IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT REGISTRY

AT ARUSHA

LABOUR REVISION No. 64 OF 2020

(Original CMA/ARS/ARB/77/2017)

BETWEEN

ARUSHA URBAN WATER SUPPLY AND SEWAGE AUTHORITY(AUWASA).....APPLICANT

AND

OBED LUKUMAY.....RESPONDENT

JUDGMENT

5/5/2022 & 14/07/2022

MZUNA, J.:

Arusha Urban Water Supply and Sewage Authority commonly known by its acronym AUWASA (herein after referred to as the applicant) has preferred this revision application challenging the award of Tshs 33,210,000/- for unfair termination in favour of **Obed Lukumay**, the respondent herein.

The factual background is very brief and straight forward. The respondent was employed by the applicant as a Security Guard effective 1st October, 1986. He applied for his job as a Standard VII leaver though in his

academic credentials (CV) he indicated to be a Form IV leaver from Arusha Secondary School in 2002. He was promoted from Plumbing Grade III in 1989, Plumbing Grade III in 1990, Plumbing grade I in 2010. Up to the time of his termination, he was promoted to the post of Operation and Maintenance Artisan II.

Sometimes in 2016 there was a Nationwide demand for all employees within the Government sectors to submit their Form IV academic certificates. The applicant says the respondent submitted his academic certificate which was suspected by the National Examination Council of Tanzania (NECTA) to be a forged certificate. The employer, the applicant directed the respondent to submit the original certificate for further verification as instructed. The respondent failed to submit it on 12th October, 2016 even after being told that failure to do so he was to consider himself as dismissed from employment. He did not submit same. The applicant construed it as voluntary termination from employment.

He lodged his complaint at the CMA which found that there was both substantive and procedural unfairness by the applicant to terminate the respondent for the reasons that there was no evidence showing that the alleged submitted forged Form 1V certificate was submitted by the

respondent. Second that the respondent was not covered as among the employees who by law were required to submit Form IV certificates because he was employed in 1986 while the Circular from the Permanent Secretary, Civil Service Ref No. CFC. 26/205/01 "Q"/ 61 of 10th July, 2017 referred to employees who were employed from 20th May, 2004.

Further that the employer did not conduct investigation as required under Rule 13 (1) of the (Code of Good Practice) Rules, GN. No. 42 of 2007 (herein after referred to as Code). The CMA found that the respondent was condemned unheard in violation of fundamental rights of natural justice particularly Article 13 (6) (a) of the United Republic of Tanzania Constitution of 1977 (as amended from time to time) (the Constitution). The CMA proceeded to award the compensation as above shown.

In this revision application which proceeded by way of written submission, the main issue is whether the CMA exercised powers vested in it or acted ultra vires?

Arguing in support of the application, the applicant through Mr. Peter John Musetti, the learned Senior State Attorney, capitalised on paragraphs 17 and 18 of the affidavit deponed by Japhet Nashon Nyambita. He argued

that the Arbitrator exercised jurisdiction not vested on him by the law as the respondent was supposed to exhaust the remedies set down under Section 32A of the Public Service Act, (Cap 298 RE 2019), which was introduced by the Miscellaneous Amendment Act, No.3 of 2016 and Public Service Regulations and its amendments.

On the issue of jurisdiction, the learned Senior State Attorney brought to the attention of this court case laws of **Bariadi Town Council v. Donald Ndaki,** Application for Revision No. 03 of 2020, High court at Shinyanga (Unreported); **Dar es Salaam City Council v. Generose Gaspar Chambi,** Labour Revision No. 584 of 2018 (Unreported) and that of **The Attorney General v. Tanzania Posts Authority and Another**, Civil Application No.476/2016.

The CMA entertained the dispute prematurely as the respondent being a Public servant ought to have exhausted the available remedies before resorting to it. This court was also brought to the attention of section 25 of Cap 298 RE 2019 and Regulation 60 of the Public Service Regulations on the internal remedies provided for under the said Act. He prayed for this court to find that the award of the CMA was improperly procured as it lacked jurisdiction to entertain the matter.

He touched as well on the awarded compensation as illustrated under paragraph 15 and 16 of the affidavit, that it is on the high side and unjustifiable under the law. He prayed for the same to be quashed and set aside.

On his part, Mr. John Shirima, the learned counsel for the respondent strongly challenged the move taken by the applicant's counsel to raise the issue of jurisdiction at this stage instead of at the CMA where he attended together with the Applicant's Human Resource Manager. That, it was not raised even during cross examination or by way of preliminary objection. In any case, even assuming it was of any application, he says under section 23 (2) (a) and (b) of the Public Service Act, it provides that the power to dismiss a public servant shall not be exercised unless:-

> *(a) a disciplinary charge is preferred against the public servant;*
>
> *(b) the public servant is afforded an adequate opportunitu to answer the charge.*

It was his view that the applicant was the first to issue a termination letter and therefore ought to have abided to the law above cited including preferring a disciplinary charge. Further that his employment did not fall

under the category of Public Servants who ought to refer the matter to the Public Service Commission first and therefore, the CMA was proper in entertaining the matter. Above all that the applicant has not indicated any prejudice which she suffered following the CMA decision to adjudicate on the matter. To do otherwise is merely to entertain technicalities contrary to the dictates of Article 107 A (2) (e) of the Constitution. He insisted that rules of procedure should not be used to "defeat justice" citing the case of **General Marketing Co. Ltd v. A.A Shariff** [1980] TLR 61 and that of **Rawal v. Mombasa Hardware** [1968] EA 392.

