in the letter aforesaid. Subsequently she sought from the 1st defendant and was issued with a Certificate of Service (exhibit P5) according to which both her efficiency and general conduct were rated "good"

The plaintiff was aggrieved by the termination of her services and claims that the premature retirement is illegal and invalid as no reasons were given for the retirement in the public interest. The plaintiff claims that in any case her employment was not subject to termination by retirement in

the public interest by the President of the United Republic of Tanzania. She also avers that the letter of retirement was defamatory/ constitutes defamatory material entitling her to general damages.

The substantive reliefs sought in this suit are:-

1. A declaration that the purported retirement of the plaintiff in the public interest was unlawful, null and void, and that the plaintiff is entitled to reinstatement.
2. A declaration that the plaintiff has been in continuous employment with the 1st defendant and that she is entitled to payment of her emoluments; and
3. General damages.

The defendants (1) The Principal Secretary Ministry of Finance and (2) The Attorney General have denied the claim. In their joint written statement of defence the defendants contend that the termination of the plaintiff was proper, that the retirement of the plaintiff aforesaid was in pursuance of the reorganisation of the Tax Departments which resulted in the

creation of the Tanzania Revenue Authority (TRA) thereby making the plaintiff's services redundant as they were no longer needed and that the letter of retirement was not defamatory.

At the trial Mr. Makange learned advocate had appeared for the plaintiff while Mr. Mboya learned State Attorney appeared for the two defendants.

The following issues were agreed upon:-

1. Whether the retirement of the plaintiff was lawful.
2. Whether the President of the United Republic of Tanzania had the statutory power to retire the plaintiff in the public interest.
3. Was the plaintiff defamed by reason of the letter of retirement, annexure P4 to the plaint, and if so, to what extent is the plaintiff entitled to payment of general damages.
4. To what other relief's, if any, is the plaintiff entitled.

The following is the case for the plaintiff (PW1) as testified by her, she being the sole witness on the plaintiff's side. At the

material time she was employed by the 1st defendant, the Ministry of Finance in the Customs and Sales Tax Department and had risen to the post of Finance Management Officer, Grade I by virtue of a normal promotion. On 30/04/96 she received the letter written by the 1st defendant informing her that she had been retired in the public interest. The termination was effective from 30/06/1996. According to the letter (exhibit P4) the said retirement had been effected under/in terms of article 36(2) of the Constitution of the United Republic of Tanzania read together with sections 19(3) and of 26(a) of the Civil Service Act No 16 of 1989 and Government Standing Orders No 41 and F.31 of 1994 and Regulation No. 29(2) of the Civil Service Regulations of 1970. The plaintiff was paid her salary up to 30/06/96, and some terminal benefits including leave arrears and repatriation costs, but not all her terminal benefits. She claimed that she had lost her pension entitlements due to the early retirement.

The plaintiff claims that her employment was not subject to retirement by the President as her appointment to the post of Finance Management Officer was not made by the President

of the United Republic, that as a lawyer in the Civil Service she was not liable to be retired in the public interest, and that no reason was given for her retirement in the public interest. She told the court that the letter exhibit (P4) is defamatory and had injured and lowered her reputation among members of her profession and in society in general, ruined her employment record and seriously affected her chances of getting alternative employment. She claims that her retirement in the public interest was wrongful and unlawful as there were no allegations of any misconduct levelled against her and she was never given any reason for the retirement or any opportunity to be heard. Finally in October 1999 she was able to come to some arrangement with the Tanzania Legal Corporation to work as a lawyer on a case to case basis.

The defendants called one witness, one Juma Mohamed Nuru who is an establishment officer Grade I in the Ministry of Finance. Basically this witness did not dispute the fact that the plaintiff was employed by the 1st defendant as testified by the plaintiff. Nor that the plaintiff was retired in the public interest with effect from 30/04/96. He told the court that in 1996

there were major changes in the Ministry of Finance. The Tax and Revenue Departments were restructured leading to the abolition of the income tax, internal revenue and customs and excise departments. At the time the plaintiff was in the Customs and Excise Department at Arusha. The restructuring of the Tax Department and the creation of The Tanzania Revenue Authority (TRA) thereby had resulted in the termination of 606 public servants by retirement in the public interest. On 17/04/96 the 1st defendant had submitted a list of a total of 606 employees to the President of the United Republic with a proposal that they be retired in the public interest. A copy of the said proposal (dokezo sabili) was produced and admitted as exhibit D 2. According to exhibit D2 the integrity experience and honesty of the employees were factors to be taken into account in selecting employees to be retired in the public interest during the exercise. The President evidently consented to the aforesaid proposal. The President's consent was conveyed to the 1st defendant by a letter from the President's Office bearing Ref. No SHC/E.50/26/D/57 dated 22/04/1996 that was received in

