

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(TANGA DISTRICT REGISTRY)**

AT TANGA

CIVIL CAUSE NO.3 OF 2020

(Arising from Misc. Civil Application No. 4 of 2018)

RICHARD WATSON MACHA APPLICANT

VERSUS

THE ATTORNEY GENERAL 1ST RESPONDENT

THE CHIEF SECRETARY..... 2ND RESPONDENT

THE PARMENT SECRETARY, PRESIDENT OFFICE, REGIONAL

ADMINISTRATION AND LOCAL GOVERNMENT 3RD RESPONDENT

HANDENI DISTRICT COUNCIL 4TH RESPONDENT

RULING

MKASIMONGWA, J.

This is an Application by Richard Watson Macha (Applicant) for Orders of Certiorari to quash and set aside the decision of the President terminating the applicant's employment and Mandamus to compel the Chief Secretary to reinstate the Applicant in his position of the District Water Engineer, Handeni District. The Application which is by way of Chamber Summons and supported by Affidavit sworn by the Applicant and a Statement is made under Section 2 (3) of the Judicature and Application of Laws Act [Cap. 358 R.E 2002], Section 18 (1) and 19 (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act [Cap. 310 R.E

2002] and Rule 8 (1), (2) and (3) of the Law Reform (Fatal Accidents Miscellaneous) (Judicial Review Procedure and Fees) Rules, 2014.

Upon being served with the Application, the Respondents contested to it and to that effect they filed a Statement in Reply and a Joint Counter Affidavit of Rashid Mohamed, learned State Attorney.

On the date the Application was called for hearing Mr. Kimwangana and Mr. Rashid Mohamed, learned Advocate and State Attorney, respectively, appeared before the Court respectively representing the Applicant and Respondents. Upon being invited by the court to argue his case Mr. Kimwangana contended that the Applicant was sometime, employed by and worked with Handeni District Council as the District Water Engineer. On 01/03/2016 the Applicant was served with a charge sheet by the 4th Respondent charging him of failure to satisfactorily perform his duties. Consequently, the Disciplinary Authority entered Judgment against him sometime on 30/06/2016. Mr. Kimwangana stated that the decision was reached without according the Applicant with a fair hearing for the later was not invited to cross examine the witnesses; he was not given an opportunity to call witnesses nor was he provided with documents used in evidence against him.

Being aggrieved by the decision of the Disciplinary Authority, the Applicant did successfully appeal to the Public Service Commission. In the decision handed on 27/07/2017 the Commission overturned that of the Disciplinary Authority. The Commission ordered for reinstatement of the Applicant to his position. It also awarded the Applicant with all his entitlements. On 09/04/2018 the President of the United Republic reserved the decision and orders of the Public Service Commission on appeal preferred to him by the employer. Mr. Kimwangana submitted that in the Appeal before the President, the Applicant was not heard nor was he served with a notice regarding to the Appeal. As such, he was not accorded with a fair trial and that was against the provisions of Regulation 47 (4) (a), (b) and (c) of the Public Service Regulations. GN. No. 168 of 2002.

As to the reason for termination Mr. Kimwangana stated that the employer did not state in the accusation those responsibilities the Applicant had failed to attend or accomplish. He submitted that the claims as well as the decision were unjustifiable hence the Applicant came to this court with this Application. Mr. Kimwangana referred the Court to the case of **John Mwombeki Byombalirwa v. The Regional Commissioner and**

Regional Police Commander (1986) TLR 73 which sets the conditions for issuance of orders of Certiorari and Mandamus which are:

1. That the Applicant must have sufficient locus stand (that he has interest in the matter)
2. That the Respondent as a Public Officer must have duty to perform imposed by statute.
3. That there must be no other appropriate remedy available to the Applicant.

