

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**

**MAIN REGISTRY**

**AT DAR ES SALAAM**

**MISCELLANEOUS APPLICATION NO. 58 OF 2022**

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

**AND**

**IN THE MATTER OF CONTRAVENTION OF RULES OF NATURAL JUSTICE**

**AND**

**IN THE MATTER OF AN APPLICATION BY COSMAS MWAIFWANI  
CHALLENGING THE LEGALITY OF THE DECISION OF THE MINISTER FOR  
HEALTH, COMMUNITY DEVELOPMENT, GENDER, THE ELDERLY AND  
CHILDREN CONFIRMING THE DECISION OF THE MEDICAL STORES  
DEPARTMENT BOARD OF TRUSTEES TERMINATING THE APPLICATION FROM  
EMPLOYMENT**

**BETWEEN**

**COSMAS MWAIFWANI.....APPLICANT**

**AND**

**THE MINISTER FOR HEALTH, COMMUNITY DEVELOPMENT,  
GENDER ERDERY AND CHILDREN ..... 1<sup>ST</sup> RESPONDENT**

**THE MEDICAL STORES DEPARTMENT BOARD OF  
TRUSTEES ..... 2<sup>ND</sup> RESPONDENT**

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

## **RULING**

### **MANGO, J**

The Applicant, Cosmas Mwaifwani worked with the second Respondent as Customer Service Manager from the year 2003. In 2004 he was promoted to the position of the Director of Customer Services and Sales. In 2012 he was appointed to be Acting Director General of the second Respondent the position he had up to mid-February 2016. On 15<sup>th</sup> day of February 2016, he was implicated in some misappropriation of public funds and suspended from employment pending investigation of the alleged misappropriations.

During the said investigation he was suspected of some disciplinary misconduct and disciplinary proceedings were initiated against him. The disciplinary committee found him guilty of misconduct. On 8<sup>th</sup> July 2016 the second Respondent terminated the Applicant from employment after it found him guilty of charges levelled against him. His appeal to the first Respondent was also unsuccessful. The Applicant was not satisfied with his termination from employment, the composition of the disciplinary committee, procedural issues during hearing and the alleged lack of impartiality of the institutions that dealt with disciplinary proceedings against him. On 9<sup>th</sup> day of November 2023, he filed this application praying for the following orders: -

- i. That this Hon. Court be pleased to issue an order of certiorari to quash the decision of the first Respondent dated 10<sup>th</sup> October 2016 which confirmed the second Respondents decision terminating the Applicant's employment with the Medical Stores department (MSD).

- ii. That, this Court be pleased to issue an order of Mandamus to issue an order of Mandamus directed to the Respondents to compel them to reinstate the Applicant to his employment with the second Respondent with full salaries paid in arrears from the date of disengagement
- iii. That this Court be pleased to issue an order of prohibition against the first and second Respondent from in any way proceeding against the Applicant other than provided by the law
- iv. Any other reliefs that the Court deems fit and just to grant

The Application is by way of Chamber summons made under section 2(1) and (3) of the Judicature and Application of Laws Act[Cap 358 R.E 2019]; Section 17(2) and section 18(2) of the Law Reform( Fatal Accidents and Miscellaneous Provision) Act [Cap 310 R.E 2019], and Rule 4 of the Law Reform ( Fatal Accidents and Miscellaneous Provisions) Judicial Review Procedure and Fees Rules,2014 GN 324 of 2014 supported by an affidavit sworn by the Applicant.

On 24<sup>th</sup> November 2022, the Respondents filed a joint affidavit sworn by Careen Masonda, learned State Attorney employed by the Office of Solicitor General. On 25<sup>th</sup> January 2023 the Respondents filed a supplementary Counter affidavit sworn by Magdalena Mwakabungu, a senior officer working with the second Respondent after being granted leave of the Court on the same date, that is, 25<sup>th</sup> January 2023. In their counter affidavits the Respondents challenged the issues raised by the Applicant in his affidavit. According to the affidavits, the Respondents are of the view that the Applicant was properly heard and the decision made by the first Respondent which was later approved by the second Respondent was properly reached.

