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

MISCELLANEOUS CIVIL CAUSE NO. 29 OF 2023

IN THE MATTER OF AN APPLICATION FOR ORDERS OF CERTIORARI ANDMANDAMUS TO QUASH AND SET ASIDE THE DECISION OF THE RESPONDENTS

IN THE MATTER OF THE DISMISSAL FROM EMPLOYMENT OF DR. PETER NANIYO PHISSOO

BETWEEN

DR. PETER NINAYO PHISSOO.. APPLICANT

VERSUS

THE EXECUTIVE DIRECTOR,
BAGAMOYO MUNICIPAL COUNCIL...............................1ST RESPONDENT
THE CHAIRMAN,
PUBLIC SERVICE COMMISSION..................................2ND RESPONDENT
THE CHIEF SECRETARY..3RD RESPONDENT
THE ATTORNEY GENERAL...4TH RESPONDENT

RULING

13th and 20th Sept., 2023
DYANSOBERA, J.:

It would be desirable to set out the circumstances leading to this application for review which is derivable from the chamber summons supported by a statement of the claim and the verifying affidavit of the applicant, on the one hand, and the counter affidavit and statement in reply by the respondents, on the other hand. The applicant was employed by the Government at Babati Municipal Council on

19th October, 1987 as Rural Medical Aid (RMA). He attended several medical trainings so as to equip himself with skills and knowledge and was awarded some certificates. Later, he was promoted to Assistant Principal Doctor. In October, 2012, the applicant was transferred to Bagamoyo Municipal Council and worked in the same capacity.

In June, 2019, the applicant was charged with disciplinary offence of giving false information to defraud his employer. The 1st respondent, subsequently, through a letter with Ref. No. HWB/CPF/P.218/17 dated 29th November, 2019 informed the applicant that he was guilty. The same 1st respondent then terminated him from employment with effect from 29th November, 2019. Aggrieved and intending to appeal against the termination of his employment contract, the applicant requested to be supplied with copies of the decision and proceedings. He then filed an appeal to the 2nd respondent. The appeal was received on 31st January, 2020. The applicant was, however, through a letter with Ref. No. CEB.67/81/06/76 dated 5th October, 2020, informed that his appeal was struck out/dismissed for being barred by limitation. Still dissatisfied, the applicant appealed to the President. Ultimately, the 3rd respondent issued the applicant with a letter Ref. No. CAB.30/536/PF. 613/11 dated 23rd July, 2021 informing him that his appeal he had filed to the Public Service Commission was not time barred.

Nonetheless, the applicant's termination of employment by the Disciplinary Authority was confirmed.

The applicant, undaunted, successfully applied for extension of time before Hon. Siyani, JK and leave for him to file prerogative orders before Hon. Kagomba, J., hence this application.

The applicant's main complaint is that he was condemned unheard by both the 2nd and 3rd respondents and that the President, after being satisfied that the appeal before the 2nd respondent had not been time barred, was supposed to refer the matter back to the 2nd respondent instead of confirming the decision terminating him from his employment.

In the chamber summons made under Sections 17 (2) and 19 (1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act [Cap. 310 R.E.2019] and rule 8 (1) (a) (b) and (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees), Rules, GN. No. 324 of 2014, the applicant is craving for orders that this court be pleased to grant orders of *Certiorari* to quash and set aside the decision of the President through the 3rd respondent, the decision which was communicated to the applicant on 25th July, 2021 confirming the decision of the 1st respondent as applicant's Disciplinary Authority dated 29th November, 2019 which dismissed the applicant from his

employment unheard. The same applicant is also praying for the grant of *Mandamus* compelling the respondents to comply with the laws and/or reinstate the applicant to his employment and pay him unpaid salaries other remuneration accordingly. The court is also asked to award the applicant with costs and any other reliefs.

