IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MUSOMA SUB REGISTRY

AT MUSOMA

CIVIL CASE NO 06 OF 2022

X. B. 5980 CPL BONIPHACE J. ALEX .....PLAINTIFF

VERSUS

COMMISSIONER GENERAL OF PRISON .....1ST DEFENDANT

THE ATTORNEY GENERAL ..... 2ND DEFENDANT

JUDGMENT

27th Oct. & 20th Dec , 2022

F. H. MAHIMBALI, J.

Mr. Boniphace J. Alex, the plaintiff in this case was an employee with the Tanzania Prisons Force. His employment has been terminated for reasons of disciplinary misconduct with the Tanzania Prisons Force contrary to the Prisons Service Regulations. He is alleged to have committed the following offences: leaving guard area, attacking his supervisor and unlawfully firing arms with intent to harm his superior.

Upon a full determination of the disciplinary hearing, the plaintiff was convicted of the charged offences and thus his employment was terminated by the Commissioner General of Prisons.

Claiming that he was unlawfully terminated, the plaintiff has preferred this suit claiming for the following orders of this court.

a) Specific damage to the tune of Tshs. 170,907,780

b) General damage to the tune to 50,000,000/=

c) Any other relief this court deems fit and just to grant.

On the other hand, the defendants are resisting the claims, arguing that since the plaintiff was lawfully convicted upon his own plea of guilty, and rightly terminated as appropriate sentence to the committed offences, he cannot claim the said reliefs unless he had first challenged his termination as unlawful.

In his testimony, the plaintiff established that he was employed by the Tanzania Prisons Force since 14th April 2010 after he had attended the basic recruitment course at Kiwira Prisons College. After the completion of the course, he was posted at Musoma prison (2010 to 2014), then Tarime (2014 to 2018) and later Kiabakari where he served until 2019 when his employment with the force was terminated.

Following his conviction as per charged disciplinary offences, three punishments were preferred against him before the disciplinary hearing committee: ½ salary payment for one month, to pay the ammunition he had fired and reprimand (exhibit PE1). That to his surprise on

27/5/2019, he had received a letter from the Commissioner General of Prison with another punishment which enhanced the former to the dismissal (exhibit PE2).

With the latter findings, he challenges it as being improper for the following reasons:

First, he was not given the opportunity to Cross- examine/ Interrogate the witnesses of the said charge. Secondly, he was not given the witnesses statements. Thirdly, there was no any investigation done. Fourthly, he was not given the opportunity to reply to the charges levelled against him.

He further claimed that those who punished him, applied wrong provisions of the law, that the Commissioner General enhanced the punishment without giving him a chance of being heard and that there was no any witness who, established the charge.

On these allegations, he then claims for the specific damage of 170, 972,000/=, general damage of 50,000,000/=. As to why specific damage of 170, 972,000/= he stated that as per his age, he was expected to retire in February 2049, (Date of his retirement) and that his salary package stood at 878,000/= per month.

For defense case, DW1 stated how he knows the plaintiff as his former co-worker with Tanzania Prisons Force. That on 10th March, 2019 there was a fracas between him and the plaintiff, in which originally the plaintiff had slashed his hen. When he was informed so, he took the slashed hen (carcass) and sent it to the home of the plaintiff (Prison Camp) where he saw his wife and left it there. Shortly, the plaintiff who was on duty was informed so by his wife who then reacted by going straight to his home, beaten him and fired out ammunitions in efforts to harm him. The incident was eventually reported to the prison leadership (Kiabakari) where then disciplinary proceedings against the plaintiff were commenced, from which, he was then dismissed. He tendered his statement which was admitted as DE1.

DW2, SSP Mwesa Makebera Nyamwihwagya, testified that he is Prison Officer of Buhigwe. That on 10/3/2019, while being prison Incharge officer of Kiabakari Prison, had received complaints in respect of misbehaviour of CPL Boniphace (Plaintiff) who had beaten his immediate officer (DW1), fired ammunition and absconded the guard area. Following this complaint by Ssg Shabani Musa Nyanga against CPL Boniphace, he ordered each one to record his statement and those of witnesses: Cpl Paschal Nchabe Cpl Boniface, Ssgt Vedastus and Elisha. When he was satisfied with the contents of the recorded statements, he

ordered disciplinary charges against the said Cpl Boniface on the above-named disciplinary offences: assaulting his superior, absconding guard and unlawful firing of ammunition (DW3).