On 31<sup>st</sup> January 2023, the Applicant filed a reply to counter affidavit to counter the contents of the affidavits filed by the Respondents.

During hearing, the Applicant was represented by Mohammed Tibanyendera learned Advocate while the Respondents were represented by Careen Masonda learned State Attorney. The matter was heard by way of written submissions.

In his submission in support of the Application, advocate Tibanyendera adopted the contents of the Applicants affidavits and the statement supporting the Chamber summons to form part of his submission. He then referred the Court to the grounds for judicial review raised by the Applicant.

The learned counsel for the Respondent challenged the decision of the first Respondent for its alleged failure to observe the rules of natural justice especially the right to be heard. In this he argued that, the first Respondent condemned the Applicant without affording him the right to be heard. He submitted that, the decision of the first Respondent has violated two nexus principles of the right to be heard, "No man should be condemned unheard" and "No man shall be a judge in his own cause"

On the first principle, '*No man should be condemned unheard*', the learned counsel argued that the first Respondent condemned the Applicant without affording him the right to be heard. He referred the Court to the statement issued by the first Respondent to the chairman of the second Respondent that he should suspend the Applicant from employment on allegations of misappropriation of funds. He quoted the statement as reported in Mwananchi News Paper dated 16<sup>th</sup> February 2016. It reads as follows: -

*'Mwenyekiti wa Bodi nakuagiza, kuna watu wanne nikiondoka hapa uende kuwaandikia barua za kuwasimamisha kazi kwasababu walikiuka sheria na utaratibu za manunuzi na kukiuka taratibu nyingine za utumishi wa umma hadi hapo uchunguzi utakapomalizika.'*

The statement may be informally translated as follows: -

*'Chairman of the Board, I instruct you to suspend four people for their breach of public procurement regulations and other public service regulations pending completion of investigation.'*

According to the Applicant counsel, the statement presents the first Respondent's conclusive opinion that the Applicant is guilty of the alleged breach of Public Procurement regulations and other public service regulations. He argued that, the first Respondent did not afford the Applicant an opportunity to be heard before publicly declaring him to have breached public procurement regulations and occasioning loss to MSD at the tune of Tshs. 1.5 Billion.

On the second principle, *'No man should be a judge in his own case'*, the learned counsel challenged the impartiality of the first Respondent in determining the Applicant's appeal against the decision of the second Respondent. He argued that, by determining the appeal, the first Respondent acted as a judge in her own case. She first concluded that the Applicant is guilty of misappropriation of Tshs. 1.5 Billion and declared so in public, she issued directives to the second Respondent to suspend the Applicant and investigate on the loss, after the second Respondent found the Applicant guilty and terminated his employment, the first Respondent

sat to determine the Applicant's appeal. He submitted that, in all circumstances, the Applicant's appeal could not have succeeded before the first Respondent who actually directed his suspension from employment after she had already concluded that the Applicant is responsible with the loss. To fortify his submission, he cited the decision of the Court of Appeal of Tanzania in the case of **Charles Mayunga @Chizi versus Republic** Criminal Appeal No. 493 of 2015 Court of Appeal of Tanzania at Tabora in which the Court insisted on the necessity of affording parties to a case fair hearing and impartiality of the institution making decisions. He also quoted some paragraphs from the book on administrative law authored by TAKWANI CK titled ***Lectures on Administrative Law***, 1980 edition Eastern Book Company Law Publishers and Book Sellers, Lucknow. The book contains extensive discussion on what constitutes fair hearing and a number of cases on every aspect. However, I will not reproduce the contents of the book, I will only refer to them where necessary.

The Applicant's counsel also challenged the decision of the second Respondent for acting under directives of the first Respondent. He argued that, the second did not act independently. He referred the Court to the contents of the letter suspending the Applicant from work dated 15<sup>th</sup> February 2016 in which the second Respondent clearly stated that the board was acting under the directives of the first Respondent.

