

**IN THE HIGH COURT OF TANZANIA  
(MAIN REGISTRY)  
AT DAR ES SALAAM**

**MISCELLANEOUS CIVIL CAUSE NO. 31 OF 2021**

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF  
CERTIORARI AND MANDAMUS  
AND**

**IN THE MATTER OF THE DECISION OF COMMISSIONER  
GENERAL OF IMMIGRATION SERVICES OF 18<sup>TH</sup> OCTOBER, 2018  
AND 24<sup>TH</sup> DAY OF AUGUST, 2020**

**BETWEEN**

**ISAYA JOSEPH CHAWINGA.....APPLICANT**

**VERSUS**

**THE COMMISSIONER GENERAL  
OF IMMIGRATION SERVICES.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**RULING**

13 Dec 2021 & 15 Feb 2022

**MGETTA, J:**

Upon being granted leave, the applicant, Isaya Joseph Chawinga, lodged this application by way of filing a chamber summons supported by affidavit sworn by himself as well by the statement. In his chamber summons filed on 19/11/2021 under **sections 17, 18 (1) and 19 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310 and rule 8 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules of 2014** (henceforth 2014 Rules), the applicant prayed for the

order of certiorari in order to quash the decision issued on 18/10/2018 and 24/8/2020 by the Commissioner General of Immigration Services (henceforth the 1<sup>st</sup> respondent) and for the order of mandamus in order to compel the Attorney General (henceforth the 2<sup>nd</sup> respondent) to reinstate him into his public service position without loss of entitlements.

When the application was called on for hearing and upon a request by parties, I allowed them to argue this application by way of written submissions, which were of course filed as scheduled. I have had opportunity to go through the affidavit, counter affidavit, the statement as well written submission jointly filed by Mr. Engelberth Boniphace and Mr. Emmanuel Anthony, both learned advocates for the applicant; and, written submission filed by Ms. Rehema Mtulya, the learned State Attorney for the respondents. I thank and commend them for their written submissions.

I start with a brief background. According to employment letter dated 29/6/2007, Isaya Joseph Chawinga was employed as Assistant Immigration Officer I on permanent and pensionable terms with effect from 15/4/2006. He was confirmed as public service officer on 06/11/2008. On 18/10/2018, the 1<sup>st</sup> respondent wrote a letter to Joseph Isaya Chawinga terminating his employment for misconduct. I quote the necessary parts of the letter dated 18/10/2018 that was addressed to

Joseph Isaya Chawinga, Immigration Sergeant, sent by 1<sup>st</sup> respondent through Kagera Region Immigration Officer, titled "KUFUKUZWA KAZI (CHEKI NA. 10608119) and briefly stated that:

*"Tafadhali husika na mada tajwa hapo juu pamoja na Notisi na hati ya Mashtaka yenye Kumb. Na. CPF.2384 iliyosainiwa tarehe 2.11.2017 na Afisa Uhamiaji Mkoa Kilimanjaro dhidi ya tuhuma mbalimbali zilizokuwa zinakukabili. ....*

Hivyo, kwa mamlaka niliyonayo, na kwa mujibu wa Kanuni Na. 10 (1) (c) Kanuni za Uendeshaji za Uhamiaji za Mwaka 2015, ninakufukuza kazi kuanzia tarehe ya barua hii, ***i.e 18/10/2018.***" (bold mine)

To my understanding, the Police Force, Immigration and Prison Service Commission (Immigration Service Administration) Regulations of 2015, **GN No.438 of 2015** published on 2/10/2015 was repealed and or revoked by Immigration Service (Administration) Regulations of 2018, **GN 473 of 2018** published on 31/8/2018. **Regulation 174 of GN 473 of 2018** reads:

*"The Police Force, Immigration and Prisons Service  
Commission (Immigration Service (Administration)  
Regulations is hereby revoked".*

Thus, **GN No. 438 of 2015** is no longer in use. What is in use now is **GN No. 473 of 2018** which under **regulation 8 (3)**, the 1<sup>st</sup> respondent has powers to terminate services of the applicant as it reads that:

*"(3) The Commissioner General shall have powers to appoint, promote, confirm or terminate appointment of officers of the rank of Constable to Sergeant Major of Immigration".*

In her termination letter, she actually cited a revoked law *per incuriam*. Whether it is revoked law, in my opinion she still had such powers that are provided under the new law. That wrong citation should not invalidate the exercise of her powers. Moreover, the applicant had also referred to that revoked law in his letter dated 29/7/2020 addressed to the 1<sup>st</sup> respondent. That letter titled "BARUA YA KUFUKUZWA KAZI" is annexed to the affidavit as ICJ4. Its relevant part is quoted hereunder:

