IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CAUSE NO. 64 OF 2022

IN THE MATTEROF AN APPLICATION FOR AN ORDER OF CERTIORARI

AND

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF CERTIORARI TO QUASH THE PRESIDENT'S DECISION DATED 26TH MARCH, 2022 WHICH QUASHED THE DECISION OF THE PUBLIC SERVICE COMMISSION DATED 27TH APRIL, 2021 WHICH CONFIRMED THE DECISION OF DISCIPLINARY AUTHORITY DATED 07TH SEPTEMBER, 2020 WHICH ORDERED DEDUCTIO OF SALARY BY 15% FOR THREE YEARS; AND SUBSTITUTED THE SAME WITH DISMISSAL

BETWEEN

CAPT. WINTON JANUARIUS MWASA ---------- APPLICANT

AND

THE CHIEF SECRETARY ---------- 1ST RESPONDENT

DAR ES SALAAM MARTITIME INSTITUTE (DMI) - 2NDRESPONDENT

THE ATTORNEY GENERAL ---------- 3RD RESPONDENT

Date of last Order: 17/3/2023
Date of Ruling: 22/3/2023

MGONYA, J.

R U L I N G

This is an Application for an Order of Certiorari filed by **Mr. Mr. Odhiambo Kobas**, the Applicant's Counsel on behalf of the Applicant herein **CAPT. WINTON JANUARIUS MWASSA** under the provisions of ***Rule 8(1) (a) and (b) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Judicial Review Procedure and Fees) Rules, 2014 (G.N. No. 324 of 2014); Section 17(2) and 19(2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, CAP. 310 [R. E. 2019].***

The main complaint, as per the affidavit filed in support of the Application is that, on 20th April 2022, the Chief Secretary through the letter to the Applicant herein **CAPT. WINTON JANUARIUS MWASSA,** conveyed the President's decision of dismissing him from employment dated 26th March 2022 as a result of his Appeal from the Public Service Commission decision; of which earlier confirmed the decision of the Applicant's Disciplinary Committee, which inter alia found him guilty of the charge of being absent from work without any permission as from 15th January 2020 for more

than 5 days. It is from that conviction, the Applicant herein was committed to a penalty of 15% Salary Deduction for a period of three years from 7th September, 2020. From the record, the said punishment started to be executed as from October, 2020.

As the Applicant is aggrieved with Her Excellency the President's decision which dismissed him from employment and which is final, preferred this application seeking for the flowing reliefs:

(i) This honourable Court be pleased to grant an order of certiorari to quash the President's decision dated 26th March, 2022 communicated to the Applicant on 20th April, 2022 which quashed the decision of the Public Service Commission which confirmed the decision of the Disciplinary Committee dated 27th April, 2021 that confirmed the Disciplinary Authority's decision which ordered the deduction of salary by 15% for three years and enhanced the same by substituting it with dismissal from employment;

(ii) Costs of this application; and

(iii) Any other order as the court shall deem fit to grant.

From the pleadings of the Applicant herein, particularly from the Affidavit duly sworn by **CAPT. WINTON JANUARIUS MWASSA** the Applicant herein, is that he was the employee of the 2nd Respondent herein **DAR ES SALAAM MARITIME INSTITUTE** (herein to be referred as **DMI**) since March, 2017 following the transfer from Marine Service Company Ltd - Mwanza, effected by Permanent Secretary Public Service Management and Good Governance (Utumishi). That he served the 2nd Respondent as Instructor II up to 13th June, 2018 when he applied for a permission to attend the Master and Chief Mate Course/Class 2/1 during the 2018/2019 intake at the 2nd Respondent's college which permission was granted to on 29th August, 2018.

That the course content for the said course required the Applicant to attend regular classes (course work) for one year and thereafter a practical training (sea time training) of not less than 12 months for ***Certification as Chief Mate*** and of not less than 36 months for ***Certification as Master*** as per STCW Convention, 1978 as amended and as per the Sections 47 and 48 of the

Merchant Shipping (Training, Certification and Manning) Regulations (G.N. No. 243 of 2003) after which a candidate is required to undergo oral examination/interview to graduate and become a Certified Master and Chief Mate.

That the Applicant's **Master and Chief Mate Course** which he was pursuing is a predominantly competency based course, "Competence Based Education and Training" (**CBET)** focusing much on delivering practical technical and vocational education training on what the learner should be able to do at the end of training than on theory.

That on 4th November, 2019 the Applicant is sid to have completed regular classes (course work) training and on 2nd February, 2020 and was issued with Transcript (DMI6) which shows that he has undergone education and training as per STCW 78 as amended, Regulation II/2 and Section II/2 for **Master and Chief Mate** but not attempted orals examinations.

That his transcript could have indicated my grades for oral examination if he could have completed the Practical Training (Sea Time Training) of not less than 24 months which I attended but could not complete due to conflicting interpretation of want of

permission to attend the same from his employer which culminated to this Application.

That following the shortage of Marine Vessel with the carrying capacity of not less than 3000 GRT in the country, the Applicant had to personally intervene and look for a Marine Vessel with the capacity of 3000 GRT which ultimately got at the Zanzibar Shipping Corporation in MV. Mapinduzi II where he was required to start training on 17th January, 2020 but instead he started on 27th January, 2020.

It is further pleaded that, upon receipt of the Letter from Zanzibar Shipping Corporation, he notified the Principal of the 2nd Respondent herein who encouraged him to attend the same immediately as it normally takes exceptionally long for students to get on board MV with 3000 GRT for practical training. Further, he was required by his Employer to write formally to notify the later so that process of his subsistence allowances while on practical training could take place. According to the Applicant, he abided to the said advice and wrote a letter in that respect dated 7th December, 2019. That in response to his letter dated 7th December, 2019 he received a letter dated 13th December, 2019 with reference No. DMI/PF.49/63 from the Principal of the 2nd Respondent requiring him to propose his budge for subsistence

allowance while on training, which he did vide letter dated 17th December, 2019.

That he made follow-up of the payment from the Institute in vain, as the days for me to report for training were approaching were approaching, on 14th January, 2020 the Applicant approached his head of Department and shared with him his concern regarding subsistence allowance while on training and asked him to collect the said money on his behalf for onward transmission to him It is further alleged that the said head of Department agreed whereas he left for Zanzibar where he joined Sea Time Training on board MV, Mapinduzi II on 27th January, 2020 for continuation of the **Master and Chief Mate course** as per STCW Convention, 1978.

The Applicant further pleaded that, on 18th February, 2020 while on training on board MV, Mapinduzi II he received a letter dated 10th February, 2020 from the 2nd Respondent's Principal acknowledging receipt of his training budget breakdown and further informed him that his permission to start sea time training will be issued after the meeting of Training Committee when it will meet to approve employees' applications for training for the year 2019/2020.

However, the contents of the said letter are said to have surprised the Applicant as the Training Committee in its meeting held in the year 2018 to deliberate on Employees Application for Training during the academic year 2018/2019, deliberated on the Applicant's application to attend **a Three Years duration Master and Chief Mate Course** as per STCW Convention 1978 and approved the same when it granted him permission vide the letter**.**

From the said arrangement, the 2nd Respondent issued the Applicant with Disciplinary Charge vide a letter dated 16th April, 2020 charging the Applicant with one charge of absence from work without permission from 15th January, 2020. That on 30th April, 2020 vide my letter with Ref: No. WJM/02/2020 the Applicant responded to the said charges in writing where he refuted the charges as he had already been given permission to pursue **Master and Chief Mate Course** whose duration is three years and that Sea Time Training (Practical Training) as per STCW Convention 1978 and that his attendance to the said sea time session **was simply a continuation** of the said **Master and Chief Mate Course.**

It is further deponed that the Disciplinary Hearing was **conducted without hearing the Applicant** and the Disciplinary Committee delivered its decision which was communicated to the

Applicant vide a letter dated 10th September, 2020 that he was found guilty of the offence charged and was given a penalty of 15% Salary Deduction for a period of three years from 7th September, 2020. The punishment started to be executed from October, 2020 by deducting 15% of the Applicant's salary.

