

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

LABOUR DIVISION

(IN THE DISTRICT REGISTRY OF KIGOMA)

AT KIGOMA

CONSOLIDATED LABOUR REVISION NO. 6 AND 7 OF 2021

(Arising from Labour Dispute No. CMA/KIG/DISP/10/2017)

TANZANIA ELECTRIC SUPPLY COMPANY LIMITED-----APPLICANT

VERSUS

KATUS MANUMBU-----RESPONDENT

JUDGMENT

02nd March & 08th April, 2022

F. K. MANYANDA, J

In this cross application, this court is being moved to invoke its revisional powers to call for and examine the proceeding and award of the Commission for Mediation and Arbitration, hereafter referred to as "the CMA" by Hon. B. Mpapasingo, Arbitrator.



The application by Tanzania Electric Supply Company Limited, hereafter referred to by its acronym "TANESCO" is made by way of a chamber summons supported by an affidavit sworn by Juliana William. The application by Katus Manumbu is also made by way of chamber summons supported by a counter affidavit to the affidavit of Juliana William; it is sworn by Riziki Thomas Mashaka. Juliana William also swore a counter affidavit to counter that of Riziki Thomas Mashaka.

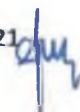
The background of this matter is that Katus Manumbu was an employee of TANESCO since 15/12/2010 as Mechanical Technician stationed at Kibondo Power Plant, in Kibondo, Kigoma Region. The employment of the said Katus Manumbu was terminated on 4/8/2017 on allegations of misconduct that he attempted to steal TANESCO's industrial diesel fuel oil about 3,000 litres valued at Tshs 7,216,380/=

Dissatisfied by the dismissal of his employment, Katus Manumbu referred a labour dispute to the CMA which was on 6/8/2021 decided in his favour holding that his termination was substantially unfair. The CMA ordered TANESCO to pay him TShs. 28,479,360/= being 24 months salaries compensation.

TANESCO was aggrieved by the award, hence came to this court with six issues as stated in Paragraph 9 of the affidavit namely: -

- i. That the Commission had no jurisdiction to entertain the dispute as the same was filed prematurely;*
- ii. That the Arbitrator erred in law and facts by deciding that the Applicant (TANESCO) had no fair reasons to terminate the Respondent's (Katus Manumbu) employment;*
- iii. That the Arbitrator erred in law and facts by ruling that the Applicant (TANESCO) does not have a code of ethics and conduct for her employees;*
- iv. That the Arbitrator erred in law and facts by ruling that the act committed by the respondent (Katus Manumbu) didn't amount to misconduct to warrant termination;*
- v. That the award of Tshs. 28,479,360/= as compensation for 24 months' salary was not justified; and*
- vi. The Arbitrator failed to consider the Applicant's (TANESCO) evidence tendered, so delivered an erroneous award.*

On the other hand, Katus Manumbu was also aggrieved by the award of compensation of Tshs. 28.479,360/=, one month notice, leave days, transport allowance and certificate of service because the same were contrary to what he prayed for in CMA Form -1. He raised four issues namely: -



- a) *That the Arbitrator erred in law and in facts by awarding unjustified reliefs to the Applicant (Katus Manumbu) contrary to CMA Form No 1;*
- b) *That the Arbitrator erred in law and in facts by holding that the procedures for termination of employment contract was fair;*
- c) *The Arbitrator erred in law and facts by failure to properly assess and evaluate the evidence tendered before it, leading to wrong findings; and*
- d) *That the Arbitrator award has occasioned miscarriage of justice to the Applicant (Katus Manumbu).*

At the oral hearing of this matter, TANESCO was represented by Ms Juliana William, learned Advocate and Katus Manumbu was represented by Mr. Chamwai Mussa, a personal representative.

It was Juliana William for TANESCO who started the ball rolling. She argued grouping the six (6) issues into four (4) issues as follows.

Submitting in support of the first complaint which comprises of issue one, she argued that the CMA has no jurisdiction because the labour dispute was filed prematurely.


She explained that this issue was raised before the CMA but was unjustifiably overruled.

The Counsel gave the reason that Katus Manumbu was a public servant, he ought to have exhausted the internal remedies available under the public service dispute resolution, instead, he referred the dispute directly to the CMA.

She cited section 3 of the Public Service Act (PSA), [Cap. 298 R. E. 2019] which defines a public servant to include employees of the public corporation and that TANESCO is also a public corporation, being a Company whose shares 100% are owned by the Government.

