IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

IN THE DISTRICT REGISTRY OF SHINYANGA

AT SHINYANGA

LABOUR REVISION NO.40 OF 2020

1.ALEX GABRIEL KAZUNGU
2.MUKOI FREDRICK MUKOI ..... **APPLICANTS**
3.MARTIN SIMON

VERSUS

TANZANIA ELECTRIC SUPPLY COMPANY LTD.....RESPONDENT

(Revision from decision of the Commission for Mediation and Arbitration(CMA) Shinyanga)

(Kiwala-Arbitrator)

Dated the 21st of April, 2020

In

Consolidated Labour Dispute No. CMA/SHY/142&123/2018

.....

RULING

8thApril&25thJune, 2021

MDEMU, J.:

The Respondent Tanzania Electric Supply Company Limited (TANESCO) employed the three Applicants on divers dates working in Shinyanga and Simiyu Office respectively. Sometimes in April, 2018, the Respondent terminated the three Applicants from service for want of form four certificates.

They then filed a labour dispute with the Commission for Mediation and Arbitration (CMA) Shinyanga which got struck out on 21st of April 2020 on what the CMA thought to be premature. The reason was that, as the Applicants were public servants, they would have exhausted remedies provided for under the Public Service Act, Cap. 298 before making reference to the CMA. The Applicants were not happy with the decision of CMA hence this application for revision on one ground that:

> *The arbitrator erred in law and facts by ruling that, the Applicants falls under the Public Servants and therefore they are binded by the Public Service Act which requires exhaustion of internal remedies before filing the matter to CMA*

The application made under the provisions of sections 91 and 94 of the Employment and Labour Relations Act, No.6/2004 as amended by the Written Laws (Miscellaneous Amendment) Act, No.3/2010 and Rules 24 and 28 of the Labour Court Rules, 2007, is supported by an affidavit of one Alhaji A. Majogoro affirmed on 8th of November, 2020.

On 8th of April, 2021, Mr. Alihaji Majogoro and Ms. Juliana William, both learned Advocates for the Applicants and the Respondent respectively

appeared before me arguing the application. In support of the application, Mr. Majogoro first asked me to adopt his affidavit to form part of his submissions. After stating on the background of the matter, Mr. Majogoro raised one issue calling for determination of this court. It is whether employees of TANESCO are public servants within the meaning of the Public Service Act.

In this, he conceded that, though TANESCO is a public company, not all its employees are regulated by the Public Service Act. He thought in this that, since TANESCO is a corporate body, and as the employment contracts between TANESCO and the Applicants were executed by the Managing Director, it means the said Managing Director has the right to hire and fire. On this he said, none of the Applicants is subjected to Local or Central Government authorities in discharge of their duties as even their disciplinary machinery are within the company. He cited the case of **Salehe Komba and Revocatus Rukonge vs. Tanzania Posts Corporation, Revision No. 12 of 2018** (unreported) which in his view, is relevant to the instant labour dispute because both TPC and TANESCO are parastatal organizations whose employees are not regulated by the Public Service Act.

He added that, employees who are required to exhaust local remedies are those whose disciplinary authority is prescribed under the provisions of

section 25 of the Public Service Act and Regulation 60 of the Public Service Regulations. The remedies to be complied are under the provisions of section 32A of the Public Service Act as amended by Act No.3 of 2016. He concluded that, there is no disciplinary authority under that section designated to deal with the Applicants herein. He thus urged me to allow the application and remit this labour dispute to CMA to be determined on merits.

In reply. Ms. Juliana William conceded that, the Applicants were employees of the Respondents and got terminated from service by the latter for want of form four certificate. She however observed that, the Applicants were public servants because TANESCO, though is a corporate sole, is owned 100% by the Government. She cited the provisions of section 3 of the Public Service Act insisting that, Applicants are public servants as they work in public service office thus rendering service on behalf of the Government.

