

THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

(LABOUR DIVISION)

AT MBEYA

LABOUR REVISION NO. 11 OF 2022

(Arising from Labour Dispute No. CMA/MBY/MBY/127/2020)

BETWEEN

NATIONAL INSURANCE CORPORATION OF TANZANIA.....APPLICANT

AND

UPENDO MICHAEL KISONZELA.....RESPONDENT

JUDGEMENT

Date of last Order: 09.11.2022

Date of Judgment: 16.12.2022

NGUNYALE, J;

This revisional application is made under **section 91(1)(a), (b), (2) (a), (b) and 94(1)(b)(i) of the Employment and Labour Relations Act, No. 6 of 2004**, read together with **Rules 24(1),(2) (a-f), (3)(a-d) and 28(1)(b-d) of the Labour Court Rules, 2007 GN. No. 106 of 2007**. The Applicant, NATIONAL INSURANCE CORPORATION OF TANZANIA is seeking for this court to revise and set aside the award of the Commission for Mediation and Arbitration dated 22.03.2022. The



application is supported by an affidavit deposed by one Paul Geoffrey Shaidi, chief legal counsel of the applicant.

Brief facts leading to the filing of this application as extracted from the record are that; the Respondent UPENDO MICHAEL KISONZELA was employed by the applicant on a fixed term contract commenced on 01.04.2019 ending on 30.09.2020. It was however, alleged that the same contract was availed to the respondent and therefore endorsed on 08.08.2020. The record also reveals that the respondent was notified on the expiry of the contract on 29.08.2020. Thereafter, on 30.09.2020 the contract ended; the respondent was paid all of her terminal benefits including a certificate of service. The respondent was discontented by the termination of contract on the ground that she endorsed the contract ten days prior to the notice of termination. Thus, she referred a labour dispute to the CMA claiming unfair termination. The Applicant to the CMA protested the claim, she maintained that there was no unfair termination since the employment was fixed term contract. Having heard both parties, the learned Arbitrator reached the decision that the respondent was unfairly terminated as she was delayed to sign the contract hence had expectation of renewal. The learned Arbitrator therefore, ordered the applicant to pay twelve (12) months compensation to the respondent and



salary arrears all at the tune of Tanzanian Shillings (Tshs.) 12,620,000/=.

Dissatisfied, the applicant instituted the instant application raising a total of 11 grounds of grievances which however, can be conveniently shortened into seven grounds as follows:

- i) *That the Arbitrator erred in law and facts by determining the matter which he has no jurisdiction to entertain.*
- ii) *That the Arbitrator erred in law and facts as he misdirected himself by failing to determine the dispute according to the issues agreed by the parties.*
- iii) *That the Arbitrator erred in law and fact when he failed to give reasons for his decision that there was unfair termination of employment.*
- iv) *That the Arbitrator erred in law and facts by holding that there was failure to renew a fixed term contract at circumstances where the employee reasonably expects a renewal of contract.*
- v) *That the Arbitrator erred in law and facts when failed to analyse evidence adduced by the parties in determining the matter.*
- vi) *That the Arbitrator erred in law and facts by holding that the employment contract was valid from the date it was made known to both parties and its terms started to be executed.*
- vii) *That the Arbitrator erred in law and facts by basing his decision on matters which were not proved by the respondent.*

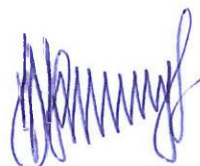
The application was disposed of by way of written submissions. The applicant was represented by advocate Christopher Bulendu, whereas the respondent enjoyed the service of advocate Michael Mwangati.

In determining this application, I will firstly resolve the first ground on the issue whether the CMA had jurisdiction to entertain the matter. This is for the reason that the court shall start determining the issues relating to the



law before reverting into factual issues. See **Intertec East Africa vs B & S International**, Civil Appeal No. 46 of 1997 Court of Appeal of Tanzania at Dar es Salaam (unreported).


Arguing in support of the legal issue, counsel for the applicant submitted that the Applicant is a public corporation established under section 3 of the Public Corporation, Act, 1992. That, being a public institution, its employees are public servant thus, their employment is governed and regulated by the Public Service Act, Cap. 298 R.E. 2019. He further submitted that the stance that employees of a public service institution are public servant was cemented by the Court of Appeal of Tanzania (CAT) in the case of **Tanzania Posts Corporation vs Dominic A. Kalangi**, Civil Appeal No. 12 of 2022 (unreported). Counsel for the applicant also argued that, according to **section 32A of Cap. 298** a public servant is obliged to exhaust all remedies provided under the Act before referring the dispute to the CMA. Thus, that the CMA in the instant matter had no jurisdiction to entertain the dispute between the parties where the respondent had not exhausted the remedies under Cap. 298. He supported his argument with the case of **Tanzania Posts Corporation vs Dominic A. Kalangi** (supra).