In resisting the application, the respondents deny that the applicant was condemned unheard and argue that the decision arrived at was reasonable, tainted with neither irregularities, illegalities nor irrationalities as the applicant was served with a charge sheet and given 14 days' notice to present his statement of defence. Further, the respondents admit that the applicant was charged with disciplinary proceedings but argue that the disciplinary action was taken against him following his giving false information to his employer whereby he presented himself to have Form IV level of education from Makumira Secondary School, the information which was found to be untrue. In fine, the respondents argue that the decisions by the Public Service Commission and that of the President were given after considering all the grounds of appeal submitted by the applicant and the reasons for their findings were clearly stated in their decisions and that the law was complied with.

The hearing of this application was conducted in writing whereby the applicant was represented by Mr. Ramadhan A. Maleta, learned counsel, while Victoria Ally Lugendo, the learned State Attorney from the Office of the Solicitor General, stood for the respondents.

Supporting the application, the applicant complained that he was unreasonably dismissed form his employment without his defence being considered as, according to him, at the Public Service Commission which was the first appellate authority, he was just informed of the decision through a letter that his appeal could not be heard on merits as it was time barred.

With regard to his further appeal before the President, the applicant submitted that the applicant was not heard on his appeal on merits; only that he was informed of the President's decision through a letter to the effect that the President disagreed with the decision of the Public Service Commission which had found that the applicant's appeal had been time barred but confirmed the decision of the Disciplinary Authority without affording him the right to be heard. The applicant was of the view that the President after finding that the decision of the Public Service Commission was erroneous on the time bar, he was supposed to remit the same to the Commission to be heard on merits, instead of proceeding to confirm the unreasonable decision of the Disciplinary Committee which is the basis of the

appeals.

It was insisted on part of the applicant that he was denied of his right of being heard at both levels. To support that the right to be heard is fundamental and courts cherish that right, the applicant's learned counsel cited the cases of **Mbeya Rukwa Autoparts and Transport Limited v. Jestina George Mwakyoma** [2003] TLR 251 and **Abbas Sherrally and another v. Abdul Sultan Haji Mohamed Faziboy**, Civil Application No. 33 of 2002 (unreported).

The applicant invited this court to grant the prerogative prayers on account that his fundamental constitutional rights were violated. His reliance was placed on the decision of the Court of Appeal in the case of **R.S.A. Limited v. Hanspaul Automech Limited and Another**, Civil Appeal No. 179 of 2016 (unreported) in support of his argument.

Responding to this submission, the respondents' learned State Attorney, after adopting the counter affidavit and the statement in reply, criticized the course taken by the applicant. She argued that there is a difference between judicial review and judicial control and explained that while judicial review is supervisory in nature and has restrictive connotation, judicial control is corrective and is a broad term. According to her, judicial review is a fundamental mechanism for keeping public authorities within due bounds and for upholding the rule of law.

She maintained that instead of substituting its own decision for that of some other body, as happens when on appeal, the court on judicial review is concerned only with the question whether the act or order under attack should be allowed to stand or not.

Citing the case of **Sanai Mirumbe and another v. Muhere Chacha** [1990] TLR 54 on what entails the order of *certiorari*, the learned State Attorney contended that the applicant's complaint is two-fold, that is the denial of his right of being heard which means that the rules of natural justice were violated and the illegality of procedure or decision.

In answering the first issue, that is whether the applicant's right to be heard was violated, the respondents' learned State Attorney invited this court to consider the law, regulations 35 to 48 of the Public Service Regulations of 2022, in particular. She explained that a disciplinary charge is preferred against the public servant who is afforded an adequate opportunity to answer the charge. Then an inquiry is held into the charge in accordance with the Regulations under Section 35 and where on the conclusion of the inquiry or consequently upon conviction on a criminal charge, the public service is punished by dismissal, the dismissal shall take effect from the date on which that public servant was found guilty.

Basing on the above procedure, the learned State Attorney submitted that the

applicant was accorded with the right to be heard; he was served with the charge sheet and acknowledged receipt of the same. Further that the 1st respondent formed an inquiry committee which issued its report.

Respecting the procedure on appeal, the learned State Attorney contended that it is totally misleading to argue that to be accorded with the right to be heard, the appellant must be summoned physically. The learned State Attorney was under the impression where all the documents are submitted to the appellate authority for appeal purposes, then the law is complied with. She cited regulation 62 (1) and (2) of the 2022 Regulations.