On that account, the leaned Advocate referred to the provisions of section 32A of the Public Service Act as amended by Act No.3 of 2016 that, the Applicants had to exhaust available local remedies in the Public service Act before resorting to labour laws. Her view was that, there is no specific law governing TANESCO empowering it the right to hire and fire other that the Public Service Act. She thus distinguished the case of **Salehe Komba and**

Revocatus Rukonge vs. Tanzania Posts Corporation (supra) because TPC has her own legislation and infact, that was the basis of that decision.

Essentially, she contradicted the Applicants' counsel position that, the disciplinary machinery of TANESCO employees are within and to her, it all depends on the tittle because under section 25(2) of the Public Service Act, Managing Director of TANESCO falls under the head of Independent Department of Government. She also commented that in terms of Act No. 24 of 2015 which amended labour laws by adding section 34A to the Public Service Act such that, for any inconsistencies, the Public Service Act will prevail.

She concluded by citing the case of **Bariadi Town Council vs. Donald Ndaki, Application No. 3 of 2020** (unreported) and **Board of Trustees of Public Service Pension Fund vs Jalia Mayaja and Another, Rev. No. 248 of 2017** (unreported) insisting that, the Applicants were public servants thus before referring their labour dispute to CMA, they had first to use remedies provided for under the Public Service Act. Under the premises, she urged me to dismiss this application for want of merits.

In rejoinder, Mr. Alihaji Majogoro distinguished the case of **Bariadi Town Council** (supra) because the employee Donard Ndaki was a teacher

and that of **Board of Trustees of PSPF**(supra) as the court did not determine if those employees were public servants. He also thought that, TANESCO is not an Independent Department of Government and that, not all employees in the Public Service are governed by the Public Service Act. He concluded that, employees of parastatal organizations are not governed by the Public Service Act requiring exhausting local remedies under the Act.

Having such submissions from parties and after having dully considered the record available, it is not disputed that, the three Applicants were employees of the Respondent Company and got terminated from employment in April, 2018 for want of form four certificate. As they were aggrieved by the decision of the Head of Public Service dismissing them from service, they made reference of their dispute to CMA which thought to have no jurisdiction on account that, the Applicants being public servants regulated by the Public Service Act, were supposed to exhaust local remedies amenable in the Public Service Act before resorting to labour laws. The rivals hinges along this argument. Two questions therefore have to be resolved. **One** is whether the Applicants are public servants and **two**, if the answer is in the affirmative, next would be whether the CMA is a forum of first instance in adjudication of their labour dispute.

Were the three Applicants Public Servants? the provisions of section 3 of the Public Service Act, Cap.298 defines a public servant to mean:

"public servant" for the purpose of this Act means a person holding or acting in a public service office;

Is TANESCO a public service office? The said provisions of section 3 of the Public Service Act defines such an office to include:

"public service office" for the purpose of this Act means:

a) A paid public office in the united Republic charged with the formulation of Government policy and delivery of public services other than-

(i) a parliamentary office;

(ii) an office of a member of a council, board, panel, committee or other similar body whether or not corporate, ***established by or under any written law;***

(iii) an office the emoluments of which are payable at an hourly rate, daily rate or term contract;

(iv) an office of a judge or other judicial office;

(v) an office in the police force or prisons service;

(b) any office declared by or under any other written law to be a public service office;

In the definition of Public office as defined above, TANESCO has not been excluded in public service office under section 3(a) (i) through (v) of the Public Service Act. It is also clear from the definition that, TANESCO is charged with delivery of public service. The fact that it is a corporate sole in itself cannot make this Independent Department of Government deregulated by the Public Service Act. As stated in **Salehe Komba** (supra), to qualify as public servant, one must be either charged with formulation of Government policy or delivery of public service. I therefore agree with Ms. Juliana William that, the employees of TPC were excluded by one reason stated in that judgment at page 6 that:

There is another reason for the employee of the Respondent not to fall under the Act. The Tanzania Posts Corporation Act, Cap.303 of the laws of Tanzania, under which the corporation is formed, confers on the corporation full powers of its staff this is in terms of section 3 and 7(g).

