IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

MISC. CIVIL CAUSE NO. 31 OF 2005

RICHARD J. MAKUSI.....1ST APPLICANT
EFRAIM ELISHA.....2ND APPLICANT
VERSUS
THE MINISTER FOR LABOUR, YOUTHS DEVELOPMENT AND SPORTS.....1ST RESPONDENT
THE ATTORNEY GENERAL .....2ND RESPONDENT

R U L I N G

MLAY, J.

This is an application made under Sections 2(2) of the Judicature and Application of Laws Ordinance Cap. 453, 17(2) and 17A of the Law Reform (Fatal accident and Miscellaneous Provisions Ordinance, act 55 of 1968 as amended by Act No. 27 of 1991 and Sections 68 (e) and 95 of the civil Procedure Code, 1966.

The applicants RICHARD J. MAKUSI and EPHRAIM ELISHA have sought against the Respondent, (1) THE MINISTER FOR LABOUR, YOUTH DEVELOPMENT AND STORES and (2) THE ATTORNEY GENERAL, the following orders:-

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i. *This Honourable court may be pleased to grant to the Applicants for orders of CERTIORARI and MANDAMUS in terms of the reliefs sought in the STATEMENT accompanying the AFFIDAVITS annexed to this Application.*
ii. *Costs be provided for*
iii. *Any other and further relief as thus Honourable Court may find just and equitable to grant.*

The application is supported by the affidavit of each applicant and accompanied by a joint STATEMENT of the applicants. The Respondents filed a counter-affidavit deponed to by SIA BEATRICE, a State attorney in the Attorney Generals Chambers. When the application came up for hearing the Applicants were represented by Mr. Luguwa, learned advocate Mr. Mbuya Learned State Attorney appeared for the Respondents and on application by the learned counsel, the Application was ordered to be disposed of by way of written submissions.

Before going inter the written submissions, the facts leading to this application as they can be gathered from the supporting affidavit, can be stated briefly. The two applicants who were employees of Tanzania Portland Cement Co. Ltd were summarily dismissed from employment on 13/5/95. On 18/7/95 both applicants were arrested by the Police and on 5/12/95 were charged in court with various offences under the Penal Code, including conspiracy to steal and stealing of Cement, the property of their employer. Both applicants were acquitted of the charges on 4/12/98. Meanwhile, both applicants had referred their summary dismissal to the conciliation Board and on 25/7/2000 the Board found the summary dismissal to be unlawful ("sio halali") and ordered their reinstatement (wanarudishwa kazini).

The employer referred the decision of the Board to the Minister for Labour, who in terms of Section 26(2) of the Security of Employment Ordinance Cap 574 [Section 27(2) of Cap 387 R.E 2002] set aside, the decision of the Board and ordered that the dismissal to have the effect of termination of employment. It is this decision of the Minister which is now being challenged by way of the prerogative orders of certiorari and mandamus.

In the written submissions, the Applicants advocate contended having quoted the particulars of the disciplinary offence as contained in form 10 (Anexture A], that after the summary dismissal, the applicants refered the matter to the Labour Conciliation Board, while the employer referred **"the very matter to the police and the applicant were arraigned at Ilala District Court** in Criminal Case No. 186 of 1995...." The Applicants counsels further contended that Section 29(1) of the Security of Employment Act 1964 requires that when there is any criminal proceeding ought to be suspended. The provisions were quoted in full but it is not necessary to reproduce them of as they are not necessary for the purpose of determining this application. The Applicants advocate further contended that the applicants **"were charged for the very loss of cement which was the course of their dismissal".** The Advocate contended that on 4/12/98 the applicants were found not guilty and the charges against them were dismissed. A copy from judgment has been annexed to the application. The Applicants advocate further contended that by the time the Applicants were acquitted " **the employer had already punished the applicants with summary dismissal, therefore there was a summary dismissal in one hand and an acquittal on the other**". The Applicants counsel submitted that " Our law does not allow the two to face a single person". They referred to section 29(2) of the Security of Employment Act, 1964, which states:-

> *"(2) where an employee has been acquitted of a criminal charge no proceedings for the imposition of penalties of summary dismissal or deduction from wages under the act shall be instituted against him for breach of the disciplinary code, which is substantially the same as the criminal charge he was acquitted, but nothing in this subsection shall preclude the institution of disciplinary proceedings or the imposition of a disciplinary penalty for other breach of the Disciplinary code arising out of his conduct in this matter".*

