IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY) AT DAR ES SALAAM

MISC. CAUSE NO. 18 OF 2021

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND MANDAMUS

IN THE MATTER OF DISMISSAL FROM EMPLOYMENT OF ELEMELECK HERZON LOVA

BETWEEN

ELMELECK HEZRON LOVA ..... APPLICANT

VERSUS

INSPECTOR GENERAL OF POLICE ..... 1ST RESPONDENT.

THE PERMANENT SECRETARY,

MINISTRY OF HOME AFFAIRS.....2ND RESPONDENT

THE ATTORNEY GENERAL ..... 3RD RESPONDENT

RULING.

Date of last 23.11.2021

Date of Ruling 8.12.2021

MARUMA, J.

The present application for leave to apply for orders for certiorari and mandamus is brought in pursuant to rule 5 (1), (2) (a), (b) (c) and (3) of the Law Reform (Fatal Accident and Miscellaneous Provisions) (Judicial Review, Procedure and Fees) Rules of 2014. The applicant before this court

is seeking the orders of this Court to grant leave to apply for orders briefly summarized as order for certiorari to quash the decision dated 2nd day of June 2010 for being tainted with serious illegalities both of procedure and decision and for being bias and/or double standard and without taking into account principle of equality of all human beings before the law. Also, an order for mandamus to compel the 2nd respondent to reinstate the applicant's employment in the Tanzania Police Force and other relief(s) which the Honorable Court shall deem fit and just to grant in favor of the applicant together with costs of this application.

The brief background of this application is that, the applicant was an employee of Tanzania Police Force in the rank of police constable stationed at Kigoma until 11th June 2019 when his employment was terminated by the Reginal Police Commander (RPC) following the misconducts committed by him together with other police officers. Before his termination the applicant together with the five police officers were subjected to the disciplinary committee which found them guilty for the misconduct they were charged with. The inquiry Committee sent recommendations and proposed punishment to the Reginal Police Commander for his approval as the proposed punishment was not within the power of the Chairman of the

inquiry Committee. The proposed punishment to the RPC was either for his approval of the proposed punishment that the condemned police officers to do general cleanness to the environment surrounding the police compound and doing fast parade for period of about 45 minutes or to direct otherwise.

Surprisingly, out of the police officers who were charged and found guilty by the Committee, only the applicant was singled out by the RPC and his employment was terminated through the letter **exhibit LLA1** without being accorded with the right to be heard. On 5th July 2021 the applicant issued a letter to the 1st respondent as an appeal in which the 1st respondent IGP dismissed the appeal hence this application to challenge both the decisions of the 1st and 2nd respondents. Annexure LLA1 (Certificate of discharge) and LLA4 (A response to the appeal from Inspector General of the Police (IGP)).

On the hearing date, the applicant was represented by Mr. Mwang'enza Mapembe, Advocate, and the 1st and 2nd respondents were represented by Mr. Urso Luoga, the learned State Attorney.

Submitting on the grounds for leave for judicial review, Mr. Mapembe started with the issue that the applicant is aggrieved with the decision of the 2nd respondent (RPC) dated 2nd day of June 2010 and the decision of the 1st respondent (IGP) dated 5th July 2021. He submitted that the application is supported by statement of facts and the affidavit of one Elmereck Herzon Lova (the applicant) and he prayed the same to be adopted and form part of his submission.

Mr. Mapembe submitted that since the application is for leave, this Court is bound by 3 pre – conditions of the law laid down by the Court of Appeal in the case of **EMMA BAYO VERSUS THE MINISTER FOR LABOUR AND YOUTH DEVELEPMENT & 2 OTHERS,** Civil Appeal No. 79 of 2012. He referred this Court to page 8 of the decision. He submitted that from the said authority the applicant has a duty to satisfy this court with 3 preconditions to wit, first, the applicant to make out any arguable case, second whether the applicant is within 6 months limitation period and the last one is for the applicant to show he has sufficient interest to be in the main application.

In respect of arguable case, the advocate for the applicant submitted that the disciplinary inquiry Committee which conducted the disciplinary hearing and found the applicant guilty together with other five officers

recommended the punishment. The RPC terminated the applicant's employment without hearing him on anything. He submitted that if the RPC was dissatisfied with the punishment proposed by the disciplinary inquiry committee, the RPC had mandate under section 52(2) of the Police Force and Auxiliary Services Act Cap 322 to either return the case to the officer by whom it was referred for hearing or taking further evidence or to make inquiry with or without taking further evidence and thereafter imposing the punishment. He also submitted that they have no doubt that the RPC has mandate to enhance the punishment but their argument is that the RPC could do so in line with the procedures underlined under section 52(2) (a) and (b) of the Act. He further submitted that the RPC has also another way of enhancing the punishment by first, inviting the applicant to show cause as to why the punishment should not be varied as required under the proviso to section 53 (1) of the Act, where it is provided that no punishment shall be enhanced unless the accused has an opportunity to show why the punishment should not be varied. He insisted that the said proviso emphasize on the requirement to give an opportunity to police officer to be heard before the punishment is enhanced. However, there is no evidence by the respondent to show the RPC complied with the

procedure. Therefore, he prayed for this court to find that the applicant has an arguable case against all the respondents as the 1st respondent was bound to observe the principles of natural justice. For the 2nd respondent, the concern is on the issue of double standards due to the fact that, the RPC singled out the applicant out of the other five officers and terminated the applicant only without any reasons.