That being aggrieved by the decision of the Disciplinary Committee, he appealed to the Public Service Commission vide my letter dated 14th September, 2020. And **without being summoned to appear for hearing and without affording the Applicant the right to be heard,** the Public Service Commission proceeded with the determination of my appeal whereupon the decision thereof was delivered vide a letter dated 27th April, 2021 which confirmed the decision of the Disciplinary Committee of deducting 15% of my salary for a period of three years from 7th September, 2020.

That being further aggrieved with the decision of the Public Service Commission, the Applicant appealed to Her Excellency the President of the United Republic of Tanzania vide my letter dated 20th June, 2021. That through the Chief Secretary, again the Applicant states that **without being affording the right to be heard on appeal,** the President proceeded with the determination of the appeal. Where upon Her Excellency the President, proceeded

to **enhanced the punishment given to the Applicant** where she quashed the decision of the Public Service Commission which confirmed the decision of the Disciplinary Committee of deduction me 15% of his salary for a duration of three years from 7th September, 2020 and substituted thereon the punishment of dismissing the Applicant from employment again **without being afforded the right to be heard.**

It is from the above assertion, the Applicant knocked he doors of this Temple of Justice seeking for the above mentioned Reliefs sought as seen above.

Upon the Applicant's affidavit, the Respondents presented before the court the Joint Counter Affidavit of which countered Applicant's assertions. Through the said counter affidavit, the Respondents jointly averred that the Applicant was supposed to attend the said course for a period of one year per his request and he was allowed by the 2nd Respondent to attend the course for one year only, which is year 2018/2019. Further that, apart from the permission to attend classes in year 2018/2019, the Applicant was never allowed to attend sea time training for the year 2019/2020 by the 2nd Respondent. It is averred further that; the Applicant requested to attend the said sea time training through the letter dated 7/12/2019 and the said request was not allowed by the 2nd

Respondent through the letter dated 10/02/2020. However, it has been partly noted by the Respondents to the extent of acknowledging receipt of training budget and informing the Applicant that his permission to start sea time training will be confirmed after the meeting of training committee

It was further stated that the Applicant was never told to propose his budget while on training, as the Applicant's request to attend sea time training was never accepted by the 2nd Respondent. Moreover, it is stated that, no Head of the Department from the 2nd Respondent communicated with the Applicant and if that happened then it should have been supported by the Applicant's Affidavit.

Further that; from the Applicant's act of attending the course without permission made the Applicant absent from work without permission from the 2nd Respondent and that was the reason why he was issued with Disciplinary charge and later penalised after being held guilty as he was charged by ordering the 15% deduction of the Applicant's salary for the period of three years.

However, the Respondent's Counsel averred that, Her Excellency the President in determining the Appeal she quashed the decision of Public Service Committee which confirmed the decision of the

Disciplinary Committee of deducting 15% of the Applicant's salary and substituting thereon the punishment by dismissing the Applicant from work. Hence this application of which is contested by the Respondents herein.

When the matter was called for hearing, the learned Counsel Mr. Odhiambo Kobas represented the Applicant while all the Respondents were presented by the learned State Attorney Mr. Kalokola and Ms. Deborah Mcharo, the learned State Attorney. The Application was disposed of by way of oral submissions respectively.

Submitting in support of the Application, Mr. Kobas Advocate for the Applicant directly declared that the Application before the court is for an Order of Certiorari seeking to quash her Excellency the President of the United Republic of Tanzania decision dated **26th March, 2022,** and served upon the Applicant on **27th April, 2022** which quashed the decision of the Public Service Commission which hard confirmed the decision of the Disciplinary Authority which ordered deduction of salary by 15% for three (3) years and substituted thereon with an enhanced penalty of DISMISSAL from Employment.

The learned Counsel thus prayed the court to adopt the Affidavit of CAPT. WINTON JANUARIUS MWASA together with the Statement in support of the Application to form part of the Applicant's submission. As the brief chronological of events and facts of this matter are contained in the Applicant's Affidavit as seen above; and of which have already been adopted, the Counsel submitted to the effect that:

The Applicant was an Employee of Dar es Salaam Marine Instituted (DMI) the 2nd Respondent since March, 2017; and held the position of INSTRUCTOR II. On 13th June, 2018 he applied for a permission to attend the Master and Chief mate Course/Class II/I during the year 2018/2019 intake at the 2nd Respondents' college which is DMI itself whereby he was granted permission to perform the said course on August, 2018.

The Counsel further submitted that, the Course content which the Applicant was going to pursue, required him to attend regular classes for 12 months Sea Time Training (practical Training) of not less than 36 months depending on his qualification, he may do it for not less than 36 months but depending on his qualification he could have to do it for not less than 24 months. Mr. Kobas informed the court that the said requirements are according to ASTON

Convention of 1978 and sections 47: 48 of the Merchant Shipping (Training Certification and Mining Regulations).

It was further submitted that, upon completion of his 12 months regular classes, the Applicant notified his Employer and further looked for an opportunity to attend the sea time training , which he secured at the Zanzibar Shipping Cooperation and where he was required to start the sea time training in MV MAPINDUZI II as from 17th January, 2020. The Applicant is said to have attended the said Training and while on that training, he received a letter from his Employer on 18th February, 2020 informing him that his permission to start sea side Training will be issued after the meeting of Training Committee; to approve the Employees Training for the years 2019 - 2020.

Mr. Kobas contended that the Applicant was surprised by the said letter because the direction of the course was very well known by his Employer and International Convention and for his Employer is compelled by the prospect and under Regulations 47 and 48 of Merchant Shipping Training Certification and Marine Regulations G.N. **No. 243/2003.** As well as in STC Convention of 1978; which was rectified by our section 162 of **Merchant Shipping Act 2003**.

It was further submitted that, following a dispute whether the permission to attend practical training was required or not, the Applicant on 16th April, 2020 was charged with Disciplinary Offence of being absent from work without permission from 15/1/2020 onwards. Whereby, the Applicant rejected the charges and stated that he was given permission to attend the said course whose duration was three (3) years. Out of the charge, the Disciplinary Committee was constituted and the matter was heard and determined. From the same, the Applicant was found guilty and penalized on a **15% deduction from his salary; for consecutive three years**.

Dissatisfied with the said punishment, the Applicant is said to have appealed to the Public Service Commission on 14th September, 2020. The counsel informed the court that, upon receipt of the Applicant's appeal, The Public Service Commission deliberated on the Appeal and delivered its decision on 27/4/2021 to which it confirmed the decision of the Disciplinary Committee.

Being further aggrieved by the decision of the Public Service Commission, the Applicant is said to have appealed to the President of United Republic of Tanzania on 20th June, 2021. Her Excellency the President having deliberated on Appeal, quashed the punishment of salary reduction by 15% for three years and

substituted it with the punishment of **DISMISSAL from Employment.**

It is the learned Counsel's concern that the enhancement of punishment was done without according the Applicant's Right to be heard. It is from that decision; the Applicant forwarded his Application for Judicial Review before this honourable court with grounds as contained in paragraphs **22(i) - (iii)** of the Applicant's Statement.

Before addressing respective grounds, the learned Counsel briefly reminded the court on the powers of this court when adjudicating for a Judicial Review. In relation to the same, Mr. Kobas summarized those powers as illustrated in the case of ***SANAI MURUNBE & ANOTHER VS. MUHERE CHACHA (CAT) 1990.*** From the same, Counsel called upon this court to see whether the decision by Hon. President and the Authorities below have observed the principles of Natural Justice in the impugned decisions. It is the Counsel's prayer that, if the court finds that the Applicant have been offended as demonstrated in the said grounds, then the court is prayed to quash those decisions in its entirety against the Applicant.