The counsel was of views that Katus Kanumbu ought to have followed the procedure provided under section 32A of the PSA as amended by the Written Laws (Miscellaneous Amendments) No. 13 of 2016 which uses a word "shall" connoting that the duty is mandatory.

Ms. Juliana William added that by virtue of the provisions of section 31(1) of the PSA as amended by the Public Service (Amendment) Act, No. 18 of 2007 public servants in executive agencies or institutions are governed by the laws of the respective agencies and institutions and by section 31(2) provides that the public servants in government executive agencies on top of the laws of the agencies and institutions are governed by the provisions of the PSA as well.



She argued further that Section 34A of the PSA was added by the Employment and Labour Relations Act (ELRA), [Cap. 366 R. E. 2019] which provides that where there is inconsistency of the laws, the PSA is to prevail.

She cited the case of **Alex Gabriel Kazungu and 2 Others vs. TANESCO**, Labour Revision No. 40 of 2020 and that of **TANESCO vs. Mrisho Abdallah and 4 Others**, Labour Revision No. 27 of 2020 (both unreported) where it was held that TANESCO employees are public servants.

As regard to the second complaint the counsel argued that the CMA was wrong to hold that TANESCO had no fair reasons to terminate the employment of Katus Manumbu. She submitted that the evidence proved that he committed gross dishonesty by his attempt to steal diesel fuel. She analysed the evidence that DW3 testimony proved that Katus Manumbu unloaded diesel fuel unlawfully. That evidence is supported by the testimonies of DW1 and DW2, he intended to steal the same.

The Counsel argued that the CMA was wrong to believe Katus Manumbu's evidence. She discredited the evidence by Katus Manumbu on the following reasons: -



One, that Katus Manumbu's evidence is that there were 38,000 litres in the fuel tanker while the Delivery Note (Exhibit D3) shows that there were only 35,000 litres;

Two, he failed to fill and produce the Deeping Form in order to establish the amount of the unloaded diesel fuel;

Three, he purported to write to the fuel supplier without authority so in order to disguise his ill intention of stealing the diesel fuel;

Four, in an unusual practice, he unloaded the fuel alone in absence store keeper, which is prohibited act; and

Five, the fuel supplier never asked for return of any excess fuel, i he mistakenly over loaded 3,000 litres.

She argued further that the conduct of Katus Manumbu was dishonest. She cited the cases of the **Bank of Tanzania vs. Adrian L. K** Labour Revision No. 96 of 2016 and **Vedastus S. Tulayenka** Labour Revision No. 4 of 2014 and **Others vs. Mohamed Trans Ltd**, Labour Revision No. 4 of 2014 (unreported).

The Ms. Juliana William argued in support of the third complaint was wrong for the CMA to rule that TANESCO had no Code of Ethics

Conduct. The Counsel shortly stated that the testimony of DW5 and Exhibit D17 proved that TANESCO had a Code of Ethics and Conduct.

The Counsel submitted briefly on the fourth complaint that the 24 months salaries compensation has no evidential justification. She argued that there was no proof of salaries because there was no salary slip tendered by Katus Manumbu.

She cited the case of **Obadia Mwambapa vs. St Pius Secondary School**, Labour Revision No. 833 of 2018 where it was held that it is a duty of the employee to prove the remedy he prays for.

Then she prayed for revision of the proceedings and the award and the same to be quashed.

On his side, Mr. Chamwai Mussa submitted in reply by adopting the counter affidavit and added that the termination of employment contract of Katus Manumbu was unfair.

As to jurisdiction of the CMA which is the first complaint, Mr. Chamwai Mussa argued that per Rule 10(1) of the Labour Institution (Mediation and Arbitration) Rules. GN No. 64 of 2007, the application was not premature because the dispute was filed on the 25th day from the dispute date, therefore, within 30 days.

He contended that since the employer, TANESCO, used the provisions of the Employment and Labour Relations Act, [Cap. 366 R. E. 2019] and the Employment and Labour Relations (Code of Good Practice and Conduct) Rules, GN No. 42 of 2007 to terminate Katus Manumbu's employment, then he was right to refer the labour dispute to the CMA.

Mr. Chamwai Mussa contended that an aggrieved party may appeal to the CMA as Regulations 60(2) of the Public Service Regulation, GN. No. 168 of 2003 uses a word "may" which connotes that an act is optional.

