

THE UNITED REPUBLIC OF TANZANIA  
JUDICIARY  
IN THE HIGH COURT OF TANZANIA  
(MAIN REGISTRY)  
AT DAR ES SALAAM  
MISCELLANEOUS CAUSE NO. 11 OF 2023  
IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI,  
MANDAMUS AND PROHIBITION  
AND  
IN THE MATTER OF CHALLENGING THE DECISION OF THE PRESIDENT OF THE  
UNITED REPUBLIC OF TANZANIA OF CONFIRMING THE DECISION OF THE  
PUBLIC SERVICE COMMISSION WHICH RESULTED INTO TERMINATION OF  
EMPLOYMENT OF JONAS JOSEPH TILYA

BETWEEN

JONAS JOSEPH TILYA.....APPLICANT

VERSUS

THE CHIEF SECRETARY.....1<sup>ST</sup> RESPONDENT

BOARD OF GOVERNORS, INSTITUTE OF SOCIAL WORK.....2<sup>ND</sup> RESPONDENT

THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT

RULING

Date of Hearing: 08/05/2023

Date of Ruling : 15/05/2023

**MONGELLA, J.**

In the application at hand, the applicant seeks for prerogative orders, to wit; certiorari, mandamus and prohibition against the decision of the 1<sup>st</sup> respondent. The application is brought under **section 17 (2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap 310 R.E.**



**2002; Rule 8 (1) (a) (b), (2), (3), (4) and (5) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Rules, 2014.** It is supported by the affidavit of Jonas Joseph Tilya, the applicant herein. The prayers contained in the chamber summons are as follows:

- (1) *That, this Honourable Court be pleased to grant the order of Certiorari to quash and remove from the court the decision of the President of the United Republic of Tanzania made through the Principal Secretary dated 4<sup>th</sup> August, the decision which confirmed the decision made by the Public Service Commission which caused the termination the Applicant from the employment. (sic)*
- (2) *That, this Honourable Court be pleased to grant the Order of Mandamus to order the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that in case they have any case against the Applicant the same be dealt according to the requirements of the law. (sic)*
- (3) *That, this Honourable court be pleased to grant the Order of Prohibition to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from interfering with the employment contract of the Applicant unless they have to do in compliance with the requirements of the laws.*
- (4) *That, the 2<sup>nd</sup> Respondent be ordered to reinstate the Applicant herein to his former employment position without losing his remuneration from the date of termination to the date of judgment.*
- (5) *Costs of the Application be provided for.*



The grounds for seeking the above orders are listed under paragraph 6 of the applicant's statement to be that:

- (1) *Her Excellence, the President of the United Republic of Tanzania by confirming the decision of the Public Service Commission she (sic) failed to exercise her discretion properly as she did not apply her mind to satisfy herself that:*
  - (a) *The Public Service Commission acted ultra vires by reviving offences (counts) which failed to be supported by evidence before the employer and then to proceed to base its decision on such counts without granting the Applicant right to be heard. (sic)*
  - (b) *The Public Service Commission acted malafidely by creating facts of conducting sexual harassment against unknown person which was not raised before, and without according the Applicant right to be heard.*
  - (c) *The 2<sup>nd</sup> Respondent who is the employer of the Applicant also failed to exercise her discretion by punishing the Applicant on matters which had no evidence.*
- (2) *Her Excellence acted wrongly by giving decision of confirming the decision of the Public Service Commission without assigning any reason.*



The background of the dispute as depicted in the applicant's supporting affidavit are briefly to the effect that: the applicant was employed by the Institute of Social Work, which is governed by the 2<sup>nd</sup> respondent, as an academic staff in the position of Assistant Lecturer (A letter of employment was attached as annexure Tilya-1). In the course of performing his duties under the employment contract, he was served with a formal disciplinary charge and a letter requiring him to provide explanation as to the charge (annexture Tilya-2). The charge contained four counts being:

1<sup>st</sup> Count: ***Failure to perform satisfactorily duties assigned to the Public Servant contrary to Regulation 42 and Paragraph 8 of Part A of the First Schedule of the Public Service Regulations 2003.*** The particulars of the offence were to the effect that: being a public servant, an assistant lecturer employed by the Institute of Social Work, on unspecified dates and time during supplementary examinations of the first semester of the academic year 2018/2019, whereby he was teaching Module HRU 07105-Information Communication Technology, with malice did unfairly mark the supplementary examination of one Ms. Kamome Subira Andrew at the Institute of Social Work Kijitonyama, knowing that it was contrary to the Code of Ethics and Conduct for the public servant.