He also referred the Court to the case of **Sanai Marumba v. Muhere Chacha** (1990) TLR.54 where the court held to the effect that an order of certiorari is the one issued by the High Court to quash decision in the subordinate Court or Public Authority where there is no right of Appeal. Again, he referred the Court to the case of **Lausa Salum and others v. Minister for Lands, Housing and Urban Development** (1992) TLR 193 where it was held that any action of any public official done in official capacity is impugnable by way of judicial review proceedings on ground of irregularity, irrationality and procedural impropriety. Mr. Kimwangana also cited the case of **Regional Service Ltd v. Secretary Central Tender Board and Three others** (2001) TLR 184; **Felix Msele v. Minister of**

Labour and Youth and three others (2002) TLR 437; **Ridge v. Baldwin** (1964) II All ER 66 and **Ndegwa v. Nairobi Liquor Authority** (1957) EA 709. In the later case it was held that an administrative decision of a Public Official which is bound or likely to adversely affect the interest of an individual has to be taken after giving such an individual reasonable opportunity of being heard otherwise there will be a clear denial of natural justice. In the present case, Mr. Kimwangana stated that the Applicant was a victim employee hence has sufficient locus stand in the matter and that he was not heard before when the decision which binds him was taken and that there are no alternative remedies available in the matter. In the premises of the matter, Mr. Kimwangana prayed the court that it grants the Application.

On the other hand, Mr. Rashid in the first place adopted all the contents of the Respondents Joint Counter Affidavit to be part of his submission. He added that the Respondents do not dispute to the fact that the Applicant was the Principal Water Engineer, Head of the Water Department of Handeni District and that his employment was limited by dismissal later on 25/08/2016. Whereas that decision was reversed by the

Public Service Commission on appeal was confirmed by the President of the United Republic of Tanzania on appeal preferred by the Employer.

Mr. Rashid argued that prior to the decision which terminated the employment the Employer complied with the laws governing Disciplinary Proceedings in the Public Service in that the Applicant was accorded with all his right before the decision was taken against him. The learned State Attorney contended that on 28/03/2016 the Applicant was informed by the Handeni District Executive Director that he is relieved from duty pending investigation on the accusation leveled against him. That was done in terms of Regulation 37 of the Public Service Regulations, 2003. After the investigation he was charged for failure to satisfactorily perform his duties and that the charge sheet was served to him on 21/04/2016. Along with the charge sheet the Applicant was asked to submit his defence in 14 days from when the charge sheet was served upon him. Later on 06/05/2016 the applicant submitted to the employer his defence which defence the employer was not satisfied with. In terms of Regulation 46 of the Public Service Regulation, 2003 the Employer formed an Inquiry Committee. The Committee which was vested with powers to hear the case against the Applicant was not part of the Disciplinary Authority. The Inquiry Committee

heard the matter from 14 to 16/06/2016 in which process all parties appeared and adduced their evidence. The Committee eventually came up with a report which was eventually handed over to the Disciplinary Authority. The later Authority eventually acted upon the report. Mr. Rashid submitted that as the Inquiry Committee is quite different from the Disciplinary Authority, it cannot be heard of the Authority being a judge on his own course as the Applicant alleges.

Mr. Rashid submitted further that the decision of the Disciplinary Authority was reversed by the Public Service Commission on ground that the Disciplinary Authority did not observe the mandatory requirements of Regulation 47 (4) (a), (b) and (c) of the Public Service Regulations, 2003 for the Applicant was not accorded with an opportunity to call witnesses and cross examine those of the employer. He stated that the Appellant was accorded with such an opportunities and failure by him to exercise his right to call witnesses and cross examine those of the adverse party did not amount to a denial of the right. To cement his contention Mr. Rashid, referred the Court to a decision in the case of **Felix Lucas Kisinyila v. R:** Criminal Appeal No. 129 of 2002 and that in the case of **George Maili Kemboye v. R:** Criminal Appeal No. 327 of 2013 CAT (both unreported).