Submitting for the 1st ground which is in para **22(i)** of the Statement, to the effect that: ***Her Excellency the President has enhanced the punishment of 15% salary deduction for 3 years from 7th September, 2020 referred to the Applicant by Disciplinary Authority and subsequently confirmed by the Public Service Commission by substituting the same with DISMISSAL from employment without affording the Applicant the right to be heard***.

The Applicant's Counsel submitting for the Applicant, informed the court that the Applicant's complaint from the very beginning after he was found guilty and punished by deduction of salary by 15% for 3 years, that he is not guilty to the offence charged. The fact which has been tabled both at the Public Service Commission as first appellate organ up to the President as the final organ for his appeal. Further, that throughout these Appeals, the Applicant never complained that punishment referred to him was too low so as to be enhanced. Rather that he had been complaining of not been **GUILTY** and the punishment of salary deduction be detached from him.

It is the Counsel's concern too that neither the 2nd Respondent never complained that the punishment referred to the Applicant was low, therefore the issue of escalation of punishment has not

been raised by any party to the proceedings neither by his Disciplinary Authority nor the Public Service Commission. However, the President in the cause of deliberating on the Appeal, on her own motion, that is ***suo motto,*** decided to quash the punishment of 15% deduction from salary and substituted thereon with a punishment of **DISMISSAL from employment**. It is the Counsel's further concern that, despite that fact, the punishment of Dismissal is too severe as compared with the punishment of deduction of salary by 15%. Moreover, that under the punishment of salary deduction, the Applicant still continued to enjoy other service and benefits associated with his employment including but not limited to Social Security, and National Health Insurance Fund. Under the dismissal, the applicant's status as an Employee has been taken away after a long time service, and also he will be subjected to denial of his Terminal Benefits after retirement or if the case was termination from employment.

Mr. Kobas further submitted that, punishing a person unheard, is contrary to the principles of NATURAL JUSTICE, as the President ought to have summoned the Applicant to show cause as to why his punishment should not be varied and increased from **salary deduction to dismissal.** Since the Applicant was not called to show cause, then the said decision have to be designated

as unfair decision. In the event therefore, it is the Applicant's Counsel concern that **Article 13(6)(a) of the Constitution of the United Republic of Tanzania** has been infringed as the Applicant was not accorded with time in that respect.

In support of his point, Counsel referred this court to the case of ***PILI ERNEST VS. MOSHI MUSANI, Civil Appeal No. 39 of 2019.*** at page 4 where the Court of Appeal observed that:

> *"This Court has in numerous decisions emphasized that courts should not decide matters affecting rights of the parties without according them an opportunity to be heard because. It is a cardinal Principle of National Justice that a person should not be condemned unheard."*

Again, the Counsel referred this court to the same case of ***PILI ERNEST VS. MOSHI MUSANI (Supra)*** at page 5 when quoted its own decision in the case of ***MBEYA RUKWA AUTOPARTS AND TRANSPORT LIMITED V. JESTINA GEORGE MWAKYOMA [2003] TLR 251*** and the case of ***ABBAS SHERALLY "ANOTHER VS. ABDUL SULTAN HAJI MOHAMED FAZALBOY, Civil App. No. 33 of 2002 (Unreported)*** both

enforcing the importance of the right to be heard as one of the fundamental principles of the Natural Justice.

Based on the above decisions, Mr. Kobas invited this court to nullify and quash the decision of that President which enhanced the punishment from a 15% salary deduction to a DISMISSAL. Further for the court to pronounce that the President's decision that was procured without observing principles of Natural Justice be quashed.

The Applicant's Advocate further referred this court to the case of ***GODFREY M. MAKORI VS. THE HIS EXCELLENCY THE PRESIDENT OF THE URT & ANOTHER Miscl. Civil Application No. 83 of 2006;*** whereas in this case, His Excellency the President enhanced the punishment to Mr. Makori by dismissing him from employment without hearing him. The Counsel submitted that, in this case, MANDIA J. on page 6 quashed the President's decision for it was against the principles of Natural Justice.

Concluding on the 1st ground, Mr. Kobas was of the view that, going by the principles of the case of ***SINAI MURUMBE (Supra)***, the Applicant have successfully proved that his rights have been infringed.

Turning to the 2nd ground, which is in paragraph **22(ii)** and also referred to **Annexture "M1"** which is the decision arrived by the Disciplinary Committee (Kamati ya Ajira na Nidhamu ya Chuo cha Bahari DSM). The learned Counsel stated that, the issue here is that the Applicant Disciplinary Authority is not "KAMATI YA AJIRA NA NIDHAMU." The Applicant's Authority is the Head of the Dar es Salaam Marine Institute (DMI) and this is clearly provided for under **Regulation 35(2) (c) of the Public Service Regulation**, as he is the person vested with powers and authority against the Applicant. The Counsel referred this court to **Section 3 of the Public Service Act** where the Disciplinary Authority has been defined.

In that regard, it is the Counsel's concern that the said **"Kamati ya Ajira na Nidhamu"** of DMI is said to have never been vested with the jurisdiction whatsoever to deal with the Applicant's disciplinary matter to the extent of providing penalty in his employment as they did to the punishment of deducting his salary in collaboration with his Disciplinary Authority. It is the Counsel's concern that the Applicant was never summoned to appear neither to the said Committee nor to his Disciplinary Authority, the Principal while the same were deliberating on his punishment, neither be given the Enquiry Report and therefore, he

was denied his right to be heard. On the other note, the Counsel informed the court that, in the course of those proceedings, the Appellant again was further denied his right to advance his **Mitigation** before the Disciplinary decision.

From the above, the Applicant's Counsel is of the view that, the Applicant's right to be heard have been offended and no fair hearing was accorded to the Applicant. And furthermore, he was not ever accorded the right to appear to his Disciplinary Authority.

Winding up this ground, the Applicant's Counsel invited this court to follow the principles of ***SANAI's case (Supra)*** and quash the Disciplinary Authority's decision and that of the Public Service Commission and President's decision thereto as the same originated from nullity.

Submitting further to the third ground which appears in paragraph **22(iii) (b)** of the Applicant's Statement, Mr. Kobas informed the court that two (2) Members to the Inquiry Committee were illegally appointed from within the Organization (DMI). Those Members were revealed to **Engineer Fortunata Kakwaya** and **Dr. Wilfred Johnson** both working with DMI.

The Applicant's Counsel informed the court that, the requirement to appoint Members from outside the Organization at

issue is provided under **Regulation 8.5** of the **Public Service Disciplinary Code of Good Practice 2007** which insists on **impartiality, transparency** and **fair decision**. However, it has been submitted that the same was not the case in Applicant's disciplinary proceedings. Counsel stated that adherence to the Regulations by the Organization concerned, is further documented in **Section 35A (3)** of the **Public Service Act** which states:

> *"Any person interpreting or applying this Act guidelines and codes of good practice and public servant departing away from the guidelines or codes of good practice shall be required to provide the grounds as to why the departure was necessary."*

From the above provision, Applicant's Counsel professed that, in the case at hand, DMI departed from the good practice of code of Conduct, by appointing **Engineer Fortunata Kakwaya** and **Dr. Johnson** of DMI to be Members of the Committee; and no reasons for departure has been provided. Not only to the Tribunal but also to this Honourable Court.

From the above fact, the learned Counsel further submitted that, the composition of the Committee was illegal for contravening the law and therefore, the Report emanated thereto was also

illegal. Further, that and whatever decision from it, be it from the Public Service Decision on appeal and further the appeal to the President was illegal.

From the above narration, it is the learned Counsel's view that the decision which came out of the illegal composed Committee becomes also illegal. Further that the entire decisions becomes a nullity since they all narrated from the Committee that was composed illegally.

