IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

(CORAM: SHANGWA, MURUKE & TWAIB, JJJ.)

CIVIL APPEAL NO. 8 OF 2008

(from the decision and award of the Industrial Court of Tanzania dated 6th June 2008 in Consolidated Revisions Nos. 13A and 13B of 2007)

EMMANUEL KAYOGELA ..... APPELLANTS

VERSUS

TANZANIA REVENUE AUTHIRITY ..... RESPONDENT

JUDGMENT

F. Twaib, J.

The Appellant, EMMANUEL KAYOGELA, was employed in the service of the Ministry of Finance on 14th August 1970. In 1996, he was transferred to the Respondent, the TANZANIA REVENUE AUTHORITY. Sometime in early 2002, he was suspended pending disciplinary proceedings on suspicions of theft, misappropriation of, and failure to deposit into his employer's account, a sum of money amounting to Tshs. 2,203,377/= which he had collected from taxpayers in his capacity as Assistant Finance Management Officer and Cashier. The alleged offences were alleged to have taken place on 4th, 7th, 14th and 19th of April, 2001.

Following his suspension, disciplinary proceedings were instituted against him and, on 14th May 2002, TRA's Sub-Committee of the Management and Appointments Committee at TRA Headquarters decided that he be dismissed from employment. He was informed of this decision on 26th June 2002. His appeal to the Senior Sub-Committee of the Management Committee was unsuccessful.

Aggrieved, the appellant filed Trade Dispute Inquiry No. 15 of 2007, where he was partly successful. Mipawa, Chairman (as he then was) sitting in the Industrial Court of First Instance, agreed with the Respondent's finding that the respondent had himself admitted the offence with which he had charged and dismissed his defence.

However, Mipawa, Chairman, reduced his punishment from dismissal to termination for three reasons: One, that the appellant had worked for more than thirty years without committing a similar offence; two, that the offence was a common one among accountants and cashiers, and three, that the appellant had already paid back the moneys through deductions from his pension. The Chairman thus granted him reliefs in terms of his employment benefits. He also ordered that the appellant be paid subsistence allowance during the time he was following up on his case in Dar es Salaam from his station in Musoma.

Both parties were not fully satisfied with the decision of the Industrial Court of First Instance. Each of them moved the Full Bench of the Industrial Court to revise the decision. The Full Bench (Mwipopo J., Chairman, William and Mkasimongwa, Vice Chairpersons), dismissed both applications and affirmed the decision by Chairman Mipawa. Still aggrieved, the appellant has preferred the present appeal. His Memorandum of Appeal contains six grounds of appeal, but, in his written submissions, he abandoned the first ground of appeal and

remained with five. On the strength of these grounds, the appellant is asking this Court to reverse the decision of the Full Bench of the Industrial Court, award damages amounting to Shs. 50,000,000/=, order the respondent "*to recognize the appellant in employment and pay full wages and fringe benefits from the date of purported dismissal to the present day and the days to come until his employment is lawfully terminated*", costs, and any other reliefs the Court may deem just and convenient to grant.

The parties tackled all the remaining five grounds of appeal (ground Nos. 2 to 6) simultaneously, but we think is more convenient, give that they are clearly distinguishable, to determine them one after the other.

The second ground states:

2. *That the Industrial Court seriously erred in law and fact in not holding that the Mara Regional Disciplinary Committee sitting on 11.10.2001 imposed a penalty of a severe reprimand on the appellant and ordered that the money lost be recovered from the appellant's salary which was complied with and there was no appeal therefrom.*

In support of this ground, the appellant has submitted that according to TRA Staff Regulations, the Disciplinary Authority of an employee of his salary scale (TRA 1-4) is the Regional Disciplinary Committee. Since his work station was Musoma, the relevant authority was the Mara Regional Disciplinary Committee. The said Committee heard his case and, on 11th October 2001, it imposed upon him the punishment of a severe reprimand and ordered that the money lost be recovered by way of monthly deductions from his salary. He submitted that neither he nor the complainant, The Regional Manager for Mara Region, appealed against this decision.

Hence, it is the appellant's argument that in the absence of an appeal from the decision of the Regional Disciplinary Committee, the Sub-Committee of the Management Committee at TRA Head Office did not have jurisdiction to reverse the Regional Disciplinary Committee's decision.

The Respondent refutes these assertions on points of both fact and law. In his written submissions, counsel for the respondent argues that in cases such the present, the role of the Regional Disciplinary Committee is simply to institute disciplinary charges, make a preliminary hearing and send the records of such hearing together with their recommendations to the Management Committees at Headquarters, which are the ones responsible for appointments and disciplinary matters. Before taking any disciplinary action in the appellant's case, the Management Sub-Committee afforded him an opportunity to be heard.