In reply, counsel for the respondent did not dispute that the applicant is public corporation and the Respondent was a public servant. He only challenged that at the time the dispute between the parties arose, the law which halt the CMA to hear disputes regarding the public servant was not in force. According to the counsel since the case which held that public service disputes cannot be determined by the CMA came in existence in 2022, the same cannot affect a dispute which was already filed like the one at issue. He supported his argument with the decision of this court in **Deogratius Lyakwipa & another vs Tanzania Zambia Railway Authority**, Labour Revision No. 66 of 2019 High Court at Dar es Salaam, where it was held that CMA has jurisdiction to entertain public servants disputes.

Counsel for the respondent added that the act of the applicant's counsel of raising the issue which has already been determined by the CMA is abusing of the court process. He therefore implored this court to dismiss this piece of complaint.

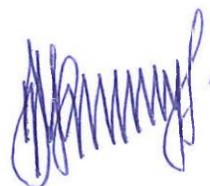
In rejoinder, counsel for the applicant argued that raising the issue which was overruled by the CMA is not abusing court process since the issue of jurisdiction can be raised at any stage/time including on appeal or revision. He relied on the case of **M/S Tanzania China Friendship**



Textile Co. Ltd vs Our Lady of the Usambara Sisters [2006] TLR

70. He argued that the CMA assumed the power which it did not have by entertaining the matter under Public Service Act. He argued further that though the CAT decision was made in 2022 it was resolving the labour dispute which occurred in 2017 and it was the High Court Revision of 2019. According to him the law which was interpreted by the CAT came into force through the Written Laws (Miscellaneous Amendment) Act, Act No. 13 of 2016 which was before the dispute at hand.

I have considered the rival submissions by the parties and the law on the contentious matters. Stating at the outset, raising a legal issue cum factual issue at appeal or revision stage where the same issue had already been determined by a lower court is not abusing of the court process. This is because, principally the issue determined at the lower court is the one supposed to form the grounds of appeal or revision; see for example, **James Funke Gwagilo v. A.G** [2004] TLR 161 **Hotel Travertine Limited and Others vs National Bank of Commerce Limited** [2006] TLR 133 where it can be drawn that as a matter of general principle, an appellate court cannot allow matters not taken or pleaded in the court below, to be raised on appeal.



Confining to the issue under consideration, the starting question before I decide whether or not the CMA had jurisdiction is who is a "public servant" in terms of the Public Service Act, Cap. 298 R.E. 2019. The term is defined under section 3 of the Act as follows:

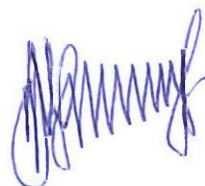
"public servant" for the purpose of this Act means a person holding or acting in a public service office;"

"Public service office" is also defined under the same section to mean:

"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;*

From the above definition of who is a public servant; it is clear that he or she should be a person holding or acting in a public service office. The public service office is as per above definition. It follows however that; in the instant matter it is undisputed that NATIONAL INSURANCE CORPORATION OF TANZANIA is a public service office. In the premises,



the respondent herein being employed and working in a public service office was a public servant.

Now, the issue is whether the CMA had jurisdiction to entertain a dispute between the parties. It should be noted that in the contract agreement by the parties it is clearly stated that the application, interpretation, and implementation of the agreement shall be governed and construed with the Public Service Act and its regulations i.e Public Service Regulations. In the circumstance, section 32A of the Public Service Act, Cap. 298 R.E. 2019 is relevant to the matter. 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."

Moreover, the CAT in the case of **Tanzania Posts Corporation vs Dominic A. Kalangi** (supra) held that:

"..... it is unambiguously clear that all disciplinary matters or disputes involving public servants are exclusively within the domain of the Public Service Commission whose decision is appealable to the President...., the CMA has no jurisdiction to adjudicate upon such matters."

Deriving from the above holding, it is clear that the dispute raising to this application though was not a disciplinary matter was a dispute to be referred to the Public Service Commission as the result the CMA was




halted from her jurisdiction. The account by the respondent's counsel that the law halting the jurisdiction of the CMA came after the raise of the instant dispute is unmaintainable. This is due to the fact section 32A was brought into force on 16th November, 2016 through the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2016.

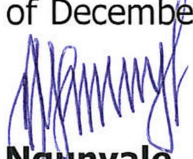
Owing to the above reason, I am firm to uphold the first ground of the application. The remaining grounds are rendered impotent since the legal issue determined above touches the jurisdiction of the CMA and of this court. At the end result, I hereby grant the application. The proceedings before the CMA are quashed, the award and the resultant orders are set aside. Being a labour dispute, I make no order as to costs.

Ordered accordingly.




D.P. Ngunyale
Judge
16/12/2022

Judgment delivered this 16th day of December 2022 in presence of both parties.


D.P. Ngunyale
Judge
16/12/2022