Submitting to the last ground which is on **22(iii) (a)** to the Applicant's Statement, the Applicant's Counsel stated that:

> *"The Applicant was punished for being absent from work without permission, while he had been given the permission by his employer to pursue a* ***three years duration Master and Chief Mate Course*** *as per STCW Convention 1978 with a one year regular class attendance and a not less than two years Sea Time Training (Practical Training) thus required no further permission and the Training Committee which purportedly sat for the second time to sit and consider his application for permission to attend Sea Time Training which is a continuation of Master and Chief Mate Course to which it*

had already considered and granted permission was ***Functus Officio."***

The Applicant's Counsel in submitting this ground averred that, before going to college, Applicant made an Application for leave for training. Counsel referred this court to **Annexture B** which is the Applicant's letter to his Employer requesting permission for attending the course. The Counsel revealed that, the same was categorical clear that it was for masters for **Chief Mate Course/CLASS 2**. Mr. Kobus expressed that the Applicant's letter was replied by **Annexure C** granting the Applicant permission to attend the course of which was well known to be a three (3) year's Masters Course as clearly provided by **Annexure A2** which is an Extract from **STCW Convention** and its Regulations of which were rectified and form part of our domestic Laws. In support of his assertion, Counsel referred the court to **Regulation 48 of the Merchant Shipping (Training Certification and Manning) Regulations, Section 162 of the Merchant Shipping Act, 2003,** and **Tanzania Maritime Qualifications Code, of 2016** of which formed **(Annexure D3**.)

The Applicant's Counsel informed the court that, by the time the Applicant was subjected to the disciplinary proceedings, he had already undergone 12 months training and still he was to undergo

24 months to make 36 whereas finally he was to attend an oral assessment before completion of the course time.

The Applicant's Counsel further submitted that, the Applicant's Employer relied on a letter which the Applicant wrote for purposes of notifying the 2nd Respondent that he was due for practical training and he wanted to be paid his practical allowances. The letter **Annexure G** was referred to the court stating that the purpose of that letter was only to notify the 2nd Respondent that he managed to obtain an opportunity for practical training in **MV Mapinduzi.**

The Counsel further informed the court that the belief that the Applicant was seeking consent to proceed with the course is superfluous as the permission has already been granted since **2018** and the 2nd Respondent is very much in knowledge of that aspect. Instead, he had already been granted permission from the very beginning and that what was required was just to provide the Applicant with his allowance sa per his submitted budget. It was further submitted that, it was from there, the Applicant proceeded to the Sea Time Training in Zanzibar knowing that he had permission and also budget in that respect as he knew that he was already permitted since 2018.

From the above submission, it is the Applicant's Counsel view that, the problem lies on the construction on whether the permission given to the Applicant on the year 2018 convened the duration of the entire course as provided under STCW Convention or convened only for 12 months regular classes. It is from the same, Counsel for the Applicant submitted that, had the Disciplinary Authority, the Public Service Commission and Her Excellency the President took into consideration **Annexures D1 (STC Convention 1978), D2 (Merchant Shipping Training Certification and Manning), D3 (Tanzania Maritime Code)** and the **Merchant Shipping Act**, regarding the course content and duration, they could have come to the conclusion that, the Applicant was already permitted to undergo the entire course far back, thus permitting the Applicant to be absent from work for that particular time and reason.

To fortify his submission, the learned Advocate referred this court to the case of ***SANAI MIRUMBE (Supra)*** in its holding **in (ii) (b)** that the Authorities did not take into account what they were supposed to, hence they arrived to a wrong conclusion.

Mr. Kobas further referred this court to **Annexure E** to the Application which is Transcript of Master and Chief Mate Course which indicates that the Applicant attended the course and the

result attained during the course. Further that on the last subject which is ORALS it has been written NA (Not Attempted); hence oral examination is given after the completion of the Sea Time Training. That since the Applicant did not attempt or rather continued with the last part of the course as he was recalled back to his Employer, as a result, he did not fully met the requirement for Certification of Master and Chief Mate and no Certificate has been issued to him in respect of the said course, todate.

Concluding to this ground, the learned Counsel submitted, it clearly shows that the course content and direction to which the Applicant was permitted to undergo was 36 months; and therefore, he was not absent from work as charged; but rather he was absent with permission from his Employer as he knew his where about.

Ending his submission in support of the Application, Mr. Kobas submitted that, the Applicant's case has met the requirement provided in the case of ***SANAI MIRUMBE (Supra)*** to warrant this court to allow the Application and further quash the President's decision together with that of the Public Service Commission and the Disciplinary Authority and allow parties to revert back to their original positions before filing of the instant Application.

Arguing against the Application, Mr. Stanley Kalokola the learned State Attorney introducing the matter, expressed that before the court there is an Application to challenge the decision of Her Excellency the President dated 26th March, 2022 as well reflected in the Applicant's Chamber Summons and in the Applicant's submission. Alongside ***SANAI MURUMBE (SUPRA)***, the learned State Attorney reinforced his submissions by submitting the role of the court in determining Application for Judicial Review. In doing so Mr. Kalokola referred this court to the decision of the Court of Appeal in the case of ***RAHEL MBUYA VS. MINISTER FOR, LABOUR & YOUTH DEVELOPMENT & THE AG Civil Appeal No. 121/2005 CAT at DSM*** where it was stated that:

> *"The Court in issuing a writ of "certiorari" acts in the exercise of a Supervisory and not Appellate Jurisdiction."*

The learned State Attorney referring to the case of ***SANAI MURUMBE (Supra)*** said that the applicant did not establish any ground that is compatible with the guiding principles enunciated in the above authority. As such, the applicant did not, in his view, establish any violation in respect of Natural Justice to warrant this court to exercise its discretion in the favor of granting the orders sought.

Responding to the instant Application, Mr. Kalokola submitted that Counsel Kobas faulted the decision of the Disciplinary Authority, further the decision of the Public Service Commission and lastly, the decision of the President as seen in the statement made by the Applicant, specifically on **paragraph 22 (i) (ii) and (iii)** which contains the grounds for aforementioned decisions.

He further submitted that, the ground faulting the decision of the Disciplinary Authority and the Public Service Commission is unfounded in the Chamber Summons; hence in the Chamber Summons, the Applicant is pleasing this court to quash the decision of the President only. So, based on the Chamber Summons, the decision of the Disciplinary Authority and of Public Service Commission are not subject of this Application as they are not sought in the Chamber Summons.

The learned State Attorney further submitted that, even assuming that this court can proceed by entertaining the Applicant's allegations on the Disciplinary Authorities and on Public Service Authority on raised issues it is still the Respondents' submission that the Applicant has already exhausted his statutory right of Appeal. This is because the 1st decision of the Disciplinary Authority has been taken to the Public Service Commission as seen whereby the decision of the Public Service Commission was also

challenged to the President via **Annexure P11.** And therefore, this Honourable Court cannot go back and revisit the past to those Authorities. Therefore, it is the State Attorney's affirmation that decisions being of the Disciplinary Authority and Public Service Commission cannot be further challenged in anyhow as they are also time barred.

Turning to the allegation that the Her Excellency the President has enhanced the decision of a 15% Salary Deduction to Dismissal, enhancement done *suo motto* by the President and also that the that the Applicant was not accorded with the right to be heard, Mr. Kalokola had the following:

That the Disciplinary Authority and the Public Service Commission are two bodies imposed and confirmed the punishment of deduction of the salary at 15% for 3 years. However, as the Applicant was charged for violating **Regulation 57(1) of the Public Service Regulation of 2003** and found guilty, then the 1st Disciplinary Authority ought to have **dismissed** the Applicant outright as it is the only available penalty. In the event therefore, Mr. Kalokola's assertion is that the punishment to deduct the Applicant 15% of his salary was misconceived as under the said law, hence there is no such punishment of salary deduction for the offence charged. The learned State Attorney further argued

that, under **Regulation 57(1) of the Public Service Regulations**, the President just followed and applied the law. Hence there was no **enhancement,** despite the fact that the President too has power to vary any punishment under **Section 25(1) (d)** of the **PUBLIC SERVICE ACT, Cap. 298 [R. E. 2019]**. Counsel declared that there was no any **illegality** in that respect and that the President varied the decision under the principle of **Legality**.