2<sup>nd</sup> Count: ***Sexual Harassment contrary to Regulation 65 (1) and Paragraph 6 of Part II of the Third Schedule of the Public Service Regulations, 2003.*** The particulars of this offence are to the effect that, the applicant in his position as public servant-assistant lecturer employed by the Institute of Social Work, on unspecified dates and time during the first semester of the academic year 2018/2019, while teaching Module HRU 07105 Information





Communication Technology, did force to have sexual relations with a student, one Kamome Subira Andrew or to unfairly mark her supplementary examination if she refused to enter in sexual relationship with him at the Institute of Social Work Kijitonyama, knowing that it is contrary to the Public Service Act.

3<sup>rd</sup> Count: ***Act or Omission involving moral turpitude contrary to Regulation 42 and Paragraph 1 of Part A of the First Schedule of the Public Service Regulations, 2003.*** The facts provided in the particulars of the offence are to the effect that: the applicant, being a public servant-an assistant lecturer employed by the Institute of Social Work at the material time, on unspecified dates during the first semester of the academic year 2018/2019 when teaching Module HRU 07105-Information Communication Technology, did intimidate students with intent to enter into sexual relationship with student named Kamome Subira Andrew at the Institute of Social Work Kijitonyama, knowing that it was contrary to the Code of Ethics and Conduct for the Public Service.

4<sup>th</sup> Count: ***Contravening of the Code of Ethics and Conduct for the Public Service, Professional Code of Ethics and Conduct or the Public Leadership Code of Ethics contrary to Regulation 42 and Paragraph 14 of Part A of the First Schedule of the Public Service Regulations, 2003.*** The particulars of the offence state that: the applicant being a public servant-an assistant lecturer employed by the Institute of Social Work at the material time, on unspecified dates during the first semester of the academic year 2018/2019 when teaching Module HRU 07105-Information Communication Technology, did solicit sexual relationship by force from a student named



Kamome Subira Andrew in exchange for a pass in the supplementary examination at the Institute of Social Work Kijitonyama, knowing that it is contrary to the Code of Ethics and Conduct for Public Service.

The applicant obliged and provided explanation to the charge as required. Thereafter, he appeared before an Inquiry Committee in the company of a fellow employee, one Dominic Nkolima, who was his representative. The results of the inquiry/hearing were communicated to him vide a letter dated 18<sup>th</sup> January 2020 (annexture Tilya-5) notifying him that he was found guilty for failure to perform his duties satisfactorily subject to Rule 42 (2) paragraph 8 of First Schedule of the Public Services Regulations, 2003. Subsequently, under Rule 42 (1) of the Regulations the 2<sup>nd</sup> respondent reduced his rank from the position of Assistant Lecturer to that of Tutorial Assistant for a period of three years.

Aggrieved by the decision, he appealed to the Public Service Commission (hereinafter to be referred to as "the Commission"), but was unsuccessful. The Commission, in fact, found him guilty of all the charges and decided he be dismissed from employment (annexture Tilya-6). Still determined, he appealed further to the President of the United Republic of Tanzania as accordingly sanctioned by the law (annexture Tilya-7). This second appeal was also unsuccessful as the President confirmed the decision of the Commission dismissing him from employment (annexture Tilya-8). The application at hand is therefore, as stated earlier, to challenge the decision of the President confirming that of the Commission.



Mr. Isaack Tasinga, learned advocate, represented the applicant. Submitting on the grounds for judicial review, he faulted the President's decision in blessing the findings and decision by the Commission. He contended that the President failed to exercise her discretion properly as she did not apply her mind to satisfy herself that the Commission acted ultra-vires by reviving the dropped charges for lack of evidence and proceeded on new charges without hearing the applicant which was contrary to the law. He continued to argue that the President ought to have noted that the Commission had no powers to create charges against the applicant as if it was the employer and punish the applicant on the new offence without hearing him.

Mr. Tasinga further argued that the President ought to have seen that the 2<sup>nd</sup> respondent, who is the employer, failed to exercise its discretion on matters on which there was no evidence. That, she ought to have checked the decisions by the employer and see that the employer was incorrect in its decision by charging the employee without evidence. He added that the decision had flaws as the employer had no evidence of malice in marking the student's paper, as the paper was never brought to the Inquiry Committee and the student never filed any formal complaint. That there was no any material document that backed the employer's case.