On whether there was illegality of procedure or decision, the learned State Attorney contended that the applicant in his submission rose an issue that the President erred in ruling out the appeal after even finding that it was not time barred and that the proper remedy was to remit it back to the Public Service Commission to entertain it. She pointed out that the procedures on appeal either to the Commission or to the President are governed by Section 25 (1) (b) and (c) of the Act which should be read together with the provisions of Regulation62 (4) of the Regulations. The learned State Attorney was contended that the President, by virtue of those provisions, had no any reason of taking back the matter to the Public Service Commission and that there was no any irregularity that occasioned

injustice.

In a brief rejoinder, the applicant's learned counsel noted that the respondents did not dispute the fact that his client was not heard on merits in as far as his appeal to both appellate bodies is concerned. Counsel was emphatic that this clearly proves that the rules of natural justice were violated by the two appellate authorities hence the illegality of the procedure or decisions justifying the grant of *certiorari* and even *mandamus*. Reiterating his submission in chief, the applicant's learned counsel implored the court to grant the prerogative orders.

The foregoing constituted the rival positions of the parties to this application.

As rightly submitted by both the applicant's learned counsel and the learned State Attorney for the respondents, the Court of Appeal in the case of **Sanai Murumbe and another vs Muhere Chacha [1990] TLR 54 CAT at Mwanza** observed that an order of *certiorari* is one issued by the High Court to quash the proceedings of and decisions of a subordinate court or tribunal or public authority where, among others, there is no right of appeal. Further that, the High Court is entitled to investigate the proceedings of a lower court or tribunal or public authority on any of the following grounds apparent on the record:- (1) taking into account matters which ought not to have taken into account (2) not taking into account matters which it ought to have taken into account (3) lack or excess of jurisdiction

(4) conclusion arrived at is so unreasonable that no reasonable authority could ever come to it (5) rules of natural justice have been violated (6) illegality of procedure or decision.

There is no dispute that applicant's dispute reached the last appellate body that is, the President whose decision is, according to section 25 (1) (c) of the Act, final. The applicant is also seeking an order of *mandamus*. While the order of certiorari is intended to bring up into the High Court a decision of some inferior tribunal or public authority in order that it may be investigated and if the decision does not pass the test is quashed that is declared completely invalid, the order of mandamus seeks to compel public authorities to take legally required acts. It is correct legal position as pointed out by the learned State Attorney that judicial review is not an appeal from the decision rather, it is a review of the manner in which the decision was made or the procedure adopted. The concern of the court is not with merits of the decision but the decision-making process of the authority concerned. It is for that reason that the court cannot substitute its own decision as is the case on an appeal.

In the chambers summons, the applicant is asking this court to grant, *inter alia*, an order of *mandamus* compelling the respondents to comply with the laws and/or reinstate him to his employment and pay him his unpaid salaries and other

remunerations accordingly.

With unfeigned respect to the applicant, I cannot accept that invitation. It should be noted that as alluded hereinbefore, judicial review is concerned with reviewing not the merits of the decision in respect of which the application is made, but the decision-making process. In that respect, the court has no right to substitute its opinion on the matter for that of the Disciplinary Authority, otherwise it would, under the guise of preventing the abuse of power, be itself guilty of usurping the power of the Disciplinary Authority.

According to the facts and circumstances in this matter, I am enjoined to only to interfere with the decision made if it has been established to my satisfaction that the applicant's right to be heard was violated and there was illegality of the procedure or decision.

The complaint by the applicant before me, is three-fold. First, that the employer unreasonably dismissed him from his employment without considering his defence. Second, that the first and second appellate authorities condemned him unheard on his appeals and third, that the President as the second appellate authority, after finding that the first appeal at the Public Service Commission was not time barred, was duty bound to remit the matter to the Public Service Commission for hearing of the appeal on merits instead of confirming the unreasonable decision

of the Disciplinary Authority.