Having so submitted and find that the President's decision was in line with the law, Mr. Kalokola referred this court to the case of ***GEORGE BARABARA & 2 OTHERS VS. MINISTER FOR LABOUR & YOUTH DEVELOPMENT & OTHERS in TLR 2002*** at page 235 holding (iv), where it was held that:

"It is not in every case that illegality will exclude the exercise if the court's discretion, but the decision will depend on the circumstances of each individual case; in some cases the court may exercise discretion to refuse granting relief even though the impugned decision or order is shown to be illegal or unlawful."

On the ground that the Applicant was not accorded with right to be heard, this court was referred to **Annexure "P"** which is the Applicant's Appeal to the President to challenge the Public Service

Commission Decision and to the President decision dated **20th April, 2022.** From the same, it is the learned Counsel's view that**,** the Applicant by writing the letter to the President was respectively accorded with the right to be heard.

Ending his submission, the learned State Attorney observed and prayed this Honourable Court to consider that the punishment imposed by the Disciplinary Authority to the Applicant and later confirmed by the Public Service Commission was not punishment in law. He further prayed this court to consider the varying of the President to the said punishment legal under the provisions of **Section 25(1) (d) of the Public Service Act**. Further the punishment of **Dismissal** is legally justified under **Section 57(1) of the Public Service Regulations of 2003.** Finally the learned State Attorney thus prayed the instant Application be dismissed for want of merit.

Having analytically and carefully scrutinized the application and the submissions by the learned counsel, for and against the application, the issues for determination lies in the four grounds that have been tabled by the Applicant's Counsel as seen in the Applicant's Statement particularly in **paragraphs 22 (i) to (iii)** as they appear herein below:

i. ***That Her Excellency the President of the United Republic of Tanzania has enhanced the punishment of a 15% Salary Deduction for three years from 7th September, 2020 meted to the Applicant by Disciplinary Authority and subsequently confirmed by the Public Service Commission by substituting the same with dismissal from employment without according the Applicant the right to be heard on appeal;***

ii. ***That both the Disciplinary Authority and the Public Service Commission did not summon the Applicant to appear and be heard on his case and on appeal;***

iii. ***That the Applicant's denial of the right to be heard by the Disciplinary Authority, Public Service Commission and Her Excellency the President lead to miscarriage of justice as follows:***

   a) ***That the Applicant was punished for being absent from work without permission, while he had been given the permission by his employer to pursue a three years duration Master and Chief Mate Course as per STCW Convention 1978 with a one year regular class attendance and a not less than***

two years Sea Time Training (Practical Training) thus required no further permission and the Training Committee which purportedly sat for the second time to sit and consider his application for permission to attend Sea Time Training which is a continuation of Master and Chief Mate Course to which it had already considered and granted permission was Functus Officio.

b) That the Enquiry Committee formed to enquire on the Applicant's alleged misconduct was partial and unfair for being unfairly composed contrary to the provisions of rule 8.5 of the Public Service Disciplinary Code of Good Conduct, G.N. No. 53 of 2007 which requires the Chairman, Secretary and Members of the Committee to be appointed from outside the organisation/DMI while in the impugned Enquiry Committee there was Eng. Fortunata Kakwaya and Dr. Wilfred Johnson who were Members and still are the employees of the 2nd Respondent herein;

c) The decision to deduct the Applicant's salary by 15% for three years consecutively was arrived at

by the Applicant's Disciplinary Authority in association with Kamati ya Ajira na Nidhamu ya Chuo cha Bahari Dar es Salaam, while the said Committee is not the Applicant's Disciplinary Authority;

d) Denial of the Applicant's Right to be heard by Disciplinary Authority, not summoned to appear and be heard by the Public Service Commission on appeal; and not summoned to appear before Her Excellency the President is an infringement of the Natural Justice to the Applicant, and

e) Denial of the right to be heard by refusing to avail the Applicant the Enquiry Committee Report and by not summoning him to appear before the Disciplinary Authority and be heard when the same was being presented to it for its decision.

Before I turn to the above task, I will foremost state, albeit in a nutshell, the law and principles governing Judicial Review.

The power and scope of this Court to review are as guided by the case of the Court of Appeal of Tanzania in ***SANAI MURUMBE VS MHERE CHACHA [1990] TLR 54*** which instructive laid down

guiding principles upon which order of certiorari can issue. They are:

i. ***Taking into account matters which it ought not to have taken into account;***
ii. ***Not taking into account matters which it ought to have taken into account;***
iii. ***Lack or excess of jurisdiction; Conclusion arrived at is so unreasonable that no reasonable authority could ever come to it;***
iv. ***Rules of natural justice have been violated; and***
v. ***Illegality of procedure or decision.***

So in determining the above grounds to this Application, I will be guided by the above outlined principles.

Further, my scrutiny of the submissions of the Parties' Counsel made it apparent that both parties are in agreement that the determination of the instant Review have to adhere to the above principles and that the determination should adhere to the errors of law apparent on the face of record as alleged in the above grounds only to the grounds which entitle the court to exercise its discretion to grant the prerogative orders sought. The basis of this application lies on the grounds upon which the orders are being

sought as it has been stated in the case of ***RAHEL MBUYA (Supra)*** at page 4 where it was stated that:

> "*It is trite law that an error is apparent on the face of the record if it can be ascertained merely by examining the record without having recourse to other evidence. An error which has to be established by lengthy and complicated arguments is not an error of law apparent on the fact of record."*

As grounds **i, ii iii** and **iii (d)** are all on the fault that the Applicant was not accorded with the right to be heard, then I will determine them collectively. In these grounds, it has been said that: ***Her Excellency the President of the United Republic of Tanzania has enhanced the punishment of a 15% Salary Deduction for three years from 7th September, 2020 meted to the Applicant by Disciplinary Authority and subsequently confirmed by the Public Service Commission by substituting the same with dismissal from employment.***

Further, it has been submitted that, the President in the cause of deliberating on the Appeal, on her own motion, that is ***suo motto,*** decided to raise the issue and quashed the punishment of 15% deduction from salary and substituted thereon with a punishment of Applicant's **DISMISSAL** from employment.

It is the Applicant's Counsel concern that, despite that fact, the punishment of DISMISSAL **is too severe** as compared with the punishment of deduction of salary by 15%. Moreover that under the punishment of salary deduction, the Applicant still continued to enjoy other service and benefits associated with his employment including but not limited to Social Security, and National Health Insurance Fund. Under the dismissal, the applicant's status as an Employee has been taken away, and also he will be subjected to denial of his Terminal Benefits as it was the case if he was to retire or terminated.

Mr. Kobas further submitted that, punishing a person unheard, is contrary to the principles of NATURAL JUSTICE, as the President ought to have summoned the Applicant to show cause why his punishment should not be increased from **salary deduction to dismissal.**

In reply it was said that the Applicant was charged for violating **Regulation 57(1) of the Public Service Regulation of 2003,** where if a person is absent from work for five days or more, a Public Servant can be charged. Further, if found guilty, then the penalty is **DISMISSAL.** Hence the 1st Disciplinary Authority ought to have **DISMISSED** the Applicant outright.

In the event therefore, Mr. Kalokola's assertion is that the punishment to deduct the Applicant 15% of his salary was misconceived as under the said law, for the offence charged, there is no such a punishment**.**

Referring to **Annexure "P"** which is the Applicant's Appeal to the President to challenge the Public Service Commission Decision; Further referring to the President decision dated **20th April, 2022,** making reference to the Applicant's Appeal dated **20/6/2021;** it is the learned Counsel's view that**,** the Applicant by writing the letter to the President he was accorded with the right to be heard. Moreover, that the right penalty according to **Regulation 57 (1) of the Public Service Regulations** is **DISMISAL**.

Under this Regulation, it is the learned State Attorney's submission that the President just adhere to and implied the law respectively, hence there was no **Enhancement,** despite the fact that the President too has the power to vary any punishment under **Section 25(1) (d)** of the **PUBLIC SERVICE ACT, Cap 298 [R. E. 2019]**. It is said that in the event therefore, there is no any **illegality** in that respect and that the President was varying the decision under the principle of **Legality**.