He also challenged the composition of the Inquiry Committee which was formed by the Applicant's employer. In this he argued that, the committee was composed of members who are directly responsible to the first Respondent. The Committee was constituted of three members Mr. Michael

John, Director of Administration and Human Resources of the Ministry of Health, Community Development, Gender, Elderly and Children, Mr. Castor Simba (Director of Procurement of the Ministry of Health, Community Development, Gender, Elderly and Children and Mr. Stanslaus W Mpembe, Principal Internal Auditor, Ministry of Finance. He is of the view the two members who works at the Ministry of Health, Community Development, Gender, Elderly and Children could not be impartial because they are not expected to decide a matter against the interest of their Principal, the first Respondent.

He submitted further that, the Applicant was not fairly heard on a number of ways. He was not availed with evidence produced against him so that he can properly defend himself nor was he given an opportunity to cross examine the witnesses who testified against him before the committee.

He added that, the Applicant was also subjected to two parallel investigations. By the time he was facing trial before the inquiry committee, he was also been investigated by the Prevention and Combating of Corruption Bureau the investigation which gave rise to Criminal Case No. 102 of 2017. The Criminal case was determined in favour of the Applicant. According to the learned counsel, the reasons for the decision of the inquiry committee are not expressly provided. Evidence gathered from the inquiry committee was not communicated to the Applicant. The documents that were relied by the committee and evidence gathered from the employees who were interrogated by the committee remained to be the secret of the committee

The learned counsel commented also on the issue of missing signatures in the report of the inquiry committee. The Committee was constituted of three members Mr. Michael John, Director of Administration and Human Resources of the Ministry of Health, Community Development, Gender, Elderly and Children, Mr. Castor Simba (Director of Procurement of the Ministry of Health, Community Development, Gender, Elderly and Children and Mr. Stanslaus W Mpembe, Principal Internal Auditor, Ministry of Finance. The report produced by the second Respondent indicates that Stanslaus W Mpembe did not sign. He is of the view that, non-signing of the report by Mr. Mpembe means that the report was not the product of the Committee.

In conclusion he submitted that, with all the highlighted irregularities, the proceedings before the inquiry committee and the first Respondent cannot be considered to be impartial. Thus, he is of the view that, the same deserves to be quashed.

In her reply submission Careen Masonda, learned State Attorney, adopted the contents of the counter affidavits and statement filed by the Respondents to form part of her submission. She then narrowed down the challenges posed against the decision of the first and second Respondent on two issues, violation of rules of natural justice by the Respondent and illegality of the decision and procedure employed during disciplinary proceedings.

She challenged the assertion that the first Respondent acted as a judge in her own cause although she conceded that the suspension letter issued by the second Respondent to the Applicant mentions that the board received directives from the first Respondent. She argued that, the second

Respondent did not act on the directives of the first Respondent rather the board acted on powers vested in it by the law, the Medical Store Department Act No. 3 of 1993, [Cap.70 R.E 2002].

According to the learned State Attorney, the first Respondent did not interfere with the second Respondent's powers as a disciplinary authority of the Applicant. She submitted that, the powers of the first Respondent to oversee the functions and operations of the second Respondent are provided for under section 7 of the Medical Store Department Act. Such powers should not be confused with powers of the second Respondent as a disciplinary authority provided for under section 12(a) of the Medical Stores Department Act. She is of a view that, in termination of the Applicant's employment, the second Respondent acted on its powers as a disciplinary authority of the Applicant in which the first Respondent was not involved.

On the argument that the Applicant was condemned unheard, the learned State Attorney submitted that the Applicant was properly heard before termination from his employment. She referred the Court to paragraph 8 to 13 of the supplementary affidavit which indicate that, the Applicant was afforded the right to be heard to the extent of having witnesses. The decision of the second Respondent terminating the Applicant from employment was issued on 8<sup>th</sup> July 2016 after the proceedings of the disciplinary committee. On 15<sup>th</sup> February 2016, the Applicant was merely suspended to allow investigation of the accusations against him. Thus, being suspended from employment being a temporary measure cannot be taken to amount to condemning the Applicant unheard.

On the composition of the inquiry committee, the learned State Attorney submitted that, the committee was duly composed as required the law, Regulation 46 of Public Service Regulation. The members of the committee are of an equivalent rank to that of the Applicant. All committee members were appointed by the second Respondent from different institutions. The learned State Attorney argued further that, the first Respondent had no hand in the appointment and approval of the members that constituted the inquiry committee. She submitted further that, all other procedures that the committee followed including the decision to terminate the Applicant by the second Respondent did not involve the first Respondent. Thus, the decision of the committee cannot be faulted on its composition.