The plaintiff is recorded to have pleaded guilty by admitting the charged disciplinary offences where then he proposed punishments to be inflicted to the plaintiff (DW4) and sent them to the RPO for sanctions.

The RPO then made his own recommendations and forwarded the same to the Commissioner General of Prisons (DE5) who then (CGP) in respect of the disciplinary offence committed by the plaintiff reacted by terminating the plaintiff's employment from service pursuant to Prisons Service Regulations, 1997, under regulation No 24 (2) and (4).

When DW2 was cross examined as to whether the CGP was justified to enhance the punishment to termination, he replied that as per regulation 24 (2) of the Prisons Regulations of 1997, the CGP is mandated to confirm any sentence passed by the subordinate officers. As to whether the plaintiff was given the opportunity of being heard, DW2 replied that to the best of his knowledge, he didn't hear the plaintiff being heard on this enhanced sentence. However, he was of the

view that the said proceedings could not be invalidated pursuant to Reg. no. 30 of the Prisons Regulations of 1997.

In totality, the defense side is saying that the plaintiff's case is misplaced and ought to be dismissed with costs.

In the hearing of the suit two issues were framed: First, whether the plaintiff's termination was lawful, secondly to what reliefs are the parties entitled to.

With the first issue, Mr. Kitia Turoke was of the view that it is undisputed that the plaintiff was lawfully terminated upon being convicted on his own plea of guilty. So long as he pleaded guilty to the charge, the issue of unfair hearing does not arise. The issue of unfair termination equally does not arise, he added.

On the reliefs sought, he argued that, so long as he was lawfully terminated, only when the termination was declared unlawful, then the sought reliefs would be justified. In the absence of unlawful termination, the sought reliefs are unjustified.

Having gone through the pleadings, heard the parties and their arguments, the first issue to consider is whether as per facts of the case and law, the plaintiff's termination was lawful.

Digesting the testimony of PW1, DW1 and DW2, it is undisputed that the plaintiff was an employee with the Tanzania Prisons Force. It is also undisputed that he was charged with the three disciplinary offences. The important question then, was he rightly convicted and sentenced?

Reading the proceedings of the disciplinary hearing authority, raise a question whether there were any disciplinary proceedings. For there to be a formal disciplinary proceeding, the alleged offences ought to have been dully charged, read over to the accused person for him to plead. In the proceedings in respect of the current case there ought to have been a formal charge and a respective plea there to. In this proceeding, assuming that the said charge was properly drafted (which I dispute) and readout, what was the plea of the accused person (plaintiff) in the respective offences. A phrase "*pleads guilty*" in the disciplinary proceedings literally means that the recording officer has paraphrased what the accused person pleaded. Unfortunately, what was actually pleaded by the said accused person is not recorded in the said purported charge sheet. With me, there is no any plea taken. For plea to be acted upon, it must be clear, unequivocal and unambiguous. In that sense, the purported plea of guilty is legally nothing, but a nullity.

According to Prison Service Regulation No. 133, provides, when the accused pleads guilty:

i. He will be invited to give his excuses and make a statement in mitigation of sentence; this will be recorded on the Offence Sheet; and the statement signed by the accused

ii. His Character Roll should be examined and the particulars required will be entered on the Offence Sheet;

iii. Punishment will be awarded or the case will be submitted to the Regional Prisons Officer who may award a punishment or submit the case to the Principal Commissioner for appropriate action.

Nothing of these statutory requirements were complied with by the defense when charging the accused person.

With these pointed out legal anomalies in the conduct of the said disciplinary proceedings, Mr. Kitia is of the considered view that the plaintiff didn't exhaust his remedies well upon being aggrieved by the decision of the Commissioner General of Prison. He ought to have appealed against it. I think this is not the first time this argument is raised. It was first raised as a point of preliminary objection where I

differed with him and has now resurfaced again. It needs a further a digest to revisit my previous stand.

The Plaintiff on the other hand had nothing more to say on this. In consideration of Regulation 37(4) of the **Prison Service Regulations of 1997** under regulation 37 which provides that the decision of Principal Commissioner General of Prison is final. Thus, the only available legal option is by challenging the said dismissal before the Court of law. This is in compliance with section 7 (5) and of the Police Force and Prisons Commission Act. To bolster his position he made reference to one case law of **Elias Marwa vs Insp and Another**, Civil Case no 2 of 2000, High Court Mwanza at page 5.