On her part, the learned State Attorney refuted the applicant's complaint that his rights to be heard were violated, as according to her, the procedures provided under regulations 35 to 48 of the Regulations were adhered to and that on appeal, it was not necessary for the applicant to be summoned physically. To buttress her position, the learned State Attorney relied on the provisions of regulation 62 (1) and (2) of the 2022 Regulations.

The rights of appeal by an aggrieved party to the Public Service Commission and the President are stipulated under regulation 60 (2) and (4), respectively. As to appeals procedure, sub-regulations (1) and (2) of regulation 62 of the Regulations come into play and run as hereunder: -

> '62. -(1) The appellate authority may, on appeal under section 25 of the Act, or under Regulation 60, 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.
> (2) Notwithstanding the provisions of this regulation, the appellate authority may determine the appeal in the absence of the appellant and in any case, unless exceptional circumstances exist.

On my part, sub-regulation (1) of regulation 62 of the 2022 Regulations

contain substantive provision that the appellate authority may on appeal under Section 25 of the Act and regulation 60 of the Regulations allow both the appellant and the disciplinary authority whose decision is being appealed against, an opportunity to be heard by presenting himself or in writing in support of or against the appeal as the case may be. This provision, directory in nature as it might seem to be, is an essential component in advancing the principle of fairness. This is particularly so as it provides a concept of fairness and protection of fundamental rights. It also upholds the basic features of the Constitution of the United Republic and prevents miscarriage of justice. In the case under consideration, there is no dispute that the first appellate authority that is the Public Service Commission dismissed the applicant's appeal on the ground that it was time barred. In its decision titled, 'UAMUZI WA TUME KUHUSU RUFAA YAKO KUPINGA ADHABU YA KUFUKUZWA KAZI' dated 5th October, 2020, the Public Service Commission observed at Clause 3.0 as follows: -

> Kutokana na sababu hiyo, Tume, kwa Mamlaka iliyo nayo chini ya Vifungu 25 (1) (b) na 32A vya Sheria ya Utumishi wa Umma (Sura 298 Marejeo ya 2019) ikisomwa kwa pamoja na Kanuni ya 62 (2) ya Kanuni za Utumishi wa Umma za mwaka 2003, ilitupilia mbali rufaa yako kwa kuwa iliwasilishwa nje ya muda unaoruhusiwa kisheria bila kutoa sababu zozote kinyume na Kanuni ya 61 (1) ya Kanuni za Utumishi wa Umma za

mwaka 2003.

There is no dispute that the issue of time limitation was raised by the Public Service Commission *suo motu* and the applicant who was the appellant thereat was not given any opportunity of being heard on that new issue. It is trite that a person be heard first before an adverse action is taken against him. This principle requires that no material should be relied on against a person without his being given opportunity of examining and responding to it.

So, apart from the fact that the first appellate authority failed to observe the statutory requirement stipulated under sub-regulation (1) of regulation 62, the same authority violated the principle of natural justice by condemning the applicant unheard.

In attempting to persuade this court that the appellate authorities were not duty bound to summon physically the applicant and hear him, the learned State Attorney sought to rely on sub-regulation (2) of regulation 62 as indicated above. I think the learned State Attorney has misconceived proper application of that sub-regulation in this matter. I must remind her that the legal requirement and the context in which it should be implemented is heavily influenced by the facts and the circumstances of each case. As the law clearly states, the appellate authority can dispense with the presence of the appellant

only when determining the appeal. As learned State Attorney will agree with me, the appeal the applicant had filed before the Public Service Commission was not determined. According to this court (Massati, J as he then was) in **Sugar Board of Tanzania v. Minister for Land and others**, HC Miscellaneous Civil Cause No. 42 of 2004, Osborn's Concise Law Dictionary, 7th ed. By Roger Bird at p. 116, defines the word 'determine' to mean (1) to come to and end (2) to decide an issue or appeal.

Since the applicant's appeal to the Public Service Commission was not determined on merit but dismissed for being time barred, then the provision of sub-regulation (2) of regulation 62 was inapplicable.