He further submitted that such an act is discriminatory and violates the Constitutional right under Article 13 (1) of the Constitution of United Republic of Tanzania of 1977 which safeguard and guarantees equality of all human beings before the law that legally, every individual should be treated fairly and equally before the law. He also submitted that the decision reached by the RPC was unreasonable due to the fact that the enhancement of the punishment by the RPC was so unreasonable that no reasonable authority could override that decision. Winding up his submission, the applicant's advocate submitted that this application is centred on para 4,5,6, and 7 of the applicant's affidavit the same were not contested by the respondent because the respondents through paragraph 4 and 5 noted and admitted the contents of para 4,5,6 and 7 of the applicant's affidavit.

Responding to the issues raised, the learned State Attorney prayed for use of the statement in reply and to adopt the counter affidavit of Maurilio Fidelis Chang'a the Superintendent of Police (SP). He submitted against for by focusing on arguable points submitted by the applicant including para 4,5,6 and 7. He pointed out that the issues were based on misconduct concerning bribery. He further submitted that what was submitted by his colleague was about enhancing the punishment in which by his own words he submitted that, the punishment was supposed to fall under section 52(2) of the Police Force and Auxiliary Services Act, Cap 322. He argued that the applicant did not deny that RPC has such mandate to enhance punishment. The issue is that no evidence that has been shown that the respondents have complied with the procedures. He further submitted that the applicant's affidavit under paragraph 10 on the annexute marked LLA4 on his appeal to the IGP, the 1st respondent which was responded accordingly to the claims that were submitted by the applicant. He argued that, if the applicant himself did not bring any evidence to show that the procedures were not followed. If we go to the affidavit, the para 4 and 5 which were mentioned the applicant was narrating that the procedures were followed of which para 4 they agreed

that they were charged before the disciplinary inquiry committee and the charges were communicated that they were received bribery. Under para 5 he is still expressing that they were heard accordingly and that all the punishments which were proposed by the disciplinary inquiry committee were subject to confirmation by the RPC. Even para 6 of the affidavit still shows the procedure were followed and the applicant never denied anything that procedures were not followed rather than surprise that out of the five others, he was only dismissed. He submitted that in regard to his affidavit in para 6 which he was explained under para 7 in line with para 4,5,6 and 7 of the applicant's affidavit showing that the procedures were followed and the right to be heard was given as well from the time the applicant was charged to the time decision was rendered. Hence, the applicant failed to show sufficient interest in order for him to bring the main application. He therefore, prayed to this court to refuse to give the applicant the leave to apply for order of certiorari and mandamus since all procedures were followed as admitted in his affidavit.

In their rejoinder, the advocate for the applicant had no much to submit. He retreated what was submitted in chief and prayed for this court to grant leave as prayed for the applicant to apply for prerogative orders.

Looking at the arguments from both sides for and against for this application. The main issue to be determined by this Court, is whether the application is sufficing the test to qualify for leave for judicial review. As correctly pointed by the advocate for the applicant and it has been directed in a number of decisions including the case of **EMMA BAYO** (Supra), That the court to determine the application for judicial review, it must satisfied itself that application has to pass three tests that;

1. Whether the applicant has an arguable case or prima facie case to justify the filing main application.
2. Whether the applicant has demonstrated sufficient interest to be allowed to bring the main application and,
3. Whether the application is filled within law prescribed time.

Determining the issue of arguable case, with respect to the submissions made by both sides, this court should restrict itself on the preliminary matters and not to go into the details of the issues to be determined in the substantive application. The assertion finds support in the case of **Re Bavic International SA (Bureau Vertas) 2005)2 EA 42 (HCK)** that, the issue raised by the applicant should be determined at a later stage on Certiorari and Mandamus.

Without going into the depth of the issues as guided above, taking into consideration the facts in the affidavit in paragraphs 4,5,6 and 7 which were note disputed by the respondent save the issue that the applicant was full given right to be heard. Also the statement of application and submissions made. The application in hand has demonstrated arguable issues for further consideration such as on whether the 2nd respondent the RPC has the mandate to enhance punishment without giving the applicant the right to be heard; and whether all procedures were followed from the time the applicant was charged to the time decisions were rendered hence termination of the applicant's employment.

Also, going by the affidavit of the applicants and the respondent respectively there is no dispute that, the applicant has interest in the subject matter due to the fact that, he is the one who was charged with the misconduct before the disciplinary inquiry committee and terminated from his employment on the result of the outcome of the decisions of subject to be challenged in the judicial review.

Moreover, the issue of time frame, as provided under rule 6 of 2014 Rules which states and I quote that:

"The leave to apply for judicial review shall not be granted unless the application for leave is made within six months after the date of proceedings, act or omission to which the application for leave relates".

Since the last decision issued by the 1st respondent on 5th July 2021 and this application was filed on 26th October 2021, there is no doubt that the application was filed during the prescribed time of six months.

As for the aforesaid reasons and findings, I find merit in this application and I accordingly grant leave to the applicant to apply for judicial review within the prescribed time. No order as to costs.

Z A Maruma,

JUDGE

13/12/2021.

Ruling delivered today 13th December through Virtual Court link https://virtualcourt.judiciary.go.tz/RULINGMISCCIVILAPPLNO.18OF2021 in the presence of Mr. Mwang'eza Mapembe, Advocate for the applicant and Mr. Urso Luoga, State Attorney for the respondents.

Z.A.Maruma,
JUDGE
13/12/2021.