In my view, this is the reason why the phraseology of section 3(b) of Public Service Act authorizes enactment of laws to make certain office a public office. This being the case, employees of TPC as held in the case of **Salehe Komba**(supra) and that of **Jeremiah Mwandi** (supra)are regulated by the Tanzania Posts Corporation Act, Cap.303 because there is a stand alone legislation, unlike employees of TANESCO who are not regulated by a standalone legislation for want of such legislation. We cannot therefore assume that, as there is no standalone legislation, then TANESCO is not a public office within the meaning of the Public Service Act. Had it been so, then it would have been excluded in the definition as was to public offices excluded in that definition section. By and large, the provisions of section 31 of the Public Service Act does not restrict servants in executive agencies and Government institutions, TANESCO inclusive, to be governed by the Public Service Act even in situations where there is a law enacted for the purpose. It is prescribed that:

> *31(1) Servants in the executive agencies and Government institutions shall be governed by the provisions of the laws establishing the respective executive agency or institution.*

(2) ***without prejudice to subsection (1), public servants referred to under this section shall also be governed by the provisions of this Act.*** *(emphasis mine)*

Given the above stance, it is obvious that the Applicants herein were public servants governed by the Public Service Act. The first issue on whether the Applicants are public servants is therefore answered in the affirmative. This being the case, next is whether the CMA is a forum of first instance in adjudication of their labour dispute. In this, the provisions of section 32A of the Public Service Act provides that:

32A. A public servant shall, prior to seeking remedies provided for in labour laws, exhaust all remedies as provided for under this Act.

This provision was interpreted and precisely applied in the Board of Trustees of **the Public Service Pensions Fund (PSPF)** (supra). At page 7 of the ruling, it was held that:-

The said Written Laws (Amendment Act) No. 3/2016 as rightly pointed out by the Arbitrator it comes in operation on 18th November, 2016 therefore from the very date the power of the

commission for Mediation and Arbitration ceased to entertain employment dispute involving the Public Servants. In the present case the cause of action arouse on 19 November, 2015 before the Written Laws (Amendment Act) No. 3/2016 came into operation thus Arbitration decision that he had power to entertain the dispute was correct and it is a finding of this court that, that decision is interlocutory hence not revisable by this court.

My decision would have been different only if the cause of action arouse after the Written Laws (Miscellaneous Amendment) Act, No. 3/2016 and Arbitrator decided to have power to entertain the dispute, though an interlocutory but because it touches the very jurisdiction

This was also the case in **Bariadi Town Council** (supra) where my Learned sister Mkwizu, J at page 8 of her ruling had this to say:-

"The respondent cause of action arising out of his employment contract as a public servant could not escape the needles of the Public Service Act. The commission for

Mediation and Arbitration therefore determined labour dispute number CMA/SHY/223/2018 without jurisdiction. Any matter that is adjudicated without jurisdiction, ought to be quashed."

As per the record, the Applicant herein soon upon termination, rushed straight to the CMA. This in my view, them being public servants regulated by the Public Service Act, was wrong for them to file their labour dispute to CMA before utilizing machineries in the Public Service Act. In essence, for employees regulated by the Public Service Act; CMA would only be clothed with jurisdiction after the respective public servant has exhausted remedies under the Public service Act. As they did not do that, then decision of the CMA to lack jurisdiction may not be faulted. That said, this application is hereby dismissed for want of merits. Each part to bear own costs in prosecution of this application for revision.

It is so ordered.

Gerson J. Mdemu
JUDGE
25/6/2021

DATED at **SHINYANGA this** 25th day of June, 2021

Gerson J. Mdemu
JUDGE
25/6/2021