All this means that the Public Service Commission as the first appellate authority did not only transgress the statutory requirement under sub-regulation (1) of regulation 62 of the Regulations but also breached the principles of natural justice by condemning the applicant unheard. This vitiated the proceedings. On this aspect I need borrow the wisdom of the court in the **Chatterji v. Durgadutt**, 23 Col LJ 436 which put this aspect in its proper perspective when it held: -

> 'The law never acts by stealth; it never condemns any one unheard, so that a personal judgment rendered against a party without notice or an

appearance by him, is vitiated by the same infirmity as a judgment without jurisdiction.'

Fortunately, the decision of the Public Service Commission delivered on 5th October, 2020 dismissing the applicant's appeal on account that it was time barred was revoked by the President on the applicant's second appeal holding that the applicant's appeal to the Public Service Commission had been filed in time.

Nonetheless, the extent to which a breach of statutory requirements and a breach of rule of natural justice stated above could be cured by the second appeal or rehearing is a mare's nest. This brings me to the applicant's other complaint that after the President had found that the appeal to the Public Service Commission was in time, he was supposed to refer the matter back to the Public Service Commission for it to determine the appeal on merit. The learned State Attorney's response to this complaint was that the President had no any reason in law to take back the matter to that first appellate authority and argued that there was no any irregularity which occasioned injustice.

I think the learned State Attorney has missed the point. In the first place, the President, after reviewing the materials before him, was satisfied that the decision of Public Service Commission dismissing the applicant's appeal on the

ground that it was time barred was erroneous and that is why he quashed and set it aside. This means that the Public Service Commission had still jurisdiction to determine the applicant's appeal in the first instance. By confirming the decision of the Disciplinary Authority, the President usurped the powers of the Public Service Commission.

Second, the decision of the Disciplinary Authority which the President is said to have confirmed left a lot to be desired. It should be recalled that, after investigation, the applicant was found to have given false information with the intention to defraud his employer contrary to Regulation D.12 of the Standing Orders for the Public Service, 2009. The Disciplinary Committee had, substantively and unambiguously, found that the charge that had been levelled against the applicant had not been proved. According to the record, the applicant's charge was couched in the following terms: -

HATI YA MASHTAKA
(Chini ya Kanuni 44 (3) ya Kanuni za Utumishi wa Umma za mwaka 2003)

SHTAKA

Wizi wa mali ya umma kwa kujipatia mishahara na kutumia taarifa za kiutumishi zisizo za kweli kwa njia ya udanganyifu kinyume na Kanuni D. 12 ya Kanuni za Kudumu za Utumishi wa Umma za mwaka 2009 ikisomwa pamoja na Kanuni Na. 42 na sehemu A ya jedwali la kwanza kipengele 1 cha Kanuni za Utumishi wa Umma za mwaka 2003.

In its reasoned decision, the Disciplinary Committee in its 'TAARIFA YA KAMATI YA UCHUNGUZI DHIDI YA TUHUMA ZA UTOVU WA NIDHAMU NDUGU

PETER NINAYO PHISSOO CHEKI NA. 7295994' prepared from 23rd to 30th September, 2019 and submitted to the Disciplinary authority on 2nd October, 2019, observed, *inter alia*, that: -

4.0 UCHAMBUZI WA TUHUMA ZA WIZI WA MALI YA UMMA

***Chimbuko la Shtaka hili**: Wizi wa mali ya umma kwa kujipatia mishahara na kutumia taarifa za kiutumishi zisizo za kweli kwa njia ya udanganyifu kinyume na Kanuni D. 12 ya Kanuni za Kudumu za Utumishi wa Umma za mwaka 2009 ikisomwa pamoja na Kanuni Na. 42 na sehemu A ya jedwali la kwanza kipengele 1 cha Kanuni za Utumishi wa Umma za mwaka 2003. Akiwa mwajiriwa wa Halmashauri ya Wilaya ya Bagamoyo kwa cheo cha Daktari Msaidizi Mkuu II, anatuhumiwa kumwibia mwajiri wake na kusababisha hasara kwa kupokea mishahara ya miezi 365 bila kustahili.*