He is of the firm view that during all his 30 years of service, the respondent never posed as a Form IV leaver and even his further studies were for Certificate of Plumbing. He urged this court to dismiss this application as there was substantive and procedural unfairness as did find the CMA.

The question to ask is, does the respondent fall within the operation service in the Public service scheme?

Before answering it, I should respond to what Mr. Shirima had submitted on the argument that the applicant never raised issue of

jurisdiction at the CMA. This point need not detain me. The position of the law and this has been stated time and again without number that objection on jurisdiction can be raised any time even on appeal.

Now on the point for determination, does the respondent fall in the public service scheme? According to Mr. Musetti, the applicant is a Public Institution which provides public service and is under a direct control by the government. That, it is a public entity and its staffs are public servants. The respondent was a Public servant as provided under section 25 of the Public Service Act, Cap 298 RE 2019 and Regulation 60 of the Public Service Regulations on the internal remedies provided for under the said Act.

On his part, Mr. Shirima seems to concede that the respondent was a public servant save that the applicant did not follow the laid down procedure and therefore this court cannot set aside the award as to do so is to entertain matters of procedure instead of dealing with substantive fairness.

If that is the case, I find it proper to quote section 32 A of Cap 298. It 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.*

The term Public servant is defined under section 3 of Cap 298 to mean:-

> ***"public servant"*** *for the purpose of this Act means a person holding or acting in a public service office;*
> ***"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 ..."*
>
> ***25.****-(1) Where-*
> *(a) ...(N/A)*
> *(b) a Permanent Secretary,* ***Head of an Independent Department,*** *Regional Administrative Secretary or a local government authority exercises disciplinary authority as stipulated under section 6 by reducing the rank of a public servant other than reversion from a rank to which the public servant had been promoted or appointed on trial, or reduces the salary or* ***dismisses the public servant, that public servant may appeal to the Commission against the decision of the disciplinary authority*** *and the Commission may confirm, vary or rescind the decision of that disciplinary authority;*
>
> (Emphasis mine).

The respondent was dismissed by the applicant, a disciplinary body. Section 6 (1) of the Act recognizes such body among the disciplinary bodies. That provision reads:-

6.-(1) Every Permanent Secretary, Head of extraministerial department, Chief Court Administrator, Regional Administrative Secretary and Local Government Authority shall-

(a)... N/A

(b) be the authority in respect of the appointment, confirmation, promotion ***and discipline of public servants other than those appointed by the President;***

(2)...(N/A)

(3)...(N/A)

(4) Every head of department or division shall be the disciplinary authority in respect of ***employees in the operational service*** *under his department or division."*

The question is, did the respondent fall in the category of employees subject for disciplinary actions by the applicant?

Section 3, the definition section defines "operational service" to mean "the cadre of supporting staff not employed in the executive or officer grades." At the time of termination, the respondent was employed as "Operation and Maintenance Artisan II" and therefore fall in the category of operation service.

So, the argument that the applicant did not follow the laid down procedure in dismissing the applicant without conducting a disciplinary hearing is a point which should be tabled at the appropriate appeal body

(the commission) not in court or at CMA. Again the argument that the respondent did not submit the alleged forged certificate while he indicated in his CV (exhibit D1) of which he signed, showing that he submitted it with qualifications that he was a Form IV leaver, cannot be an excuse. He is responsible for it not any other person. He ought to have followed the laid down channel under the Public service Act, instead of referring the matter at the CMA or "exploring other avenues for dispute settlement". That position was stated in the case of **Bariadi Town Council v. Donald Ndaki,** (supra where the Hon Judge cited with approval the case of **Faima Siraji v. Mbeya Urban Water Authority,** Labour Revision No. 47 of 2017 (unreported). I associate myself with that holding. May be for emphasis, the principle can be restated thus, where a public servant other than those appointed by the President finds that the disciplinary body has acted contrary to the law, he/she has no option other than referring the complaint to the commission as well stated under section 25 A of the Public Service Act, Cap 2298 RE 2019. A body or court which attempts to deal with such complaint lodged by such employee at first instance, will place itself at the risk of having the decision set aside for being ultra vires.

On the basis of the above position, the CMA award is hereby set aside as it had no powers to deal with the matter. Consequently, the award of Tshs 33,210,000/- (being Tshs 810,000/- as one month salary in lieu of notice and Tshs 32,400,000/- as statutory compensation equivalent to 40 months' salaries) are hereby set aside.

This revision application is allowed under section 94 (1) (b) (i) of the Employment and Labour Relations Act, Act No 6 of 2004 (as amended) with no order as to costs.

M. G. MZUNA,

JUDGE.