Mr. Tasinga's arguments stem from his introductory submission to the effect that the Commission's letter in response to the applicant's appeal "annexture Tilya-7," reveals that a new offence was created to the effect that the applicant followed the student/victim, one Subira Andrew, up to church and harassed her regarding her clothing. He said that this was in





addition to reviving charges that were already dropped by the Inquiry Committee, which were the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> counts.

On those bases, he concluded that the Commission acted ultra-vires and condemned the applicant unheard, the grounds which could be seen clearly by the President in her position and faulted the employer's decision. In that respect, he had the opinion that the decision by the President was unfair and occasioned mis-carriage of justice on the applicant's part. That, an order of certiorari to remove the decision of the President and subordinate bodies to her is warranted, in the circumstances. That, an order of mandamus is also warranted to compel the President to act in accordance with the law; and not to interfere with the applicant's employment; and if satisfied that the applicant was unfairly terminated, an order be issued to the effect that he be reinstated, without loss of remuneration.

The respondents were represented by Francis Wisdom, learned stated attorney. He opposed the application. He straightforwardly addressed the issues advanced in the applicant's supporting affidavit and submission by the applicant's counsel. First, he addressed the claim that no reasons were given by the President in her decision. On this, he contended that the President, as a quasi-judicial body, is not bound by the rules applicable in courts of law. In support of his stance, he referred the case of **Yusufu Selemani Kileo vs. The Attorney General**, Misc. Cause No. 35 of 2022. He added that there is no hard and fast rule binding the government and the President in following a certain format in providing a decision. Referring to the annextures in the applicant's affidavit, that is, "annexture Tilya-8" he





contended that the reasons for upholding the Commission's decision were given. That, the letter clearly shows that the President passed through the record of appeal and was satisfied that the offence charged was proved. He thus found the allegation unfounded.

Addressing the claim that the Commission formulated a new charge, he argued the claim is misplaced. He contended that the charge on the 2<sup>nd</sup> count was on sexual harassment; on the 3<sup>rd</sup> count was on act or omission involving moral turpitude; and on 4<sup>th</sup> count on contravention of the Code of Ethics and Conduct for Public Servants. He had the view that the counts in the charge clearly show that there was sexual harassment and breach of the Code of Ethics. He challenged the assertion under paragraph 6 (i) of the applicant's affidavit saying that no new offence was committed.

Mr. Wisdom also challenged the applicant's claim that the 2<sup>nd</sup> Respondent failed to exercise her discretion by punishing the applicant on matters which had no evidence. He found the assertion misconceived arguing that evidence was duly presented and the applicant found guilty as accordingly charged. Further, referring to the case of **Sanai Murumbe & Another vs. Muhere Chacha** [1990] TLR 54, he argued that the criteria for grant of an order of certiorari has not been met by the applicant. He argued that the Commission is empowered to go through the whole record and make a decision whereby it can even vary the decision of the employer, as it did. He prayed for the application to be dismissed.

In rejoinder, Mr. Tasinga first addressed the assertion by Mr. Wisdom that the Commission and the President are not bound by any law. He found the



argument misleading on the ground that the same is not the legal position. He was of the view that these offices discharge their functions in accordance with the law.

With regard to the claim on assigning of reasons by the president, he first challenged the authority relied on by Mr. Wisdom, that is, the case of **Yusufu Selemani** (supra) arguing that what was stated therein cannot be said to be sufficient. He contended that there was an appeal before the President challenging the decision of the Commission, however the response by the President seems to cover the decision of the employer, which was not dismissing the applicant from employment. He had the view that if the discretion was applied properly, it would have dealt with the appeal.

With regard to the conditions settled in the case of **Sanai Murumbe** (supra), Mr. Tasinga had the stance that the conditions therein were met by the applicant. He argued that one of the conditions in the said case is that the decision-making body should not take into consideration matters which ought not to be considered and the Commission, in the case at hand, dealt with matters it ought not to deal with.

He added that another condition in **Sanai Murumbe** (supra) is that there has to be an illegality in the decision. He said that the Commission committed many illegalities. He mentioned two of them being: that, it revived charges without any powers conferred to it by any law. Pointing another illegality, he contended that under the 1<sup>st</sup> count, the applicant was alleged to offend Public Service Regulation 42, however, the employer's letter cited a different charge. He considered the illegalities apparent on



face of record justifying the court to exercise its powers in granting orders of certiorari and mandamus.