The Respondent's counsel also submitted on the challenges raised against the procedure, illegality of the decision and the missing signature in the committee's report. On illegality of the decision based on the fact that the Applicant was acquitted in a criminal case based on the same allegations, she argued that acquittal of the public servant in a criminal charge on legal technicality shall not bar subsequent proceedings against the public servant. She quoted Regulation 50 (c) of Public service Regulations on that aspect. Thus, she is of the view that the decision of the committee was not illegal. On the missing signature of one member to the committee, she submitted that, that alone cannot make the report invalid.

In his brief rejoinder, the Applicant's counsel reiterated his submission in chief. He insisted that the first Respondent controlled the disciplinary proceedings against the Applicant. He argued that allegations of impartiality of the committee formed by the second Respondent is a mere afterthought.

He submitted that the entire process that resulted to the termination of the Applicant from employment is closely connected to the first Respondent to the extent that the issue of impartiality of the decision of the institutions that were involved in disciplinary proceedings against the Applicant cannot be ascertained.

I have considered submissions by both parties and contents of the statements and affidavits that were filed by the parties to this application. I must point out from the beginning that, the Applicant has not challenged the law that establishes disciplinary authority and disciplinary processes against the Directors of the second Respondent. Had the Applicant wished to challenge that, he would have done so through appropriate procedure as provided by our laws. The Court has been moved to assess the legality of composition and procedure adopted by a specific committee that was composed to deal with the Applicant's issue.

I will start with how the second Respondent was moved to initiate disciplinary proceedings against the Applicant. The letter communicating the Applicant's suspension, annexure 1 to the Applicant's affidavit, indicates that it acted on the directives of the first Respondent. However, as correctly submitted by the Respondent's counsel, the letter expressly provides that, such suspension is pending disciplinary proceedings to be conducted against the Applicant. Suspension pending investigation does not mean that the Applicant should be terminated from his employment. In such circumstances, it cannot be considered that the first Respondent issued directives to the second Respondent to terminate the Applicant's employment.

On the composition of the committee that dealt with the Applicant's disciplinary proceedings, I will determine the same under guidance of the provisions of Order 16.2 of Public Service Disciplinary Code of Good Practices which require the chairperson of the committee to be impartial. Record of this matter does not establish that the chairperson of the committee or any of the members of the disciplinary committee was involved in any way to the issue that gave rise to the disciplinary actions against the Applicant. The only issue raised by the Applicant is his suspicions against the two members who were appointed from the office of the first Respondent which by itself does not directly affect their impartiality in dealing with the matter.

The appointment of the three committee members is in compliance with the regulations that require the chairman to be from a different institution. I hold so because the law, section 3 of the Medical Stores Department Act, establishes the medical stores department as an autonomous department. In other words, the department exists separately from the ministry. Thus, employees of the Ministry cannot be legally construed to be employees of Medical Stores Department. In that regard, I find the composition of the to be in accordance with the law. Suspicions that the first Respondent might have influenced their decisions because they are working in the ministry remains mere suspicious that need to be backed with evidence before relying on the same in decision making.

On legality of the procedure, I considered the terms of reference that were given to the committee reproduced at page 4 of annexure MSD 5 to the Respondents Supplementary affidavit. According to the terms of reference the committee was required to do the following;

- a) Kupitia Nyaraka mbalimbali ambazo kamati iliona zinafaa katika kutekeleza jukumu la uchunguzi, Kuwahoji watuhumiwa au wahusika na tuhuma hizo kupata ukweli
- b) Kuwahoji watumishi mbalimbali wa taasisi ili kupata taarifa zaidi
- c) Kuandaa taarifa na kuiwasilisha kwa mamlaka husika

The report that was submitted by the committee indicates that they acted within the terms of reference. The purpose of interviewing some employees was to collect more information before summoning the suspects to defend themselves. The Employees were not summoned as witnesses before the committee. They were merely interviewed by the committee in the course of information gathering. After the Committee found valid charges of misconduct against the Applicant, they communicated the same to the Applicant and summoned him to defend himself. Since the committee complied with the terms of reference issued to it, it cannot be considered to have acted with biasness solely on the reason that, some members of the committee work in the office of the first Respondent who directed investigation of the Applicant's conduct.