He added that the provisions under section 2 of the Employment and Labour Relations Act applies to both Public and Private services save for military service.

He concluded that when Regulations 60(2) of GN. No. 168 of 2003 is read with section 14 of the Labour Institutions Act, (LIA) [Cap. 300 R. E. 2019], the CMA gets jurisdiction to entertain disputes of public servants.

He cited the case of **Mbozi District Council vs Michael Simbeye**, Labour Revision No. 47 of 2015 (unreported).

Mr. Chamwai Mussa attacked the first complaint from another angle arguing that the status of Katus Manumbu was a mere operation or supporting staff even if the employment contract may not say so.

He argued that "assuming" he was a supporting staff then he was just discharging operational services, in case of which Regulation 60(4) of the Public Service Regulations comes into play and be applicable to him. Mr. Chamwai Mussa was of the views that Katus Manumbu could appeal to the CMA under the Security of Employment Act, which later on became the Labour Institutions Act (LIA). He concluded that Katus Manumbu was at liberty to apply the ELRA not the PSA because TANESCO used it, hence the PSA became inapplicable.

As regard to the complaint of unfair reasons for termination of employment, Mr. Chamwai Mussa argued that there was no proof of attempted theft by Katus Manumbu because all the witnesses of TANESCO testified hearsay. He contended that there was no eye witness who witnessed the alleged attempted stealing. He went on explaining the testimonies of each witness that DW1, a Branch Manager, was not in office on the fateful day, hence Katus Manumbu was acting. DW2 was at Kasulu he was only informed by the chief internal auditor. He insisted that Katus Manumbu was alone at the work station, the evidence was a mere suspicion which is not evidence in law.

Regarding the complaint number three Mr. Chamwai Mussa argued that TANESCO had no Code of Ethics and Conduct. He submitted that under



Rule 2(b) of the GN No. 42 of 2007 it is a requirement that in order for the Rules of conducts to be valid, the same must have been made known to the employees. He contended that TANESCO listed a number of regulations but failed to show that the same were made known to the employees including Katus Manumbu. Moreover, it was said that DW5 failed to state on cross examination whether Katus Manumbu was given the instruments of the Branch Manager when he acted as such.

Regarding the fourth complaint on inadequacy of the compensation award, Mr. Chamwai Mussa argued that the amount of 24 months salary compensation was justified. He contended that the CMA is entitled to award any appropriate amount of compensation by considering the minimum and the maximum per Rule 32(5) of the Labour Institution (Mediation and Arbitration) Rules GN No. 67 of 2007. He stated further that section 40(1) (c) of the ELRA provides for employers to prove salary of the employee. He argued that since TANESCO failed to cross examine on the amount of salary, then the awarded amount should be taken as admitted and it is the proper award of compensation. He also pointed out that even the other reliefs prayed in CMA Form 1 were denied without reasons. He prayed this Court to revise the award and grant the reliefs prayed for in CMA Form 1.

Ms. Juliana William re-joined basically reiterating her submissions in chief and added that the salary was proved through the employment contract which was tendered in evidence. The Counsel also insisted that the Code of Ethics and Conduct was tendered as an exhibit and that it was known to Katus Manumbu, if he was stranded then, then he could have asked. As to the evidence, the Counsel conceded that the TANESCO witnesses were not present at the incident but misconduct was proved circumstantially by the intentional non-compliance of the guidelines by Katus Manumbu.

Regarding jurisdiction the Counsel argued in clarity that Katus Manumbu was required to exhaust the internal remedies then the CMA becomes seized with the jurisdictions as enumerated by Mr. Chamwai Mussa.

She distinguished the case of **Mbozi District Council vs Michael Simbeye** (supra) because an appeal by public servants may only be to the commission established under the PSA. She contended that though TANESCO used the ELRA, it was necessary for Katus Manumbu to exhaust the PSA dispute resolution procedures first. As to operational service servants she observed that though they are covered by both laws, the PSA prevails.

Those were submission by both parties. I am thankful to them for their zeal and eloquence argument on their position.

In this mater I will first address the first complaint on jurisdiction of the CMA because it concerns a pure legal issue which in case it is found in affirmative that CMA lacked jurisdiction, then the matter will be disposed of.