response to the proposal and was produced as exhibit D3, bearing inter alia the following text “Rais amekubali ushauri uliotolewa katika aya 6(a) na (1) ya Wizara yako” The plaintiff was on the list of employees earmarked for retirement in the public interest. Consequent to the endorsement by the President the 1st defendant issued the letters of retirement to the persons selected for retirement the plaintiff being amongst them. The plaintiff was clearly retired in the public interest. The plaintiff’s employment record was good.

It is not disputed that the plaintiff was retired in the public interest.

The first issue that this court must address is whether the retirement of the plaintiff in the public interest was lawful.

Mr Makange learned counsel for the plaintiff has by written submission argued the first two issues together contending that the retirement aforesaid was unlawful and wrongful because one, no reasons were given by the President for the retirement of the plaintiff in the public interest and secondly, the plaintiff was not afforded an opportunity of

being heard prior to her retirement in the public interest. Citing the decision of the Court of Appeal of Tanzania in Civil Appeal No 64 C/F No 66 of 2002 between (1) the Permanent Secretary (Establishments) and (2) The Attorney General and Hilal Rashid & 4 others, Mr. Makange pressed for payment of general damages in the sum of shs 50,000,000/.

Countering these submissions Mr.Mboya learned State Attorney while not denying that the plaintiff's general performance and conduct were good and that the plaintiff was retired in the public interest, argued that the President is empowered under article 36 (1) and (2) of the Constitution, section 19(3) of the Civil Service Act No 16/1989 and the Civil Service Regulations 1979 to retire a civil servant in the public interest and as such the retirement of the plaintiff was not unlawful. Again while not denying that the plaintiff's general conduct and performance were good learned counsel argued that the plaintiff's retirement was not due to unsatisfactory services and as such not a disciplinary penalty. The learned State Attorney added that the reasons for the retirement are

“public interest” as demonstrated in the heading of the letter of retirement (exhibit P4).

It is not disputed that the President terminated the services of the plaintiff by “retirement in the public interest”. It is now settled that article 36(2) of the Constitution and S.19 (3) of Act No 16/1989 empower the President to “remove” or retire a civil servant in the public interest. Although the statutory provisions under which the retirement of the plaintiff was made do not directly require the President to give reasons for the decision to retire a person it is now settled from a number of judicial pronouncements that the principles of natural justice demand that a decision to retire a civil servant in the public interest being a decision which affects the rights of individuals must be supported by reasons. In the case of *James Gwagilo v. Attorney - General* (1994) T.L.R. after this issue was discussed extensively this court said inter alia that when removing a civil servant in the public interest the president must show the public interest being served, and held inter alia:- “When removing a civil servant in the public interest, the president is bound to give reasons indicating the

public interest to be served” to enable the civil servant to exercise his right of appeal or the right to judicial review as provided under article 13(6) (a) of the Constitution and also so as to reduce the possibility of arbitrariness and abuse of power in the decision making process. In Civil Case No 289 of 1998 (Dar es Salaam) Joseph Ntogwisangu and 2 Others versus The Principal Secretary Ministry of Finance and Attorney General, this court (Msumi J.K., as he then was) said “it is mandatory that the affected persons should be told the reasons for making the decision to retire them in the public interest (See also Saidi Juma v. Attorney General). In the instant case clearly the reasons to retire the plaintiff were set out in the recommendation made to the President by the 1st defendant (exhibit D2). However these reasons were evidently never communicated to the plaintiff in the letter of retirement or otherwise. Clearly this omission deprived the plaintiff of the right to be given the reasons for being retired in the public interest. I accordingly find that although the President of the United Republic had the statutory power to retire the plaintiff in the public interest, in the instant case the retirement of the