It was contended further by Mr. Rashid, that the Appeal before the President of the United Republic of Tanzania, was heard by virtue of Code 25.2.2 of the Public Service Disciplinary Code of Good Practice of 2007 in which case only substantive issues were considered by the President when hearing the Appeal. After hearing the Appeal, the President found merit in it hence held that the employer's decision was correct and consequently the decision of the Public Service Commission was quashed and that of the Employer was restored.

Regarding to the submission made by Mr. Kimwangana, Mr. Rashid contended that the cited cases/authority, show that the High Court granted application for judicial review where the court or Board below did not comply with the procedures in hearing matters before them. In the case at hand the employer did dully comply with the procedures hence the cited cases do not apply to the facts of this case. As the Respondent employer dully complied with the procedures required, the Applicant is not entitled to the orders sought in this Application. Mr. Rashid therefore prayed the Court that this Application be dismissed.

In a brief rejoinder Mr. Kimwangana submitted that in the matter, the Applicant has shown that he was not accorded with an opportunity to

be heard. In his letter dated 08/09/2016 responding to the request by the Applicant to be availed with the necessary documents the Applicant was expressly denied of the documents. Mr. Kimwangana reiterated that those who set as the Disciplinary Authority were the ones involved in the Inquiry Committee. He added that the decision of the Public Service Commission clearly shows that the decision of the employer was reached without Regulation 47 (4) (a), (b) and (c) of the Public Service Regulations being complied with. He prayed the court that it grants the Application.

I have considered the submissions and attentively read the record. I finds it is not disputed that the Applicant was a Public Servant. He was employed and worked as the District Water Engineer of Handeni District. His employment was terminated by dismissal later on 26/08/2016 as he was found guilty of failure to satisfactorily performance his duties. It is also, not disputed that decision of the employer was successfully challenged by the Applicant to the Public Service Commission. In reversing the decision, the Commission stated as follows.

"2.0 *Tume ilipitia vielelezo vyote vilivyowasilishwa mbele yake pamoja na mwenendo mzima wa shauri hilo na kubaini yafuatayo:-*

2.1 *Tuhuma ya kushindwa kutekeleza majukumu yako ipasavyo na kumsababishia hasara mwajiri wako haikuthibitika*

2.2 *Kamati ya Uchunguzi ilikiuka Kanuni ya 47 (4) (a – c) ya Kanuni za Utumishi wa Umma za Mwaka, 2003 kwa kutokukupa haki za kuhoji mashahidi wote waliotoa ushahidi mbele ya Kamati ya Uchunguzi, kutokukupa haki ya kuona vielelezo vilivyotumika kama ushahidi dhidi yako na haki ya kuita mashahidi wako mbele ya kamati ya uchunguzi*

3.0 *Kutokana na sababu za hapo juu. Tume kwa kutumia Mamlaka iliyonayo chini ya Kifungu cha 25(1)(b) cha Sheria ya Utumishi wa Umma Sura 298 kilisomwa pamoja na Kanuni ya 60(2) ya Kanuni za Utumishi wa Umma za Mwaka, 2003, imekubali rufaa yako na kutengwa adhabu ya kufukuzwa kazi iliyotolewa na Mamlaka yako ya nidhamu. Badala yake Tume imeamua urudishwe kazini na kulepwa haki zake zote”*

That decision of the Commission was reversed on Appeal preferred to the President of the United Republic of Tanzania by the employer (4TH Respondent). This Application is brought so that the Court may quash and set aside the decision of the President to terminate the Applicant from his employment and to compel the Chief Secretary to reinstate the Applicant in his position of the District Water Engineer, Handeni District. Going by the

Provisions of Regulations, the decision of the President in an appeal preferred to him against that of the Public Service Commission is final. In terms of the decision in the case of **Sanai Marumba v. Muhere Chacha** (1990) TLR. 54 an order of certiorari is the one issued by the High Court to quash decisions in the subordinate court or Republic Authority where there is no right of Appeal. In **Lausa Salim and others v. Minister for Lands, Housing and Urban Development** (1992) TLR 193 case, the court explained grounds under which one may challenge actions of any Public Official done in official capacity by way of Judicial review. There it was stated that:-

"Any action of any public official is impugnable by way of judicial review proceedings on ground of irregularity, irrationality and procedural impropriety."