In determining this ground, I have to acknowledge that, it is not disputed that the Applicant herein was charged with the offence of **"Absent without leave" contrary to Regulation 57(1) of the Public Service Regulations 2003.** The same provides:

> ***"57.- (1)*** *Where a public servant is absent from duty without leave or reasonable cause for a period exceeding five days, that public servant may be charged with the disciplinary offence of* ***being absent without leave and punished by dismissal."***

Further, it is not disputed that the Applicant's Disciplinary Authority (The Principal of Dar es Salaam Institute of Marine) via a letter dated 10th September 2020 informed the Applicant that, after the Applicant being served with the charge where he was supposed to respond by defending himself, the Applicant's Disciplinary Authority together with the **Kamati ya Ajira na Nidhamu** of the Applicant's Employer have found him **guilty** of the offence charged. Whereas, finally the above Authorities collectively have decided to penalize him with the **15% salary deduction for the term of three years as from 10th September 2020.** This was the decision. As clearly observed in the Applicant's letter **"Annexure M1"** from the Principal, the Appellant herein was

served and also through his written defence, of which he was required to submit, he defended himself through his reply, hence accorded time to be heard. Had it been that the Applicant was not availed with an opportunity to defend himself, then this court could have ruled out that he was not accorded with an opportunity to be heard, of which was not the case.

Regulation **62(1) of the Public Service Regulations 2003** provides appeals procedure, the same provides:

> ***"On appeal under section 25 of the Act, or under Regulation 60 of these Regulations the appellate authority may, allow both the appellant and the disciplinary authority whose decision is being appealed against, or either of them, an opportunity to be heard by presenting himself or in writing in support of, or against the appeal as the case may be.***

The wording of Regulation **62(1)** above is clothed with the word **"MAY"**. To satisfy myself as to the correct meaning of the said word, I have decided to approach **Chapter I** to our Laws that is the **Interpretation of Laws Act,** particularly in **Section 53(1)** which provides:

"Where in a written law the word "<u>may</u>" is used in

conferring a power, such word shall be interpreted to imply that the power so conferred may be exercised or not, at <u>discretion</u>."

From the wording of the above provision, I turn to my above conclusion that as the Applicant was given a chance to write his defense, he was already accorded with an opportunity to be heard. This is so as the word **"May"** under the law imports appearance of the person before the Disciplinary Authority to be **discretionary** and not compulsory. By saying so, I have to state that the Authority chose the way that the Applicant was not to appear and defend himself but rather through writing of which according to the law as seen above, it is acceptable, as it deemed fit by the Disciplinary Authority.

Another point in this ground goes to the assertion that the final Appellate Body, that is the President, again varied the Applicant's punishment without accorded the Applicant chance to be heard but also the act of varying the punishment was done *suo motto*. In determining this point, I would like again to refer to

Regulation 60 (1) of the **Public Service Regulations 2003.** The same provides:

60.-(1) Where the Chief Secretary exercises disciplinary authority Appeals in accordance with part V of these Regulations, in respect of a public servant who is an appointee of the President, that public servant may appeal to the President against the decision of the disciplinary authority and the President shall consider the appeal and may confirm, vary or rescind the decision of that disciplinary authority.

With profound respect, I am obliged to adhere to the above provision by stating that the President when dealing with appeals from the Disciplinary Authority, is vested with jurisdiction either to **confirm, vary or rescind the decision of that disciplinary authority.** In the instant case, the President decided to **vary** the decision by imposing the punishment of **DISMISSAL** from that of salary deduction as issued by the Disciplinary Authority and confirmed by the Public Service Commission of which was the first Appellate Board, the decision of which in my considered opinion was right as according to the offence under Regulation **57 (1) of the Public Service Regulations 2003,** for the offence of being

absent without leave is **dismissal.** So in my intense view, the punishment varied and imposed by the President was **legal**.

Having said all of the above, it is my considered view that grounds **i, ii iii** and **iii (d)** are collectively answered **NEGATIVELY**.

Coming to the 2nd ground which now appears under Ground **iii (a),** the same is to the effect that:

> ***"****The Applicant was punished for being absent from work without permission, while he had been given the permission by his employer to pursue a* ***three years duration Master and Chief Mate Course*** *as per STCW Convention 1978 with a one year regular class attendance and a not less than two years Sea Time Training (Practical Training) thus required no further permission and the Training Committee which purportedly sat for the second time to sit and consider his application for permission to attend Sea Time Training which is a continuation of Master and Chief Mate Course to which it had already considered and granted permission was* ***Functus Officio."***

From the above ground, it is my firm observation that the contents of this ground goes straight into determining the merits of the offence that the Applicant was charged with. In determining

this ground, under Review and evaluation of the evidence in this matter could have only be done by this court in an Appeal and not in this Judicial Review.

In the case of ***JOHN BYAMBALIRWA VS THE REGIONAL COMMISSIONER AND REGIONAL POLICE COMMANDER, BUKOBA, [1986] TLR 73, 75 (MWALUSANYA J.)*** stated:

> *"Judicial review is an important weapon in the hands of the judges of this country by which an ordinary citizen can challenge an oppressive administrative action. And* ***judicial review by means of prerogative orders certiorari, prohibition and mandamus) is one of those effective ways employed to challenge administrative action.*** *It is my conviction that the courts should not be too eager to relinquish their judicial review function simply because they are called upon to exercise it in relation to weighty matters of state.* ***Equally however it is important to realize that judicial review is not the same thing as substitution of the court's opinion on the merits for the opinion of the person or body to whom a discretionary decision-making power has been committed."*** *[Emphasis is mine].*

With greatest respect, from the above precedent, I find that the above ground irrelevant in this application. This is so because the ground invite this court to review the evidence contrary to its powers in Judicial Review as restated by the Court of Appeal of Tanzania in ***SANAI MURUMBE VS MHERE CHACHA (Supra).*** It is instructive that Sanai Murumbe's case laid down guiding principles upon which Order of Certiorari can issue. Let me reiterate the same which are: Taking into account matters which it ought not to have taken into account; not taking into account matters which it ought to have taken into account; lack or excess of jurisdiction; Conclusion arrived at is so unreasonable that no reasonable authority could ever come to it; rules of natural justice have been violated; and Illegality of procedure or decision. The above ground do not fit into the required guidelines for reasons stated above.

Consequently, this ground is misconceived and therefore answered **NEGATIVELY.**

The **third ground** in this regard is under item **iii (b)** which is to the effect that:

> *"The Enquiry Committee formed to enquire on the Applicant's alleged misconduct was partial and unfair for being unfairly composed contrary to the provisions of* ***rule 8.5 of the***

Public Service Disciplinary Code of Good Conduct, G.N. No. 53 of 2007 *which requires the Chairman, Secretary and Members of the Committee to be appointed from outside the Organisation/DMI while in the impugned Enquiry Committee there was* ***Eng. Fortunata Kakwaya*** *and* ***Dr. Wilfred Johnson*** *who were members and were and still are the employees of the 2nd Respondent herein."*

In submission, it was stated by the Applicant's Counsel that two (2) Members to the Enquiry Committee were appointed from within the Organization (DMI). These are **Engineer Fortunata Kakwaya** and **Dr. Wilfred Johnson** both from DMI and still working with the DMI where the Applicant was working.

I have with the great attention went through the contents of the referred Regulation **8.5** of the **Public Service Disciplinary Code of Good Practice G. N. 53 of 2007** which fall under the Disciplinary Principles. The same provides:

*"**To ensure impartiality, transparency and fair decision**, the disciplinary authority **shall appoint a Chairman, Secretary and Members of the Committee from outside the Organization,** whereas the Secretariat shall be appointed by the disciplinary authority from within the organisation. **While appointing members of the***

committee, Regulation 46 of the Regulations should be taken into account."