plaintiff's in the public interest was wrongful and unlawful as no reasons were given to the plaintiff indicating the public interest to be served. In his submission Mr Makange argued that as the plaintiff was unlawfully and wrongfully retired she is entitled to reinstatement and payment of all her emoluments from the date of the purported retirement in the public interest. However there is evidence that the plaintiff was given two month's notice and paid her terminal benefits. The letter of retirement exhibit P4 is dated 30/04/1996 while the effective date of the retirement is stated to be 30/06/1996. In the circumstances justice would be served if the retirement in the public interest is deemed to be merely termination of employment the same to be effective from the date of the retirement in the public interest. Hence I hold that the plaintiff is not entitled to reinstatement. Prayer No. (1) is accordingly hereby refused. Accordingly the claim for payment of the plaintiff's emoluments from the date of the retirement set out in prayer (ii) to the plaint must also fail. An employee is not entitled to be employed until he/she reaches the age of compulsory retirement as claimed by the plaintiff. In the case

of *Twikasyege Mwaigombe v. Mbeya Regional Trading Co. Ltd* (1988) T.L.R. 237, this court (Mroso, J, as he then was) stated:-

“There is sometimes a misconception that where a person is offered employment on permanent and pensionable terms, then that he must be employed for life and must be paid a pension”. This observation was endorsed by the Court of Appeal of Tanzania in Civil Appeal No 64 C/F No 66 of 2002 (Dar es Salaam) between the Permanent Secretary (Establishments) and Attorney General Versus Hilal Hamed RASHID and Others (unreported). The Court of Appeal said “a person may for various reasons not be eligible to get salaries and other benefits for the period up to the compulsory retirement age. An employee is not entitled to employment until his retirement.” The prayers for reinstatement and emoluments in prayers No (i) and (ii) are therefore refused.

Now the next question is whether the plaintiff was defamed by the contents of the letter of retirement, exhibit P4. Mr. Makange contended that: (i) there has been publicity relating to the retirement of the plaintiff, (ii) the retirement in the public interest carries a very bad stigma on the part of the

retiree, (iii) the retirement has had adverse effects on the Plaintiff's family as she is also the bread winner in her family, and (iv) the Plaintiff has lost her plum job where she had been elevated to the position of Finance Management Officer Grade I. Learned counsel, citing the case of the Permanent Secretary and another v. Hilal Hamed Rashid and others (supra) submitted that the plaintiff being a member of the legal fraternity was on the evidence defamed and hence entitled to compensatory general damages amounting to shs 50,000,000/=.

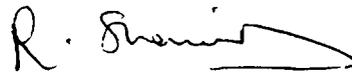
With all due respect I must disagree. There is no evidence to support the first two claims about the bad publicity and stigma and defamation. The plaintiff called no evidence on this point. (See the case of the Permanent Secretary v. Hilal Rashid (supra). The last considerations also in the instant case are not persuasive for the reasons given hereinbefore when considering prayers (i) and (ii), to the effect that the retirement of the plaintiff ought properly to be deemed to be termination of employment. Indeed the case of the Permanent Secretary v. Hilal Rashid (supra) in this aspect is distinguishable. Although the Court of Appeal of Tanzania

held that the respondents were unlawfully retired and consequently entitled to damages the facts in that case are distinguishable, in that the services of the plaintiffs were terminated abruptly and retroactively. In the instant case the plaintiff was evidently given two month's notice and paid all her accrued benefits including repatriation costs until the date of the commencement of her retirement. For the above reasons, I find that the plaintiff has failed to prove her claims which must be dismissed.

Lastly notwithstanding the foregoing I would like to say that I subscribe to the view held by Msumi J.K (as he then was) in the case of Joseph Ntongisanko (citing the book titled de Smith's Judicial Review of Administrative Action) regarding the court's discretion, in certain circumstances to decline to issue declaratory orders even if the cause of the application for such relief has been proved. The categories of circumstances which may justify the refusal of a declaration include situations where an award of a declaration would lead to serious public inconvenience, or would be contrary to public policy, or if compliance with its terms would be impracticable. In the

instant case the number of employees unlawfully retired in the public interest in the exercise being evidently quite high, being about 606 or more in all, the award of declaratory relief claimed, even had the plaintiff been entitled to such reliefs, may probably lead to numerous claims of a similar nature. Clearly this would be against the public police and practically impossible to implement.

For the above reasons the prayers for declaratory reliefs are refused with no order as to costs.



**R. SHEIKH
JUDGE**

22/01/2008

Judgement delivered this 14/02/2008 in the presence of Mrs. Kimale the plaintiff and Mr. Mboya learned State Attorney for both defendants, and Marim B/C.



**R.SHEIKH
JUDGE**

14/02/2008

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