Conditions, under which an order of Mandamus and Certiorari can be issued, have been well set by the Courts. They are as explained in the case **John Mwombeki Byombalirwa v. the Regional Commissioner and Regional Police Commander** (1986) TLR 73 – that.

1. The Applicant must have sufficient locus stand (that he has interest in the matter)

2. The respondent is Public Officer must have a diet to perform imposed by statute.

3. That must be no other appropriate Remedy available to the Applicant.

Going by the facts of this case it is my considered opinion that the conditions above exist and apply in the facts of this case. As to why this application is brought this is stated under paragraph 9 of the Affidavit filed in support of the Application where it was averred that:-

"That at the stage of appeal to the president I was not served with the copies of appeal nor given an opportunity to present my defence."

I had an opportunity to read the reason for the president's decision as per the Chief Secretary Later Comminuting it to the Applicant. I have also considered response to the paragraph given in the counter affidavit as it is shown under paragraph 8 of the Counter Affidavit that the second respondent confirmed the termination of the Applicant's employment and after revisiting evidences and inquire the relevant information on the charges and allegation against the Applicant. With due respect before the President there were grounds of Appeal filed by the District Council of Handeni it is no doubt that the grounds affected the interests of the

Applicant. In the letter of the 2nd Respondent communicating the President's decision to the Applicant it is partly stated that:-

"Rais amekubaliana na sababu za Baraza la Madiwani la Halmashauri ya Wilaya ya Handeni ametengua uamuzi wa Tume ya Utumishi wa Umma wa Kutengua adhabu ya Kufukuzwa kazi na kumrejesha kazini Mhandisi Richard L. Macha. Rais amethibitisha Uamuzi wa Mamlaka ya Nidhamu, Baraza la Madiwani la Halmashauri ya Wilaya ya Handeni wa Kufukuza Kazi.

Whether the grounds of appeal before the President were made known to the Applicant? Whether the Applicant was heard in the Appeal before the President? The answers to these questions were not exhibited in the matter. Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time provides in Kiswahili that:

"13 (6) Kwa madhumuni ya kuhakikisha usawa mbele ya sheria, mamlaka ya Nchi itaweka taratibu zinazofaa au zinazozingatia msingi kwamba

(a) Wakati haki na wajibu wa mtu yeyote unahitaji kufanyiwa uamuzi wa Mahakama au chombo kinginecho kinachohusika mtu huyo atapewa fursa ya kusikilizwa kwa ukamilifu na pia haki ya kukata rufaa au kupata nafuu nyingine ya kisheria

*kutokana na maamuzi ya Mahakama au chombo
hicho kinginecho kinachohusika.”*

In the case at hand it evident that the right to be heard as it is provided for by the Constitution was not accorded to the Applicant in the Appeal to the President. In that premise of the case, the President's decision in the Appeal was reached without adhering to the laid procedures. As such the decision was unlawful. It is consequently quashed and the Chief Secretary is hereby compelled to reinstate the Applicant in his position of the District Water Engineer, Handeni District as it was ruled out by the Public Service Commission. No order as to costs is made.

Dated at Tanga this 18th of August, 2021.


E. J. Mkasimongwa

JUDGE

18/08/2021

Date: 18/08/2021

Coram: E. J. Mkasimongwa, J

For Applicant: Present in person

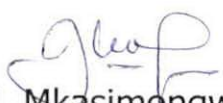
For Respondent: Mr. Rashid Mohamed (SA) and Ms. Luciana Kikala (SA)

C/C: Mohamed

Court: Ruling delivered in Chambers this 18th day of August, 2021 in the presence of Mr. Rashid Mohamed (SA) and Ms. Luciana Kikala (SA) for the Respondent s and of the Applicant in person.

Right of appeal is explained.




E. J. Mkasimongwa

JUDGE

18/08/2021