I have digested the submission of Mr. Kitia Turoke, I am in agreement that as per **section 5 (f) of the Police Force and Prisons Service Commission Act** which provides amongst the functions of the Police Force and Prisons Service Commission is to receive and act on appeals from the decisions of other delegates and disciplinary authorities. Therefore, it clearly means that the said Commission is not precluded from dealing with such appeals by an aggrieved party just in consideration of section 7 (5) of the said Police Force and Prisons Service Commission Act which appears to be derogatory to the former.

The latter clearly sets the disciplinary authority in matters relating to Police and Prison officers as follows:

i. The Police and Prison Officers above the rank of Assistant Commissioner, their final disciplinary authority shall be the President.

ii. The Police and Prison Officers of the rank of Assistant Inspectors to the rank of Assistant Commissioners, their final disciplinary authority is vested in the Commission.

iii. The Police and Prison Officers below the rank of Assistant Inspector, their **final disciplinary authority** is vested in the Inspector General of Police and the **Principal Commissioner of Prisons** respectively.

Therefore, the argument by the plaintiff that he had no further chance of appealing to the Commission, he being an officer below the rank of Assistant Inspector (Corporal) is unfounded in line with section 5 (e) of the Police Force and Prisons Service Commission Act. He could appeal against it before the Commission as per law (see also regulation no. 19(2) of the Prisons Service Regulations (GN No. 721 of 1997) which says that the decision of the Principal Commissioner of Prison is appealable to the Commission). Though section 7(5) of the Police Force

and Prisons Service Commission vests the powers of disciplinary hearing in respect of Subordinate Prison Officers of the rank below that of Assistant Inspector to be exercised by the Principal Commissioner or his delegate, and that the decision of Principal Commissioner of Prisons shall be the final disciplinary authority to Prison Officers below the rank of Assistant Inspector, the close reading of the said provisions don't in a real sense oust the powers of the Commission provided under section 5 (f). It is merely in conflict with the general powers of the Commission. In my view, it could only make sense had the said appeal been refused by the Commission in interpretation of the inharmonious provisions of the law. So long as it is the plaintiff's own choice, he cannot be an authority of interpreting the inharmonious provision of the law. The plaintiff being an officer of the corporal rank, fits in all fours to this category under section 5 (f) of the Police and Prisons Service Commission to have challenged the said dismissal order by the Commissioner General of Prison he also being both an actor and subject of the said law. Thus, strictly speaking, the said available legal remedies were not fully exhausted.

However, in a full and further digest between what is prayed by the plaintiff as per his pleadings and what has been prayed in the course of his testimony draws an inference that the pleadings and evidence are

at variance. I say so because the plaintiff's main interest in the institution of this suit is more seeking for damages than challenging the termed unlawful termination. That can only be done first upon there has been determination that the said termination is unlawful. The only authority to do that as per law was first the Commission itself on its appellate powers (section 5(f)). Therefore, the plaintiff cannot jump that necessary legal step. It is like cerebrating a goal before it has been scored. Had he needed damages, he was first duty bound to challenge the said unlawful termination.

In the case of **YARA Tanzania Limited Vs. Charles Aloyce Msemwa t/a Msemwa Junior Agrovet and 2 Others**, HC Commercial Case No. 05/2013 (unreported) at page 6-7 while making reference to Nigerian case in **Mojeed Suara Yusufu Vs. Madam Idiatu Adegote SC.** 15/2002, it was held:

> *"It is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded by the Court".*

Otherwise, the plaintiff believing that he had exhausted all the available legal remedies as per law, he could only do so by a proper

legal forum as provided by law, which is by way of judicial review against the administrative decision (see the case of the **Inspector General of Police and another vs EX-B83565 Sgt Sylvester Nyanda,** Civil Appeal No. 36 of 2019).

The next question now is whether this Court can entertain such an administrative decision in a suit like this. This similar question was asked by Hon. Nyangarika, J (a.h.w) in **Eliasi Marwa V. Inspector General of Police and Another**, Civil Case No. 2 of 2000, HC, Mwanza, where he was faced with a similar situation. He sought reliance to the case of **DR. Kaijage V. Esso Standard Tanzania Limited**, Civil Appeal No. 10 of 1982, CAT (Unreported). In this case, the Court of Appeal ruled that it is not necessary that an aggrieved party of the administrative action should file an application or an action by way of certiorari. He can still file an ordinary civil suit. Therefore, so long as there is an injustice by the plaintiff, this is a triable issue which this Court is clothed with legal mandate to entertain notwithstanding the modality the said matter is filed up.