***Uchunguzi wa Kamati umebaini kuwa**: Mtuhumiwa aliajiriwa katika nafasi ya Tabibu Msaidizi Vijijini (R.M.A) akiwa na cheti cha darasa la saba ambapo alimaliza masomo mwaka 1981 (Kiambatisho Na. 11) na hatimaye kujiunga na masomo ya Tabibu Msaidizi Vijijini katika Kituo cha Mafunzo ya Tabibu Vijijini kilichopo Mbozi Mjini Mbeya, kuanzia mwezi Julai 1984 had Aprili 1987 na kutunukiwa cheti cha kuhitimu mafunzo hayo na Bodi ya Mafunzo ya Utabibu Tanzania (Tanzania Medical Training Board) (Kiambatisho Na. 12)*

Mtuhumiwa pia, alijiendeleza kitaaluma katika chuo cha Maafisa Tabibu kilichopo Bumbuli katika Mkoa wa Tanga mnamo Septemba 1993 had Agosti, 1995 na kutunukiwa Stashahada (Diploma) (Kiambatisho Na. 13)

Kamati ilibaini cheti cha kumaliza kidato cha nne (Secondary School Leaving Certificate) ambapo mtuhumiwa alianza kusoma katika Shule ya Sekondari Makumira kuanzia mwaka 1996 na kuhitimu 1999 (Kiambatisho Na. 14).

Aidha, katika jitihada za kujiendeleza kitaaluma, Mtuhumiwa alihudhuria mafunzo ya ngazi ya Stashahada ya Juu (Advanced Diploma) katika Kituo cha Mafunzo ya Madaktari Wasaidizi kilichopo Tanga mwaka 2003 Septemba na kuhitimu mnamo mwaka 2005 mwezi Agosti. (Kiambatisho Na. 15).

***Kamati imebaini kwamba**: Kanuni D. 12 ya Kanuni za Kudumu za Utumishi wa Umma za mwaka 2009, haiwezi kumtia hatiani mtuhumiwa.*

The Disciplinary Committee further observed at p. 11 of the report that:-

***Hivyo Kamati imeona kwamba, Kanuni D.12** ya Kanuni za Kudumu za Utumishi wa Umma za mwaka 2009 si sahihi kutumiwa katika shtaka hili, kwa hiyo **Shtaka hili kwa mujibu wsa Kanuni D. 12, HALIJATHIBITIKA**.*

All this means that the offence with which the applicant stood charged before the Disciplinary Committee under Regulation D. 12 of the Standing Orders for the Public Service, 2009 was not proved. It should be recalled that the applicant was charged with one and only one offence of giving false information contrary to Regulation D. 12 of the Standing Orders for the Public Service, 2009.

It is on record that the Disciplinary Authority dismissed the applicant from employment on the offence of, '*kumwibia mwajiri wake na kusababisha hasara kwa kupokea mishahara ya miezi 365 bila kustahili'.* It is not clear under which law the applicant was found guilty and on which charge; there having been only one charge under Regulation D. 12 of the Standing Orders for the Public Service, 2009 which disciplinary offence was found to have not been proved as indicated in the report of the Disciplinary Committee submitted to the Disciplinary Authority on 2nd October, 2019.

It is my finding that, apart from the fact that the President usurped the powers of the Public Service Commission, the same second appellate authority confirmed

the decision of the Disciplinary Authority which left a lot to be desired. The decision of the President cannot, in such circumstances, be left to stand.

In view of the aforesaid, I hereby grant the application for prerogative orders of *certiorari* and *mandamus* with costs. I declare the decision of the President given on 25th July, 2021 through the 3rd respondent null and void, quash and set it aside and compel the 2nd respondent to act in accordance with the law by hearing the applicant's appeal on merit.

It is so ordered.

W.P. Dyansobera
JUDGE
20.9.2023

Dated and delivered at Dar es Salaam this 20th September, 2023 in the presence of the applicant and Mr. Ramadhan Maleta, learned counsel and Ms Victoria Lugendo and Ms Caroline Lyimo, both learned State Attorneys for the respondents.

W. P. Dyansobera
JUDGE