From the submissions by Ms. Juliana William, the Counsel for TANESCO and MR. Chamwai Mussa, personal representative of Katus Manumbu, it is not in dispute and it is clear that TANESCO is a public corporation because it is a company whose 100% shares are owned by the Government. It follows therefore that employees in the executive agencies and institution of the Government, TANESCO being among its institution, are governed by the laws in their agencies and institutions by virtue of section 31(1) and (2) of the PSA. This provision of the law applies to public servants in the Government agencies and institutions. TANESCO been a company whose 100% shares are owned by the Government, is one of its institutions.

The section referred to above reads as follows: -

*"31 (1) Servants in the executive agencies and Government institutions **shall be governed by***



provisions of the law establishing the respective executive agencies or institution.

*(2) without prejudice to subsection (1), Public Servants referred to under this section **shall also be governed by the provisions of this Act.***”(emphasis added).

It can be gleaned from the wording of section 31(2) of the PSA that it uses the word “shall” which connotes a must; then, public servants in the government executive agencies and government institutions are governed by the provisions of the PSA.

“On the other hand, the words “public servant” under section 3 of the PSA means a person holding or acting in a “public service office”. The words “public service office” are defined to mean a paid public office in the United Republic charged with the formulation of government policy and delivery of public service or any office declared by or under any other written law to be a public service office.

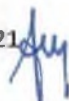
Employees of TANESCO, Katus Manumbu inclusive are charged with delivery of public service of electric supply to the public, they are public servants covered by the PSA provisions.

Mr. Chamwai Mussa argued that Katus Manumbu is a mere supporting or operation staff even if his employment contract does not say so.

He did not elaborate more but he just assumed, but courts do not work on assumption as that is an academic exercise. Moreover, courts are not there to do academic exercises, they are there to determine actual cases. Even if I take it that he meant that supporting staff are not covered by the term "public servant", a question is whether the evidence shows that Katus Manumbu was a supporting staff. Ms. Juliana William appeared to concede that supporting staff are covered by both the PSA and the labour laws, but insisted that in whichever the case, the PSA prevails.

My perusal of the record led me to Exhibit A2, a Placement Letter, tendered by Katus Manumbu himself. In the said placement letter, he was on 15/12/2010 located to Kibondo Power Station as a Mechanical Technician after being employed.

Moreover, there is Exhibit (a) a letter headed "change of your employment contract from three years to unspecified period terms of service" dated 31/10/2011. From this piece of evidence, to me, it is clear that Katus Manumbu was an employee of TANESCO on permanent terms delivering public services. Hence, he was a public servant within the definition under the PSA.



Being a public servant, then it becomes obvious that under the provisions of section 31(1) for the PSA, Katus Manumbu's employment was supposed to be governed by the provisions of the laws establishing the executive agencies or institutions as well as the PSA. However, TANESCO has no such law specifically catering for its employees, therefore, the provisions of section 31(2) of the PSA comes into play covering the TANESCO employees, Katus Manumbu inclusive.

Now Public servants are not required under section 32A for the PSA to seek remedies provided for in labour laws before first exhausting all remedies provided for under the PSA.

Mr. Chamwai Mussa argued that since TANESCO used the provisions of the ELRA and the Employment and Labour Relations (Code of Good Practice and Conduct) Rule GN. No. 42 of 2007 to terminated the employment contract of Katus Manumbu, then, it condoned to the said Katus Manumbu to resort to labour laws instead of the PSA. He justified his argument by citing Regulation 60(2) of the Public Service Regulation GN No. 168 of 2003 which uses the word "may" as interpreted in **Michael Simbeye's case (supra)**, connoting option.

According to Ms. Julian William there is inconsistency of laws. However, Mr. Chamwai Mussa's views is that there is no inconsistency of laws

because the two laws do operate parallel to each other, it is a matter of choice by the concerned person.

In my views I agree with Ms. Juliana William that there is inconsistency between the PSA provisions on one hand, and the labour laws on the other hand. Seeing this situation, the legislature cured the conflict by harmonizing the two sets of the law whereas section 34A was inserted in the PSA via Act No. 24 of 2015, in which case, the provisions of the PSA.

The provision reads as follows: -

"34A Where there is an inconsistency between the provisions of this Act and any other law governing executive agencies, public institutions or other public service offices, the provisions of this Act shall prevail."

It follows therefore, that in a situation where there are other laws governing employment in executive agencies public institutions or such other public service offices, including labour laws, the provisions of this Act prevail. Katus Manumbu, been a public servant of TANESCO, ought to follow the provisions of the PSA.