*"Mimi Isaya Joseph Chawinga naandika barua hii kukuarifu kama ifuatavyo:*

1. Kwamba, tarehe 17/07/2020, nilipatiwa barua kwa dispatch ya kufukuzwa kazi yenye Kumb. Na. CPF.2384/56.
2. ....
3. Kwamba, hata kama barua hiyo ingeandikwa majina yangu na kwa anuani yangu bado isingekuwa halali kwani inakinzana na Ibara ya **13(6)(a) ya Katiba ya Jamhuri ya Muungano wa Tanzania ya mwaka 1977** kama ilivyofanyiwa marekebisho mara kwa mara na kanuni ya 25(1-5) na Kanuni ya 26(1-6) ya **The Police Force, Immigration and Prisons Service Commission (Immigration Service Administration), Regulations, 2015**; Pamoja na **The Police Force, Immigration and Prisons Service Commission Act (CAP.241); The Immigration Service (Administration) Regulations, 2018.**
4. Kwamba, katika barua hiyo nimeshangaa kama sio kufedheheshwa ilipoeieza kuwa eti kulikuwa na Hati ya mashtaka yenye Kumb. Na. 2384 iliyosainiwa 21.11.2017 na Afisa Uhamiaji wa Mkoa wa Kilimanjaro yenye tuhuma mbalimbali dhidi yangu **ISAYA JOSEPH CHAWINGA** au

*huyo **JOSEPH ISAYA CHAWINGA** (ambaye ofisi yako inamjua) ambazo zimeorodheshwa katika barua hiyo.*

5. ....

*Sgd. Isaya Joseph Chawinga*

***(Sajini wa Uhamiaji)***

From the submissions filed herein, it is not in dispute that the applicant was employed by the first respondent on permanent and pensionable service. It is on the record that it was on 18/10/2018 when his employment as public service officer at the post of Immigration sergeant was terminated by the 1<sup>st</sup> respondent. The records dictate that it is the decision of 18/10/2018 and not of 24/8/2020, as the applicant tried to put forward, which is impugned here. Thus, it should be understood that the termination of service dated 18/10/2018 is the centre of this application. He complained that such termination was irregular and did not follow the laid down procedures.

In paragraph 6 of his affidavit, the applicant alleged that the termination was issued without any charge and notice; whereas, in paragraph 4 of the Counter Affidavit the respondents jointly alleged that the charge sheet and notice were issued to the applicant through his station of work at Bukoba, but he avoided it. I managed to get hold of copies of the notice and the charge which were annexed to the counter

affidavit, as annexure SG1. The charge sheet consisting of two counts was framed at Kilimanjaro Regional Immigration Office. The charge and a notice requiring the applicant to file a defence as well to appear before Kilimanjaro Regional Immigration office on 29/11/2017 for hearing of the charge levelled against him.

I am therefore satisfied that the same were prepared and sent to his station of work at Bukoba. It was confirmed by Bukoba Regional Immigration Officer that he received them. The record shows that he was not at place of work. That is why the same were not served to him personally. That abscondment from work place had been communicated to the 1<sup>st</sup> respondent for her action. Likewise, the charge and notice were returned back to Moshi for disciplinary action (vide: Annexure SG2 – the letter date 14/11/2017 from Kagera Immigration Office).

The applicant alleged that he was terminated without disciplinary action being conducted against him. On the contrary, the respondents stated in paragraph 8 of the counter affidavit that the Inquiry Committee conducted disciplinary hearing as required by law and procedure prior to termination of his employment. It is further assertion of applicant that following that irregularities, on 29/7/2020 he wrote a letter to the 1<sup>st</sup> respondent requesting her to cancel the termination letter, but he was replied through a letter dated 24/8/2020 by the 1<sup>st</sup> respondent that the

termination was legal and regular. She added that her decision should be challenged through writing to relevant authority and that judicial review should not be a first remedy to resort to. The applicant stated in his affidavit that termination letter issued to him by the 1<sup>st</sup> respondent did not state to him his right of appeal.