I have accorded the parties' submissions and pleadings due consideration. In granting prerogative orders, particularly, the order of certiorari, there are factors to be taken into consideration by the court, particularly on irregularities in reaching the decision. That is, procedural irregularities, such as, acting without jurisdiction, without adhering to legal rules and procedures, or infringement of natural justice. This position has been settled in a number of authorities. For instance, in **M/S Olam (T) Limited vs. Leonard Magesa & 2 Others**, Misc. Civil Cause No. 6 of 2019 (HC at Mwanza), it was held:

*"... for this court to exercise its powers to issue an order for certiorari against the decision of the 2<sup>nd</sup> respondent, it must be established that the decision was arbitrary and contrary to the rules of natural justice. It must also be proved that, the decision was irrational, i.e., unreasonable and unfair, or that it was tainted with procedural impropriety and, or it violated the provisions of Art. 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977, as amended."*

In **Sanai Murumbe & Another vs. Muhere Chacha** (supra) the Court listed six conditions being:

*"... **One**, that the subordinate court or tribunal or public authority has taken into account matters which it ought not to have taken into account; **two**, that the court or tribunal or public authority has not taken into account matters which it ought to have taken into account; **three**, lack or excess of jurisdiction by the lower court; **four**, that the conclusion arrived at is so unreasonable that no reasonable authority*





could ever come to it; **five**, rules of natural justice have been violated; and **six**, illegality of procedure or decision."

See also: **Ezekiah T. Ulouch vs. The Permanent Secretary, President's Office, Public Service Management & 4 Others**, Civil Appeal No. 140 of 2018 (CAT at DSM, found at [www.tanzlii.go.tz](http://www.tanzlii.go.tz)). Further, the Court of Appeal in the case of **Rahel Mbuya vs. Minister for Labour and Youth Development & The Attorney General**, Civil Appel No. 121 of 2005 (CAT at DSM, found at [www.tanzlii.go.tz](http://www.tanzlii.go.tz)), quoted in approval a decision from the Supreme Court of India in the case of **Hari Vishnu Kamath vs. Ahmed Ishague**, AIR 1955 SC 233 and held that:

- "(i) 'Certiorari' will be issued for correcting errors of jurisdiction as when an inferior court or tribunal acts without jurisdiction or in excess of it, or fails to exercise it.
- (ii) 'Certiorari' will also be issued when the court or tribunal acts illegally in the exercise of its undoubted jurisdiction, as when it decides without giving an opportunity to the parties to be heard, or violates the principles of natural justice.
- (iii) The court issuing a writ of 'certiorari' acts in the exercise of a supervisory and not appellate jurisdiction. One consequence of this is that the court will not review findings of fact reached by the inferior court or tribunal, even if they be erroneous. This is on the principle that a court which has jurisdiction to decide wrong as well as right, and when the legislature does not choose to confer a right of appeal against that decision, it would be defeating its purpose and policy, if a superior court were to rehear the case on the evidence, and substitute its own findings in certiorari."



*(iv) A writ of 'certiorari' could be issued to correct an error of law. But it is essential that it should be something more than a mere error; it must be one which must be on the face of the record."*

Considering the decisions referred to above, I can firmly say that prerogative orders of certiorari, mandamus, and prohibition can be granted by the court where there is illegality or irrationality in the decision challenged. In the matter at hand, the applicant challenges the decision of the President confirming the decision passed by the Public Service Commission, dismissing him from employment. He contended that the Commission committed serious errors by reviving charges that were dropped by the employer's "Inquiry Committee" for lack of evidence, particularly charges on sexual harassment; and by framing new charges without according the appellant the right to be heard.

Being a public servant, termination of the applicant's employment is governed under the Public Service Act, 2007. Under **section 25 (1) (b) of the Public Service Act, Cap 298 R.E. 2019** and **Regulation 60 (2) of the Public Service Regulations, 2003**, the Commission, when hearing appeals has powers to **confirm, vary** or **rescind** the decision of a disciplinary authority. In that respect, considering the contents of the Commission's decision "annexture Tilya-7" it is clear that the Commission varied the decision of the 2<sup>nd</sup> respondent, the disciplinary authority. In accordance with "annexture Tilya-7" the Commission replaced the punishment of reduction of rank with that of dismissal upon consideration of the record placed before it, including the disciplinary proceedings.