The respondent further contends that the appellant's statement that the Regional Disciplinary Committee had imposed a severe reprimand on him is mere hearsay, as the Committee's decision was not, and could not, be communicated to him formally, since it was only a non-binding recommendation to the senior level (the Management Committee at Head Office). It has further been argued on behalf of the respondent that this procedure was proper, as was held in **Board of Internal Trade v Yonah Mapenzi** [1998] TLR 306. In that case, the Court of Appeal stated:

> *"It was proper for Tanga RTC, to which the respondent was posted by the appellant to institute disciplinary proceedings against the respondent, invite him to defend himself, deliberate on the matter and send the records of proceedings and recommendations to the appellant employer."*

The issue here is essentially one of evidence. The respondent asserts that the Regional Committee did not make any decision. Instead, it simply sent the record

of proceedings, together with its recommendations, to Head Office, where the appellant was again given an opportunity to defend himself. Indeed, we see no evidence at all adduced at the Industrial Court of First Instance or the Full Bench of that Court, which supports the appellant's contention that the Regional Committee had made a decision to reprimand him and ordered him to pay the money at issue. Though he did in fact pay, no evidence has been adduced to show that he was ordered by the Regional Disciplinary Committee to so pay. One would have expected a written decision to that effect. As correctly argued on behalf of the respondent, there was none.

Given this finding, the second ground of appeal cannot hold water. Due to lack of evidence, the Industrial Court was right in not holding that the Mara Regional Disciplinary Committee sitting on 11th October 2001, imposed a penalty of severe reprimand on the appellant and/or ordered that the money lost be recovered from the appellant's salary. It may very well be that the recovery of the moneys was a result of a decision to that effect, but that part of the appellant's grievance was correctly determined by the Industrial Court, given that the appellant himself had admitted that he had not remitted the moneys he collected on 4th, 7th, 14th and 19th April 2001. Without a formal decision having been made or communicated to him, the appellant's contention that there had been such a decision is a mere assumption.

On the foregoing findings, the second ground of appeal is dismissed.

Ground No. 3 runs thus:

3. That on the evidence supported by Staff Regulations that the appellant's Disciplinary Committee for Mara Region the Industrial Court should have held that it was wrong for the appellate Committee at the Headquarters of the Respondent to summarily dismiss the appellant, thus denying the appellant's

right to appeal to it against the decisions of the Regional Disciplinary Committee for Mara Region, if at all there was such a decision.

In support of this ground, the appellant's submissions are that there was no appeal by him or the complainant (the respondent's Mara Regional Manager) against the decision of the Mara Regional Disciplinary Committee. Given our findings on the second ground of appeal, to the effect that there was no decision made by the Regional Committee, it follows that there can be no appeal against a non-existent decision.

Besides, the TRA Code of Conduct of January 2000 (which was received in evidence by the industrial Court of First Instance) supports the respondent's position that the Regional Committee has no power to decide on a matter which may involve summary dismissal, which is reserved for the Human Rights and Administration Department at Headquarters. A Committee of the Department would act on the recommendation of the Disciplinary Committee and approval by the Commissioner General. The offence with which the appellant was charged falls under Schedule 3 to the TRA Code of Conduct, namely, "Very Serious Offences and Penalties", which attract the maximum penalty of summary dismissal [items (j), (zb) and (zc) of Schedule 3].

In other words, the Mara Regional Disciplinary Committee did not have jurisdiction to make any decision on the matter, but could make preliminary investigations and forward the record with its recommendations to the proper disciplinary authority at Head Office. It is common ground that it was at a meeting of the Sub-Committee of the Management Committee at TRA Headquarters that the decision to dismiss him was made. It is also common ground that the meeting was held on 14th May 2002 and the decision was made on the same day. The appellant was notified of this decision on 5th July 2002.

These findings lead us to the conclusion that the third ground of appeal lacks merit: The Management Sub-Committee at Headquarters was the body responsible for making the decision that was ultimately imposed on the appellant, namely, dismissal, and in doing so it did not deny the appellant any right to appeal to it against the decisions of the Regional Disciplinary Committee for Mara Region, as there was in fact no decision of the Regional Committee against which the appellant could have appealed. In any case, the appellant did exercise his right of appeal to the Senior Sub-Committee of the Management and Appointments Committee, which dismissed his appeal on 20th November 2002.

The fourth ground of appeal states:

4. *That on the undisputed evidence that the Principal Human Resources Manager Mr. Kaude participated in the Sub-Committee of the Management Appointments and disciplinary Committee which confirmed the dismissal of the Appellant, the Industrial Court should have held that the vice of bias affecting one of the members of the Committee spread to the whole group hence the whole proceedings are vitiated.*

We would wish to state, from the outset, that there is no "undisputed evidence" that Mr. Kaude, the Principal Human Resources Manager, participated in the Sub-Committee of the Management Appointments and Disciplinary Committee and later sat in the Appellate Committee, which confirmed the appellant's dismissal. The respondent contended that Mr. Kaude was a Principal Human Resources Officer in Charge of Industrial Relations. By virtue of that position, he was the coordinator of all disciplinary meetings, but he was not a member of any of the Committees and thus, the claim of bias cannot stand.