The Applicants advocate argued that, "**when there are two proceedings as it is in the case at hand, the disciplinary bodies and court normally quash the disciplinary penalties so as to allow the employee who is charged with the criminal charge to have the matter determined in a criminal trial only".** He quoted the following passage from the decision of the Court of Appeal of Tanzania, in BANK OF TANZANIA VS. MINISTER FOR LABOUR, THE ATTORNEY GENERAL, RAMADHANI J.N. HAMIS AND 6 OTHERS, CIVIL APPLICATION NO. 11 and 12 of 1997.

> *"The employees have been both summarily dismissed under the Security of Employment Act, 1964 and charged with a Criminal offence in criminal case No. 295/93 in the court of the Resident Magistrate Arusha. The Regional Labour Conciliation Board, upon the application of the employees, decided that the employees should be re-instated as they could not be summarily dismissed while there was a criminal case pending in court. BOT applied to the Minister for Labour without success and so applied for certiorari to quash the decision of the Minister for Labour in Misc. Civ. Application No. 256 of 1955 which was dismissed by MUNUO J on 18th July, 1996."*

The Applicants advocate did not quote the actual decision of the Court of Appeal on the decision of Munuo J in dismissing the Application for certiorari or supplied the text of the ruling of the Court of Appeal. Be that as is may, the Applicants advocate submitted that; **"When the same subject matter has been heard and determine by the criminal case and its decision is one of acquitted of the employee, to go on with the punishment of dismissal or deduction of wages by way of disciplinary penalty".** He argued that, "**the acquittal of that employee disproved the employer and made the employers decision to dismiss the employers unlawful. This**

is because our law makes it unlawful for an employee who is acquitted in face an employment penalty of dismissal". He contended that, "the **MINISTERS DECISION INFRINGES THE EVIDENCE IN THE CRIMINAL TRIAL"** The Applicants advocate further attended that, **"where there is a decision in a criminal trial that the Board is presided (sic) from making any finding which is inconsistent to the decision in criminal trial"** He quoted section 24(2)(b), presumably of the Security of Employment Act 1964), which states:-

> " *(b) may in the case of an employee who has been dismissed or suspending pending the decision of the Board, order his re-engagement or re-instatement, as the case may be, or direct that the dismissal or proposed dismissal shall take effect unless the employer re-engages or re-in states the employee, as a termination of employment otherwise than by dismissal, and may authorize the imposition of a lesser disciplinary penalty.*"

The learned advocate argued that his **"emphasis is on the principle that the board shall not question the findings of the court and that the board shall not question the findings of the court and that the board shall not make any other decision inconsistent with or repugnant to the court decision.**" He submitted that" **"The act of the Minister reversing an illegal punishment of dismissal and convicting the applicant with negligence we found this repugnant and inconsistent with the courts decision. In actual fact this is tantamount to questioning the finding of the court".** The Applicants advocate conceded that the Minister has powers to vary the decision of the Board and that the Minister can make all the orders which the Board can make, in accordance with sections 26(2) and 24 of the Security of Employment Act, 1964. He quoted the provisions of section 24(1)(a) which state:-

"(a) Shall decide whether summary dismissal, proposed summary dismissal or deduction from wages, as the case may be, is, having regard to the circumstances of the breach to any previous breaches of the Disciplinary code, justified and appropriate, and shall make such consequential orders and directions as are provided in this section, according to its assessment of the culpability and record of the employee".

The Applicants advocate submitted that the guiding principle requires that consequential orders should consider the assessment of the culpability and the record of the employee. He contended that, "**The minister did not throw any light as to the degree of culpability of the said employees and it did not show that the employees has (sic) a bad record. That bring the case..... the Minister ..... did not give reasons to holding that the applicants were negligent before punishing them by terminating their service**" He submitted that based on the above, **"the Minister did exercise into power with material irregularity".**