The president, in accordance with "annexture Tilya-8," confirmed the decision of the Commission after going through the documents presented on appeal. The applicant complained that the President accorded no reasons for its decision. However, after going through the contents of "annexture Tilya-8" I find the assertion unfounded. The annexture clearly shows that the President considered the record placed before her and agreed with the Commission that the counts in the charge were proved. That was the reason for the decision and is sufficient.

The applicant further challenged the Commission for reviving charges that were dropped by the disciplinary authority, particularly involving sexual harassment and further formulated a new charge on harassment and interference with personal freedom/privacy. I shall start with the latter on interference with personal freedom/privacy.

It is clear on record that the counts in the charge, particularly the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> counts do not involve, in the particulars of offence, any explanation about interference with personal freedom or privacy of the victim by the applicant. The same was therefore formulated by the Commission. Even if there were facts of that nature stated during hearing, the Commission had no legal base to include the same in its verdict and punishment, as they never formed part of the charge against the applicant. In the premises, I agree with the applicant that the Commission committed an irregularity and it was improper for the same to be sanctioned by the President in the appeal before her.





With regard to the count on sexual harassment and acts involving moral turpitude, the applicant complained that the same were dropped by the disciplinary authority for lack of evidence and it was erroneous for the Commission to revive the same and for the President to confirm the Commission's decision without evidence or according the applicant the right to be heard. First of all, being an appeal, the Commission and the President deals with the documents on record placed before it. As such, no additional evidence is taken at that stage.

Second, like pointed out earlier, the Commission and the President, while entertaining appeals enjoys the power to confirm, vary or rescind the decision of the disciplinary authority. In that respect, the decision is reached after considering the record placed before them. In the matter at hand, the letter from the 2<sup>nd</sup> respondent to the applicant as to the decision on the disciplinary hearing stated that the applicant was found guilty for failure to perform his duties satisfactorily. This was a charge in the 1<sup>st</sup> count. The letter stated nothing about other counts in the charge. By the look of it, one can insinuate that the applicant was not found guilty on the rest of the counts.

However, as I stated earlier, the Commission has a mandate to vary the decision upon deliberating on an appeal. The Commission in its decision, that is, "annexture Tilya-7" reached a decision to vary the sentence from reduction of rank to dismissal, in consideration of the record before it, which included the disciplinary hearing proceedings and found that the rest of counts in the charge were proved as well. In my view, the disciplinary hearing proceedings contain the evidence on the charges against the applicant. In that respect, the proceedings on disciplinary hearing were



very crucial to guide this court in determining whether the Commission considered matters/evidences that were not at all on record thereby acting procedurally irregular. However, for reasons best known to the applicant, the proceedings were not made part of the record in the application at hand. As such, it becomes impossible for this court to fault the decision of the Commission varying the decision of the disciplinary authority (the 2<sup>nd</sup> respondent) on the charged offences; and that of the President confirming the Commission's decision on the charged offences.

In consideration of the observations, I have made hereinabove, I find irregular the decision by the Commission and confirmation of the Commission's decision by the President on the newly formulated offence of interference on personal freedom/privacy against the applicant and quash any decision entered in that respect.

I however, find nothing to fault the Commission's decision and that of the President confirming the Commission's decision regarding the four counts charged against the applicant. That is, of *Failure to perform satisfactorily duties assigned to the Public Servant contrary to Regulation 42 and Paragraph 8 of Part A of the First Schedule of the Public Service Regulations 2003; Sexual Harassment contrary to Regulation 65 (1) and Paragraph 6 of Part II of the Third Schedule of the Public Service Regulations, 2003; Act or Omission involving moral turpitude contrary to Regulation 42 and Paragraph 1 of Part A of the First Schedule of the Public Service Regulations, 2003. And Contravening of the Code of Ethics and Conduct for the Public Service, Professional Code of Ethics and Conduct or the Public Leadership*



*Code of Ethics contrary to Regulation 42 and Paragraph 14 of Part A of the First Schedule of the Public Service Regulations, 2003.*

In the premises, with regard to the four counts charged against the applicant, I find the applicant's application devoid of merits and dismiss the same accordingly. Considering that this is a labour matter, I make no orders as to costs.

Dated at Dar es Salaam on this 15<sup>th</sup> day of May 2023.



  
**L. M. MONGELLA**

**JUDGE**