In the cause of digesting the above law, I took interest of looking into the contents of **Regulation 46 of the Public Service Regulations 2003.** From there I have gathered that the same provides for the qualifications of the Members to the Inquiry Committee and other important related matters which have to be adhered to in the cause of composing the said Committee. The section also proclaims the reason as to why the above **Regulation (46)** had to be mentioned therein.

Expounding further on the logic behind the conditions in **Regulation 8.5** quoted above, I am of the firm view that, the condition as to why the appointment of the ***Chairman, Secretary and Members of the Committee to be from outside the Organization, and as for the Secretariat to be appointed by the disciplinary authority from within the organisation,*** I am of the firm view that the Legislature had the following in mind:

1st, taking into consideration of the conditions set in **Regulation 46 of the Public Service Regulations 2003, particularly in appointment of the Members of the** Enquiry Committee, and in order to **ensure impartiality, transparency and fair decision**, the Members of the Committee if appointed

within the Organisation, they cannot avoid being biased. This is so as their allegiance lies upon to the Employer whom have appointed them. In order to safeguard the interests of the Employer and maintain the allegiance, obvious they will have to obey the orders from the Employer. In doing so, the person of whom is under inquiry, it is obvious that his rights will be infringed. On the serious note, these Members unlike the Secretariat, they are the ones to make decision on the matter to be inquired. All these facts cements as to why Members of the Committee should be from outside the Organisation as they don't owe any allegiance to the Organisation's Management of which the Disciplinary Authority too originates unlike the Employees of the same Organisation.

From the above, I fully subscribe with the above wisdom that in order to observe and maintain **impartiality, transparency and fair decision,** Members of the Inquiry Committee should come from outside the Organisation of the Inquired person / Employee.

After observing that all I have pointed above, the appointment of **Engineer Fortunata Kakwaya** and **Dr. Johnson** of DMI to be Member of the Committee; and no reasons for departure has been provided not only to the Appellate Bodies and to this

Honourable Court is a gross violation of principles of **Natural Justice** particularly in having a fair trial.

Section 35A (3) of the **Public Service Act** which states:

> *"Any person interpreting or applying this Act guidelines and codes of good practice and public servant departing away from the guidelines or codes of good practice* ***shall be required to provide the grounds as to why the departure was necessary."***

From the above provision, I have not read anywhere particularly from the Respondents be it in their joint counter affidavit or heard from their respective submission the reason of departing from the compulsory requirements as provided under Code 8.5 of the **Public Service Disciplinary Code of Good Practice.**

Interpreting this situation, it is my profound view that, **out of this legal anomaly, the Applicant had no a fair trial.**

At this juncture, let me say something on **what are the Rules of Natural Justice** and its importance.

Rules of Natural Justice are about **Fairness and Justice** in the society. They address how judicial, administrative and other organs are to function in the process of reaching a fair decision in determination of any issue before them. These rules of fair-play in

the administration of Justice are regarded as Universal Rules of the wise. They are an integral part of the doctrine of **Rule of Law**. It is in that light that Lord Esher, M. R. in ***VIONET V. BARRETT [1885] 55 Q. B. 39*** referred to them as indicators of the natural sense of what is right and wrong.

Originally, we are told that there were only two main principles of Natural Justice. These are the **rule against bias**-popularly known by the maxim ***nemo judex in sua causa*** which prohibits a man from being a Judge in his own cause; and the right to be heard which is embodied in the maxim ***audi alteram partem*** i.e a person should not be condemned unheard. Over time, courts of law have developed a third principle of Natural Justice. That is **the right to know the reasons for the decision**. That is to say, the deciding authority has a duty to provide reasons for the decision reached. This is also referred to under the maxim ***nullum arbitrium sine rationibus.***

I have decided to state the above sentiments to insist that, if the Disciplinary Authority who decided to appoint the above two Employees to be part of the Committee, contrary to the Law, then the reason to that decision should have been tabled to justify the decision thereto. Short of that, it is just a violation of Rules just like

any other form of violation. Hence unreasonable and unfair appointment.

At this point I wish to borrow the wisdom of New Zealand where the obligation to give reasons was discussed at some length by the Court of Appeal in ***R. V. AWATERE [1982] 1 N. Z. L. R. 644.*** In delivering the judgment of the Court, Woodhouse, P. made the following observation:

> *"In the area of administrative law, statutory attention has been given to the provision of reasons by statutory tribunals but reasons are not required at least as a matter of course, by the rules of natural justice. We have said at least as a matter of course because some cases may arise where absence of reasons in the particular circumstances could justify a discretionary setting aside of a decision on grounds of natural justice. So that we would not ourselves exclude the possibility of particular cases in which the rules may be found to require reasons and in which failure to provide them would warrant a setting aside of the decision.*
>
> *I find some difficulty in defining the circumstances in which* ***fairness on the one hand requires reasons to be given, and on the other does not. Often, it is only the reasons***

***that disclose that there has been unfairness in the decision-making process.*"**

In our Jurisdiction (Tanzania), **Rules of Natural Justice** have been incorporated to the Bill of Rights in the Constitution of the United Republic of Tanzania in 1984 where for the first time the Rules of Natural Justice were made part of the basic law of this Land. **Article 13(6) (a)** provides *inter alia* that:

"13 (6) To ensure equality before the law, the State Authority shall make procedures which are appropriate or which take into account the following procedures, namely:

(a) When the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or any other legal remedy against the decision of the agency concerned."

In order to persevere the above article and the point thereto, I see it pertinent to quote the same in Kiswahili as herein below:

"13 (6) Kwa madhumuni ya kuhakikisha usawa mbele ya sheria, Mamlaka ya Nchi itaweka taratibu zinazofaa au zinazozingatia misingi kwamba -

(a) ***wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi wa mahakama au***

chombo kinginecho kinachohusika, *basi mtu huyo atakuwa na* ***haki ya kupewa fursa ya kusikilizwa kwa ukamilifu,*** *na pia haki ya kukata rufaa au kupata nafuu nyingine ya kisheria kutokana na maamuzi ya mahakama au chombo hicho kingenecho kinachohusika;*

The above quoted Constitutional provision gives the Rules of Natural Justice special status in the Tanzanian Legal System and it is not easy neither allowed to ignore them.

Therefore the appointment of the two staff from DIM to constitute the INQUIRY COMMETTEE is not acceptable, as the same is contrary to the law; as that amounts to a denial of Justice. In the words of Lord Guest in the case of ***WISEMAN AND ANOTHER V. BORNEMAN AND OTHERS [1969] 3All E. R. 275 at page 279 and [1971] A.C. 297 at page 309*** in such matters, said: ***"Parliament is not to be presumed to act unfairly."*** It is the learned Author K.C. Davis in his book ***Discretionary Justice***, ***Baton Rouge, 1969 at page 3*** where he states with marked emphasis that:

"Where the law ends, discretion begins and the exercise of discretion may mean either beneficence or tyranny, either justice or injustice, either reasonableness or arbitrariness."

Thus when a discretion has to be exercised by any Statutory Body, it means that the same has to be guided by law. It must be governed by **Rule** and not by humour; it must not be arbitrary, vague and fanciful but **legal and regular**. A loose and unfettered discretion is a dangerous weapon. Its exercise is likely to be a refuge of vagueness in decision and naturally that invites public criticism and shakes Public confidence in the Justice of Tribunal or Authority concerned.