The Respondents in their submissions contended that **"The employer having discovered that this Applicant had neglected or failed to protect the propery or welfare of the company, on 28/2/1995 summarily dismissed the Applicants basing on section 21(2) of the Security of Employment Act Cap 574, being a disciplinary action "under Item "h" of the 2nd schedule"**. They contended that the Minister was guided by Section 28(2) of the said Act, which authorizes him to set aside the decision of the conciliation Board. They further contended that **"the Ministers decision contained as a reason the fact that though the Applicants were not convicted on the charges they faced, there were liable for the disciplinary misconducts which caused loss to the company."** They

quoted the contents of item "h" of the 2nd schedule to the security of Employment Act, which state:

> *"where he employees ... (h) neglects to carry out his duties so as to endanger..... property or neglects or fails to comply with instructions relating to safety or welfare faces summary dismissal."*

The Respondents submitted that the Applicants reliance on section 29(2) of the Act to challenge the decision of the Minister is wrong and unfounded in law in that it is inapplicable in the circumstances of this case. They argued that the Applicants were charged in court on conspiracy and theft and of the corresponding Disciplinary Code was to be preferred, it would be item "g" on "misappropriation". They submitted that the Minister made an order basing on item "h". They further submitted that section 24(1) of the Act will automatically not apply to the Applicants case because the Minister could not have decided otherwise as he was satisfied that the Applicants did not execute their duties properly and as the result, they were to be terminated. The Respondents contended that section 26(2) of the Act was sufficient to reach the just decision. They finally submitted that the Minister (1st Respondent) reached his decision after consulting the relevant law and followed proper procedure and to decision reached is justifiable in law. They further submitted that the offence which the applicants faced in court are different from the disciplinary misconduct the Applicants were charged in court on conspiracy and theft are of the corresponding Disciplinary Code was to be preferred, it would be item "g" on "misappropriation ". They submitted that the Minister made an order basing on item "(h)". They further submitted that section 24(1) of the Act will automatically not apply to the Applicants case because the Minister could not have decided otherwise as he was satisfied that the Applicants did not execute their duties properly and as the result, they were to be terminated. The Respondents contended that section 26(2) of the Act was sufficient to reach the just decision. They finally submitted that the Minister (1st Respondent) reached his decision after consulting the relevant law and followed proper procedure and

the decision reached is justifiable in law. They further submitted that the offences which the Applicant faced in court are different from the disciplinary misconduct.

This application has been brought to seek the order of certiorari to quash the decision of the Minister on grounds that the decision is unlawful. It has been argued that the decision of the Minister which varied the decision of the Labour Conciliation Board from reinstatement to termination of employment, is unlawful for a number of reasons. The first reason given by the Applicants, is that the law does not allow employees who have been acquitted of the criminal charge to be punished by imposition of a disciplinary penalty. Reliance was placed was placed on the provisions of Section 29(2) of the Security of Employment Act, 1964 and also on CIVIL APPLICATION NO. 11 AND 12 of 1997 decided by the Court of Appeal which has been cited and quoted earlier on in this judgment. The Respondents have argued that the provision of section 29(2) are in applicable to this case. We respectively agree with the Respondents submission that the section 29 is inapplicable .

Subsection (2) of section 29 provides that, **where an employee has been acquitted of a criminal charge** no proceedings for the imposition of penalties of summary dismissal..... shall be instituted against him for breach of the disciplinary code**, which is substantially the same as the criminal charge he was acquitted"** (emphasis mine). The documents filed by the applicants show that the Applicants were charged for breach of the disciplinary Code on 29/6/95 and were summarily dismissed on 13/7/95. In paragraph 5 of the Applicants Affidavit they have both stated that they were arrested by Police on 18/7/95 and sent to court and charged on 5/12/95. The Applicants were therefore charged in court nearly six months after they had been charged for breach of the disciplinary code. They were not charged for breach of the disciplinary code after they were acquitted of the criminal charges, which is the matter prohibited by section 29(2) of the Security of Employment Act, 1964. The case of BANK of TANZANIA Versus MINISTER FOR LABOUR AND

OTHERS, CIVIL APPLICATION NO. 11 AND 12 OF 1997 as quoted by the Applicants in their submissions, does not state what the Court of Appeal decided. What has been quoted as shown earlier in this judgment, does not advance the applicants case in any way as it is not stated that employees who had been dismissed prior to being charged criminally cannot be subsequently charged.