In his attached statement, the applicant stated in paragraph 2, 3 & 4 and I quote that:

2. *"That, the termination conducted by the first respondent was concluded on the 24<sup>th</sup> August, 2020 when she responded to my request I made to her on the 29<sup>th</sup> day of July, 2020.*
3. *That, the relief were sought in the leave to apply for judicial review in terms of Certiorari and Mandamus were as stipulated in paragraph 4 of this statement.*
4. *The grounds on which the reliefs are sought are that, the decision by the first Respondent were attained under the auspices of irregularities, un-reasonability and irrationality."*

Going back to **rule 11 of 2014 Rules**, the decision of this court should base on the grounds and reliefs sough in the statement. In her written submission Ms. Rehema stated that the 1<sup>st</sup> respondent in



terminating the applicant followed proper procedure and her decision confined within the ambit of the law. She submitted, first the applicant was charged with the disciplinary offences. The charge and the notice (SG1) were delivered to him through his duty station at Bukoba. However, the documents were returned to the Immigration office Moshi without being delivered to him personally with the endorsement that he had avoided service and absconded from duty station. He was not served with charge and notice to appear before the Inquiry Committee scheduled on 29/11/2017. It was confirmed by SACI – Abdallah Towo, Kagera Region Immigration officer, in his letter dated 14/11/2017 (SG2) addressed to Kilimanjaro Region Immigration Officer. I quote the relevant part that:

*"Nakutaarifu kuwa mtajwa ni mtoro kazini na tayari taarifa za kutokuhudhuria kwake kazini nimeziwasiiisha kwa Kamishna Jenerali wa Uhamiaji kwa barua yangu Kumb. Na. KGR/CPF.232/10 ya tarehe 13/11/2017 kwa hatua zake (Nakala imeambatanishwa).*

*Hivyo kutokana na sababu niliyoeleza hapo juu, nakurejeshea nakala zote tatu (03) za Notisi na Hati ya Mashitaka ambazo hazijasainiwa na Mtuhumiwa kwa hatua na kumbukumbu zako."*

Pursuant to **regulation 50(1) of GN 473 of 2018**, the Inquiry Committee sat and conducted hearing in Moshi without his presence and without his written defence. For easy of reference **regulation 50(1) of GN 473 of 2018** reads:

*"50. (1) If the Charged Officer whom a copy of the charge has been delivered, does not submit the written statement of defence on or before the date specified for the purpose or does not appear in person before the Inquiring Committee or otherwise fails or refuses to comply with the provisions of this regulation, the Inquiry Officer or Inquiry Committee may hold the Inquiry Ex-parte".*

As correctly submitted by Ms Rehema, the applicant denied himself the right to be heard for his own failure to submit a written defence and failure to appear in person on 29/11/2017 before there Inquiry committee sitting in Moshi as required by law.

After the Inquiry was conducted, the report was sent to 1<sup>st</sup> respondent who, in the exercise of her powers provided under **regulation 8(3) of GN No. 473 Of 2018**, served him with termination of employment letter dated 18/10/2018.

At this juncture, I am in agreement with Ms Rehema that the law and procedures were followed and efforts to procure his attendance to accord him right to be heard were also made. Not only that but also efforts to communicate the charge and notice to him were done but he was nowhere to be seen as he had absconded from his duty station.

He also complained that he was not told of his right of appeal. **Regulation 58 of GN No. 473 of 2018** provides that any party aggrieved by the decision of a Disciplinary Authority has a right to appeal. In this case, the matter proceeded ex parte. In such circumstances I believe he could not be told of his right of appeal. Nevertheless, upon receipt of termination letter he ought to take action to appeal to the relevant appeal authority as per **GN No. 473 of 2018**. The record show that he did not appeal. I find that the applicant had appropriate and available remedy to appeal, instead of rushing before this court seeking for orders of mandamus and certiorari.

It is on record that due to his abscondment and nonappearance and failure to file a defence, the committee of inquiry proceeded to determine the charges ex parte as per provisions of **GN No. 473 of 2018**.

In sum, I find that the procedures towards applicant's termination were followed by the 1<sup>st</sup> respondent. On the other hand, the applicant has

failed to demonstrate any sound grounds to support the application. I therefore dismiss the application. Each party has to bear its own costs.

It is so ordered.

**Dated at Dar es Salaam** this 15<sup>th</sup> day of February, 2022.

  
**J. S. MGETTA**  
**JUDGE**

**COURT:** This ruling is delivered today this 15<sup>th</sup> February, 2022 in the presence of the applicant in person and in the presence of Mr. Salum O. Salum, legal officer from 1<sup>st</sup> respondent and who is holding a brief for Ms. Rehema Mtulya, the learned state attorney, for respondents.

  
**J.S.MGETTA**  
**JUDGE**  
**15/02/2022**

**COURT:** Right of appeal to the Court of Appeal is full explained.

  
**J.S.MGETTA**  
**JUDGE**  
**15/02/2022**