The argument by Mr. Chamwai Mussa that, since it is TANESCO who started to apply labour law in terminating his employment, then Katus Manumbu was also entitle to apply labour laws, do not amuse me. I say



so because this court cannot condone violations for the otherwise clear provisions for the law.

There is plethora of authorities which interprets the provisions of the PSA as far as the principle of the law which bar public servants from applying labour law until they have prior exhausted the dispute resolution mechanisms provided for under the PSA.

Starting with the most recently decided case by the Court of Appeal of Tanzania, the judgement of which was delivered on 28/3/2022 hardly two weeks ago, the case of **Tanzania Posts Corporation vs Dominic A Kilangi**, Civil Appeal No. 12 of 2022 (unreported) CAT at Mtwara, where it stated as follows : -

"Going by the wording of the above quoted provision it is unambiguously clear that all disciplinary matters or disputes involving public servants are exclusively within the domain of the public service commission whose decisions is appealable to the President. As correctly submitted by Ms. Kinyasi, and as amply demonstrated above, the CMA has no jurisdiction upon such matters".

This court also had time to examine the law on labour disputes concerning public servants in the case of **Alex Gabriel Kazungu and 2**

others vs. TANESCO, Labour Revision No. 40 of 2020 where my brother Judge, Hon. Mdemu, Judge, stated as follows: -

"As per record, the Applicant herein soon upon termination, rushed straight to the CMA. This is in my view, them being public servants regulated by the Public Service Act, was wrong for them to file their labour dispute to CMA before utilizing machineries in the Public Service Act. In essence, for employees regulated by the Public Service Act, CMA would only be clothed with jurisdiction after the respective public servants have exhausted remedies under the Public Service Act".

A similar holding was made by my sister Judge Hon. Bahati, Judge, in the case of **TANESCO vs. Mrisho Abdallah and 4 others**, Labour Revision No. 27 of 2020 in which she stated as follows: -

*"Applying the principle laid down in the case of **Benezer David supra**, the respondents being public servants had no other option than to fully utilize all the remedies available under the Public Service Act before exploring other avenues for dispute settlement. It is my respective views that the Commission for Mediation and Arbitration has no jurisdiction to entertain labour disputes concerning a public servant as a proper forum for that is the one which has been provided for in the Public Service Act, [Cap. 289 R. E. 2019]".*



Mr. Chamwai Mussa cited the case of **Mbozi District Council vs Michael Simbeye**, Revision No. 47 of 2015 which, after discussing Regulation No. 60(2) of the Public Service Regulation which uses the word "may" as discussed above, held that there is option to a public servant to appeal either to the CMA or the Public Service Commission where he feels that his employment has been wrongly terminated.

From the string of authorities cited above, including that one from the Court of Appeal of Tanzania, it is obvious that the **Michael Simbeye's case (supra)** is distinguishable in that it discussed Regulation 60(2) in isolation of its parent Act, the PSA, which following the amendments effected in 2016 put a mandatory requirement of exhausting the remedies under it before resorting to the labour laws.

Therefore, it is my take that the CMA was not seized with the requisite jurisdiction when it entertained Labour Dispute Number CMA/KIG/DISP/10/2017 which was referred to it by Katus Manumbu prematurely who. Being a public servant, he is required to exhaust the dispute resolution machinery under the PSA first.

As to the way forward, the authority in the case of **Tanzania National Roads Agency, vs. Godo Ramadhani Biwi**, available at Tanzlii [220 TZLC 14] tells it all, it was stated as follows: -

"It is obvious that labour dispute number CMA/PWN/KBH/14/2018 was determined without jurisdiction. Any matter that is adjudicated without jurisdiction ought to be quashed".

In this matter, as explained above, labour dispute number CMA/KIG/ISP/10/2017 was determined by the CMA which had no jurisdiction, the concerned proceedings and award thereon are a nullity.

Having found that the proceedings and the award are a nullity, then I need not to proceed on determining the rest of the grounds of revision because they emanate from a nullity.

Consequently, in exercise of revisional powers vested in this Court, I do hereby quash the proceedings of the CMA in labour dispute number CMA/KIG/ISP/10/2017 and set aside the purported award thereof.

Katus Manumbu is advised to lodge his labour grievance, if any, with the relevant authorities in the public service in accordance with the Public Service Act and its Regulations. This being a labour case, I make no order as to costs. It is so ordered.




F. K. MANYANDA

JUDGE

08/04/2022