The appellant had first claimed that the same people who sat in the Management Committee of First Instance also sat in the Senior Management and Disciplinary

Committee which sat as the appellate body to consider the appellant's appeal. Mipawa, Chairman, did not, unfortunately, decide this question, and neither did the Full Bench. It has thus become necessary for us to consider and analyze the evidence. We have gone through the evidence available, but were unable to see any evidence to that effect. It is trite that one cannot introduce new evidence at the stage of appeal, unless special leave is granted upon satisfying the court or tribunal that legally recognized grounds exist for such an action. In the instant case, the appellant is simply alleging a point of fact that is not supported by the record. Suffice it to say that we can accord no weight to such submissions and would, consequently, dismiss this ground of appeal.

5. *That the Industrial Court seriously erred in law in not holding that the disciplinary penalty was imposed on the appellant after expiry of one month contrary to clause 26 of the respondent's Code of Conduct, 2000 on the "Time Limits and Validity of Penalties".*

In support of this ground, the appellant has relied on clause 26 of the TRA Code of Conduct, which deals with "Time Limits and Validity of Penalties". He submitted that clause 26:

> *"…provides that a valid penalty must be made within 30 days. In this case the Sub-Committee met on 14th May 2002 and made its decision on 5th July 2007 [presumably 2002]. Again the Appellate Committee which met on 23rd August 2002 made its decision on 20th November 2002."*

The appellant thus contends, on the authority of the Court of Appeal decision in **Kennedy Nyambe v Tanzania Zambia Railway Authority**, that the dismissal was unlawful as the Disciplinary Committees did not exercise their powers of dismissal in accordance with the clear and mandatory provisions of the Code.

At this juncture, it is necessary to point out certain crucial factors and facts in order to put the issues in their proper perspective. These are:

1. The decision to dismiss the appellant was not made by the Appellate Committee, but the Committee of first instance.

2. The Sub-Committee which met on 14th May 2002 and made its decision on the same day. The 5th of July 2002 ***was not the date on which the decision was made,*** but rather the date the decision was ***communicated*** to the appellant. The appellant himself says so in his submissions.

   On page 2 of his written submissions (second paragraph), the appellant states: "What I want to say here, my Lords, is that by the time the Sub-Committee of the Management Committee *was hearing the purported appeal and imposing the penalty of summary dismissal on 14/05/2002…*" [emphasis ours]. This was also the findings of the two levels of the industrial Court that heard the case. The Industrial Court of first instance observed (page 2 of its ruling):

   > *"Uamuzi wa Kufukuzwa kazi ulitolewa na Management Appointments and Disciplinary Sub-Committee ya Makao Makuu ya Dar es Salaam toka 14/5/2002 na ulimfikia Musoma tarehere 05/07/2002 kwa barua yenye Kumb. Na. TRA.PR.HQ 2/ES/230 ya tarehe 26/06/2002."*

   Then, on page 5 of the ruling, Mipawa, Chairman, reports the appellant's own statement as follows (clause (d)):

   > *"Katika shauri hili uamuzi ulitolewa Dar es Salaam 14/05/2002 na kupokelewa na mlalamikaji tarehe 5/07/2002 baada ya takriban siku 50 na zaidi kupita.*

The revisional panel stated (on page 5 of the typed ruling):

> *"[Bwana Myogela] alisimamishwa kazi, kutuhumiwa na tarehe 14/5/2001 the Management Appoitments and Disciplinary Committee ilitoa uamuzi afukuzwe kazi."*

It would appear that the appellant is under the mistaken belief that it is the date of his receipt of the notification of the Committee's decision which is the date of reckoning. With due respect, it is not. Instead, clause 26 talks of the date of the decision, not of receipt of the said decision. It states: *"…The following schedule summaries [sic] the time limits by which decisions pertaining to an offence should be reached…"* It is thus clear that the clause provides for the time within which a decision to dismiss an employee must be made (which is 30 days), and not when it should be communicated to the employee.

Hence, the date of reckoning for the purposes of clause 26 in this case is 14th May 2002 (the same day the Committee met and made its decision). It is not correct to say that the decision was ***made*** on 5th July 2002 when the appellant received the letter of notification.

It is therefore our finding that ground 5 of appeal is devoid of merit and it is dismissed.

Ground No. 6 is a general one, and could only have succeeded if the other grounds (or some or any of them) succeeded. It states:

6. That serious injustice has been caused to the appellant.

Since all the grounds of appeal have not succeeded due to want of merits, it cannot be said that any injustice, let alone serious injustice, has been occasioned to the appellant. Consequently, this last ground of appeal is likewise dismissed.

In the result, the appeal is dismissed in its entirety. This being an employment matter, we would make no order as to costs.

DATED at Dar es Salaam this 19th day of April, 2016.

A. SHANGWA

JUDGE

Z.G. MURUKE

JUDGE

F.A. TWAIB

JUDGE

I certify that this is a true copy of the original.

P.R. KAHYOZA

DEPUTY REGISTRAR