It has being further submitted that the Ministers decision is unlawful in that, **" it infringes the evidence in the Criminal trial"** or that it was **" repugnant and inconsistent" with the courts decision".** The Respondents have argued that the applicants were charged in court with the offices of conspiracy and theft, while the Ministers decision was based on item "h" of the 2ndschedule to the Security of Employment Act and therefore different from the criminal charges and even the corresponding offence under the disciplinary Code which falls under item "g" dealing with "appropriations".

Looking at the copy of the judgement it, cannot be disputed that the applicants were offence charged with the offence of conspiracy to commit theft, and theft. Again looking at Form No. 1 (Annexture A to the Application), the Applicants were charged for having contravened paragraph "h" of the Disciplinary Code which states as follows:-

> *"(h" neglects or fails to carry out his duties so as to endanger himself or others or property or neglects or fails to comply with any instructions relating to safety or welfare"*

While the criminal charges alleged conspiracy to commit theft and actual theft, the disciplinary charge alleged negligence. The Criminal charges are not the same or even substantially the same as the disciplinary charge. Section 24(2)(b) of the Security of employment Act (S.25(2)(b) Cap 387 R.E 2002) which has been relied upon by the applicants, prohibits the Board from making **"any other decision inconsistent with or repugnant to the courts decision " where a court has convicted an employee of criminal charge."** See Section 24(2)(b)(iii). In the Applicants case, the applicants had not been "convicted" but acquitted of the criminal charges and for that reason, the

provisions of section 24(2)(b) of the Security of employment Act, 1964 or section 25(2)(b) of Cap 387 RE 2002, are in applicable. The Ministers decision cannot therefore be assailed or quashed on grounds that the decision is **"inconsistent or repugnant to the decision of the court in"** the criminal trial.

The Ministers decision has also been questioned on grounds that the reasons no given were for the decision. The Respondents have argued that the Minister gave reasons in that he was satisfied that the applicants did not execute their duties properly. The Ministers decision as contained on Form No. 8 Anneture E" states as follows:

> "KWA MUJIBU WA KIFUNGU 26(2) CHA SHERIA YA USALAMA KAZINI NA. 62 YA 1964 SURA 574 NATENGUA UAMUZI WA BARAZA LA USULUHISHI MFANYAKAZI RICHARD MAKUSI AACHISHWE KAZI NA KULIPWA HAKI ZAKE ZOTE **KWA SABABU PAMOJA MAHAKAMA IMEMUACHIA HURU KWA TUHUMA YA WIZI BADO ANAWAJIKA KWA UZEMBE"**

The decision of the Minister in respect of the 2nd Applicant EPHRAHIM ELISHA, is worded similarly. On the face of the Ministers decision as quoted above, clearly the Minister gave a reason for his decision that although the applicants were acquitted of the criminal charged, they are held accountable for negligence. It is not within the realm of judicial review to question the merits of the Ministers decision. Section 24(1)(b) [S.25(1)(b) of Cap 387 R.E 2002] of the Security of Employment Act 1964 Cap 374 provides:

> *"24(1) Subject to the provisions of this part, where a reference is made to a Board under Head (b) of this part, the Board-*
>
> *(a).....*
>
> (b) *May in the case of an employee who has been dismissed or suspended pending the decision of the Board, order his re-engagement or reinstatement, as the case may be, or direct that the dismissal or proposed dismissal shall take effect (unless the*

employer re-engages or re-instates the employee) as termination of employment otherwise than by way of dismissal and may authorise the imposition of a lesser disciplinary penalty"

In his decision, the Minister purported to act under Section 26(2) of Cap 374 [and Section 27(2) Cap 387 R.E 2002] which provides that where a matter is referred to the Minister " the Minister **may exercise the powers conferred on a Board by Section 24".** (S.25 Cap 389 R.E 2002) As shown above, the Minister has powers to order "**termination of employment otherwise than by way of dismissal"** pursuant to Section 24(1)(b) of Cap 374 or 25(1)(b) of Cap 387 R.E 2002. The decision of the Minister cannot therefore be quashed by this court on grounds that he acted unlawfully, in varying the decision of the Conciliation Board in the manner he did in the Applicants Case.

For the reasons given above, this application has no merit and it is accordingly dismissed. This being an employment matter, I make no order as to costs.

J.I. Mlay

JUDGE

Delivered in the presence of the Applicants and Mr. Mkapa State Attorney, this 2nd day of June, 2009. Right of Appeal in explained.

J.I. Mlay

JUDGE

02/06/2009