The applicant was served with notice of disciplinary proceedings that have been initiated by the second Respondent on 30<sup>th</sup> May 2016. He was also served with the disciplinary charges against him. The notice, annexure A-3 of the Respondent's supplementary affidavit indicates that, the Applicant was supposed to lodge his defence on the disciplinary charges in writing within 14 days from the date of service of the notice. He was then summoned to appear before the disciplinary committee on 25<sup>th</sup> June 2023. This establishes that, the Applicant was aware of the charges against him almost 45 days

prior to the date he appeared before the Committee. In such circumstances it cannot be considered that, the Applicant was taken by surprise.

On the missing signature in the report submitted by the Committee, I agree with the State Attorney that, the same cannot nullify the contents of the report. It should also be noted that, the disciplinary committee did not order termination of the Applicant. It only found him to have contravened section 41 of Public Procurement Act No. 7 of 2011 and Regulation VII (4) of the MSD Code of ethics and conduct. The same committee found the Applicant to have not contravened Regulation 265(k) of the MSD Employment regulations. In this, it should be noted that the committee was merely a disciplinary committee. It was determining disciplinary misconduct alleged to have been committed by the Applicant and not a criminal case. Termination of the Applicant was done by the second Respondent after it considered the findings of the committee. Moreover, there is no evidence that the said Stanslaus Mpembe did not take part in the proceedings or anyhow disputed the contents of the report submitted to the second Respondent.

On the alleged parallel proceedings, record indicates that, criminal case against the Applicant was instituted after finalization of disciplinary proceedings and termination of the Applicant. Criminal charges are initiated by filing a charge before the Court. Citation of the case that was instituted against the Applicant, Criminal Case No. 102 of 2017, indicates that it was instituted in the year 2017 not in 2016 when the disciplinary proceedings were conducted. In that regard it cannot be considered that the Applicant was subjected to parallel trials as alleged. Even in his statement before making his defence, he merely informed the committee that he has been

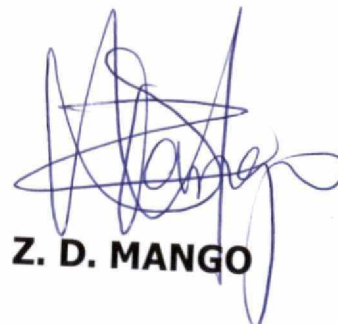
summoned by the Prevention and Combating of Corruption Bureau. He did not inform them that there is a criminal case against him. All such facts, indicates that, the criminal case against the Applicant was instituted after the conclusion of disciplinary proceedings against him and termination of the Applicant from his employment which was done by the second Respondent on 8<sup>th</sup> July 2016.

On whether it was proper for the first Respondent to sit as the appellate authority in the Applicant's appeal, the law which establishes disciplinary machinery of the Directors of the second Respondent establishes the first Respondent to be the sole appellate authority of the decision made by the second Respondent. When vesting the first Respondent with such powers, the powers of the first Respondent to oversee the functioning and the operation of the second Respondent were clearly indicated in the same law. In such circumstances, the first Respondent correctly exercised powers vested to her by the law. I am of a considered view that, exercising of the powers vested in the first Respondent cannot be considered to contravene the principles of natural justice unless the provisions that vests such authority to the first Respondent are successfully challenged.

Moreover, in the matter at hand, the first Respondent only ordered investigation of the allegations against the Applicant. There is no evidence that establish any kind of interference by the first Respondent in disciplinary proceedings that were conducted by the second Respondent. During appeal, the first Respondent found the decision of the second Respondent against the Applicant to be proper. In such circumstances, the first Respondent cannot be considered to have acted as a judge in her own case.

In upshot, the Application is hereby dismissed with no order as to costs  
Dated at Dar es Salaam on this 26<sup>th</sup> day of June 2023



  
**Z. D. MANGO**  
**JUDGE**