However, in its recent decision, the Court of Appeal of Tanzania sitting at Mwanza in the case of the **Inspector General of Police and Attorney General V. Ex. B. 835665 Sgt Sylvester Nyanda,** Civil

Appeal No. 369 of 2019, it was insisted that when dealing with a similar matter but involving a police officer had this to say:

> *"Although there is no harmony between the first two pieces of legislation on the one hand and the latter legislation on the other, the difference being that the first two provide that Inspector General of Police is the final authority while the latter provides that it is the Minister,* ***none of the legislations provides for aggrieved officer to resort to the Court by way of ordinary suit****, as it was done in the instant case" [Emphasis mine].*

The Court of Appeal went further that insisting on the jurisdictional issue that:

> *"Since jurisdiction is conferred by statute as earlier stated, and none of the three statutes or any other confers the trial court with jurisdiction, the learned trial judge erred in assuming that he had it.*
>
> *We have consistently maintained the position that "....where the law provides for a special forum, ordinary courts should not entertain such matters."*

A similar view was held in other cases such as **Elieza Zacharia Mtemi and 12 Others V. The Attorney General and 3 Others,** Civil Appeal no. 177 of 2018 and **Commissioner General Tanzania Revenue Authority V. JSC Atomredmetzoloto (ARMZ),** consolidated Civil Appeals Nos. 78 & 79 of 2018 (both unreported).

All this considered and done, it is now my finding that the plaintiff misconceived in believing that he could claim damages to High Court against the decision of the CGP without first challenging it in a proper forum. In anyway, this court is not a proper forum for the said appeal. And the plaintiff also skipped a mandatory procedural legal requirement that before claiming for such damages as done, there must first be successful challenge of the said unlawful termination before the proper legal forum which as the case may be, this is not one, unless as last resort.

I understand that the plaintiff in his earlier submission in this case, had relied in the position that the first defendant's decision could be challenged in a suit like the one he filed. He stressed that it was equitable for the High Court to investigate and determine the reliefs claimed. This could be relied on section 7 (2) of the CPC and as held in the cases of the **Registrar of Buildings v. Eliniiria Patton Mwasha** [1982] T.L.R. 242, **the Dar es Salaam Young Africans Sports Club v. The Registrar of Sports Association and 2 Others** [1982] T.L.R. 278 and **D.R. Kaijage v. Esso Standard Tanzania Ltd**, Civil Appeal No. 10 of 1982, CAT (unreported). In his view, the position was more succinctly put in the case of **D.R. Kaijage v. Esso Standard Tanzania**

Ltd, Civil Appeal No. 10 of 1982, CAT (unreported) where the Court said that:-

> *"We wish to say, as we clearly said in Civil Appeal No 15 of 1981* ***Patman Garments Industries Limited v. Tanzania Manufacturers Limited*** *wherein an act of by the Minister for Lands was questioned in a court of law, that, a party dissatisfied need not necessarily proceed by way of certiorari. He can file an ordinary civil suit as in the instant case. With respect therefore, the learned trial judge was in error in holding a contrary view. We wish to add, in any event, the learned judge's view cannot be right because proceedings in an application for certiorari would also be civil proceedings and so also excluded under section 28 if the argument were proper."*

In that same case, the Court stressed that:-

> *"The plaint, the appellant contended that there was injustice and the respondent has denied this. The learned trial judge appeared to agree that there might have been injustice but his view was that the only way to bring up the matter was by way of certiorari and mandamus, which, as we have pointed out, is not the case. There was a triable issue which the High Court should have tried notwithstanding the way this particular matter was brought."*

I think the position taken in the case of **Dr. Kaijage** (Supra) is more applicable in situation where there is no further remedy provided after having exhausted all available legal remedies. In such a situation then, the plaintiff could benefit in filing a normal suit like this. In the

current case, the situation is different. The plaintiff has skipped the other remedy of appealing against that decision of the CPG to the Commission. Moreover, each case must be considered in its own merits.

That said, the plaintiff's case is misconceived in believing that he could appeal to High Court against the decision of the CGP. The plaintiff's case is hereby dismissed. However, if still minded, the plaintiff is hereby advised to challenge the CGP's decision before the Commission first as per law.

As per circumstances of this case, parties shall bear their own costs.

DATED at MUSOMA this 20th day of December, 2022.

F. H. Mahimbali

Judge

Court: Judgment delivered this 20th day of December, 2022 in the presence of the plaintiff, Ms. Neema Mwaipyane, state attorney for the defendants and Ms. Elizabeth Gwerino, RMA

Right of appeal is explained

F. H. Mahimbali

Judge