It is my concern that, when a Statute provides that a discretion should be exercised by a Public Officer, what is meant is a Judicial discretion regulated according to the known rules of law and not the mere whim or caprice of person to whom it is entrusted on the assumption that he is desecrate. The dangers of unfettered discretion were echoed a long time ago by Lord Camden in the English case of ***HINDSON V. KERSEY*** *where he said:*

> *"That discretion is the law of tyrants. It is always unknown, it is different in differing men, it is casual and depends upon constitution, temper, passion. In the best it is often times caprice, in the worst it is every vice, folly and passion to which human nature is liable.*

To buttress my point, let me refer to the decision of the ***TRADE DISPUTE NO. 1 /1992, between PETER M. BUKURU and N. P. F.*** at page 418, where the illegal constituted Committee was proclaimed a nullity and declared that it had no authority to perform as it was wrongly constituted. The same ruled:

> *"In the circumstances he submit in effect that group of people who fronted as a Staff Committee are in fact not a legally constituted Staff Committee to which Board could have delegated its disciplinary powers.* ***What the illegally constituted Staff Committee purported to do, that is including the punishment it passed in the claimants, were all a nullity. There was therefore nothing before the Board which it could have ratified because the committee which putted to discipline the Claimant had no authority to do so****."*

Having said all the above, I am of the firm view that, since the Applicant's disciplinary proceedings which finally initiated his dismissal from employment, originated from the Inquiry Committee which was illegally constituted, all the proceedings and all the decision which followed, originated from the illegal source which degraded the rules of Natural Justice.

From the above, the Disciplinary Authority decision of which was later confirmed by the Public Service Commission and finally by the President's decision to dismiss the Applicant from employment, it has been confirmed by this court that they all originate from an illegal decision of an illegally constituted Committee, hence null and *void ab initio* and that they have no legal legs to stand on.

On the same taken I wish to refer to the case of ***REPUBLIC VS. ABDALLAH SELEMANI T.L.R. [1983]*** where it was stated that:

> ***"The Court's power of confirmation of sentences can only be exercised on relation to sentences legally passed, an illegality cannot be confirmed."***

It was further held in the same case that:

> ***"Enhancement of sentence should not be made to the prejudice of the accused person, for example, where he cannot be given an opportunity to be heard."***

Therefore the Disciplinary Authority, the Public Service Commission and the President ought not to have confirmed the decision of **INQUIRY COMMETTEE** and **Disciplinary Authority**

which was pure illegal. In the event therefore, this ground has merit and is answered **POSITIVELY.**

Next on the line is the ground which appears in ground **iii (c)** in which is to the effect that:

> ***"The decision to deduct the Applicant's salary by 15% for three years consecutively was arrived at by Applicant's disciplinary authority in association with Kamati ya Ajira na Nidhamu ya Chuo cha Bahari Dar es Salaam, while Kamati ya Ajira na Nidhamu ya Chuo cha Bahari Dar es Salaam is not the Applicant's Disciplinary Authority."***

It was submitted by Mr. Kobas for the Applicant that, the Kamati ya Ajira na Nidhamu of DMI has never been vested with the jurisdiction whatsoever to learn the Applicant's disciplinary matter. The Applicant also apart from appearing before the Inquiry Committee for inquiry purposes, the Applicant was not summoned to appear neither to Kamati ya Ajira na Nidhamu ya Chuo cha Bahari DSM nor to the Principal (Mkuu wa Chuo cha Bandari DSM) who is the Disciplinary Authority. Further that he was never summoned to appear before it while it was deliberating on enquiry report and therefore, he was denied his right to be heard before the Kamati ya Ajira na Nidhamu ya Chuo cha Bahari DSM as well

to the Principal (Disciplinary Authority). And therefore when the Committee was passing the 15% deduction of the Appellant salary it passed that punishment without according the Applicant the right to be heard.

In this groan too, it was submitted that it is alleged that the Appellant was further denied his right to advance **Mitigation** before the Disciplinary decision.

I fully agree with the Applicant's Counsel that the said Employment and Disciplinary Committee herein referred as Kamati ya Ajira na Nidhamu ya Chuo cha Bahari DSM, has been indeed incorporated to the Applicant's issue despite the fact that they are not his Disciplinary Committee as defined under the law. I had an ample time to go through the letter to the Applicant from his Disciplinary Authority, informing him the disciplinary proceedings results and the penalty thereto. I wish to quote part of the said letter (Annexure **"M1"** to the Applicant's pleadings) as herein below:

> *"Napenda kukuarifu kuwa, pamoja ana utetezi ulioutoa kuhusiana na shtaka hili, tuhuma ya utoro kazini imethibitika. Hivyo,* ***Mamlaka yako ya Nidhamu, pamoja na "Kamati ya Ajira na Nidhamu ya Chuo cha Bahari Dar es Salaam katika kikao chake cha tarehe 07/09/2020 kimeamua***

kukupa adhabu ya kukatwa 15% ya mshahara wako kwa muda wa miaka 3 kuanzia tarehe 07/09/2020 *ulipothibitika kuwa ina hatia kwa mujibu wa Kanuni ya 48(6) ya Kanuni za Utumishi wa Umma za mwaka 2003."*

I understand that the Disciplinary Authority is the one who signed the said letter. Further, behind the curtain, he must have besides the advisory body to advise him. However, the disciplinary decision at that level has to come from the Disciplinary Authority as detected in the law. Informing the Applicant that the other Body of which is not recognised in law has been fully engaged in construction of his disciplinary punishment is not proper as the same is not vested with that authority.

Turning to Mitigation issue. That the Appellant is said not to have been accorded with an opportunity to mitigate. On this I have to acknowledge that an opportunity to **Mitigate** is one of the indispensable factor to the fair hearing. The opportunity is provided under **Regulation 8.4 of the Public Service Disciplinary Code of Good practice;** which provides:

"Prior to any disciplinary decision being taken, any mitigating factors or circumstances must be taken into account."

As the Applicant's allegation did not counter any objection in this respect, then I have to say that, the omission is against the Law hence serious one. Its omission renders the proceedings nullity as it infringes ones rights.

It suffice to say that. As this ground in its entirety has merit and it is hereby answered **POSITIVELY**.

The last ground in this respect states:

> *"Denial of the right to be heard by **refusing to avail to me the Enquiry Committee Report** and by not summoning me to appear before my Disciplinary Authority and be heard when the same was being presented to it for its decision."*

In determining this ground, I will focus to the issue as to whether the Applicant was entitled to be availed the copy of the Enquiry Committee Report or not.

Regulation 25. 3. 3. (c) of the Public Service Disciplinary Code of Good Practice provides:

> *"In cases of misconduct, the appellate authority **shall** consider whether: the employee has been provided with the copies of notes / minutes taken at the committee hearing and given an opportunity to comment".*

This provision is termed in mandatory way as it has the word **"shall".** This fact has never been denied by the Respondents in their joint Counter Affidavit.

I have noted that in the Respondents' reply to the Statement replying this issue which appears in paragraph 3 (e) of the Applicant's Statement. The reply thereto reads:

> ***"2. That the contents of paragraph 1, 2 and 3 of the Statement are noted."***

It is from that response; I confirm that indeed the Applicant was never supplied the said documents to enabled him to prepare himself. Neither the appellate Authorities never took a look if that was complied. Thus, this ground too similarly is answered **POSITIVELY.**

Having said all, I find this application **meritious** due to failure to abide with the statutory procedures which was to apply to disciplinary measures to the Applicant as well narrated above. This court has confirmed that the Applicant's Disciplinary Authority have infringed the rights of the Applicant; particularly by not having a fair trial out of non-adherence of the Rules of Natural Justice as well explained in this Ruling.

Unfairness resulted the decisions of the Appellate authorities to be grounded from **NULLITY**. In the event therefore, **I proceed to grant an order of Certiorari by quashing the President's decision dated 26th March, 2022 communicated to the Applicant on 20th April, 2022 of which quashed the decision of the Public Service Commission confirming the decision of the Disciplinary Committee dated 27th April, 2021; that ordered the deduction of salary by 15% for three years and enhance the same by substituting it with dismissal from employment.**

The Matter be referred to the Applicant's Disciplinary Authority for re-determination according to the law, if still wishes so.

The Applicant to have his cost from the Respondents.

Ordered accordingly.

L. E. MGONYA

JUDGE

22/03/2023

COURT:

Ruling delivered in the presence of the Applicant in person, and Mr. Stephen Kimaro, State Attorney for the Respondents and Ms. Magreth Kanyagha RMA on this 22nd day of March, 2023.

L. E. MGONYA

JUDGE

22/03/2023