

IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

MISCELLANEOUS APPLICATION NO. 629 OF 2019

BETWEEN

DAUDI MITUMBA AYOUB APPLICANT

VERSUS

THE CHIEF SECRETARY, PRESIDENT'S OFFICE ... 1ST RESPONDENT

THE PUBLIC SERVICE COMMISSION 2ND RESPONDENT

THE NATIONAL AUDIT OFFICE 3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

RULING

Date of Last Order: 03/06/2020

Date of Ruling: 10/07/2020

S.A.N. Wambura, J.

The applicant **DAUDI MITUMBA AYOUB** has filed this matter under the provisions of Rules 8(1)(a)(b)(2)(3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014 – GN Notice No. 324 of 2014, Section 2(1)(2)(3) of the Judicature and Application of Laws Act Cap. 358 RE. 2002, Section 17(2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act Cap. 310 RE.

2002, Section 94(1)(d)(f)(i) of the Employment and Labour Relations Act No. 6 of 2004 as amended by Act No. 8 of 2006, Sections 51 and 52(1) of the Labour Institutions Act No. 7 of 2004 as amended by Act No. 8 of 2006, Rules 24(1), (2)(a)(b)(c)(d)(e)(f), (3)(a)(b)(c)(d), (11)(b) and 55(1)(2) of the Labour Court Rules, 2007 published as Government No. 106 on 18/05/2007 praying for the following Orders:-

(a) An Order of Certiorari to remove into the High Court and quash the decisions of the First, Second and Third Respondents contained in letters with Ref. No. CAB.30/536/PF.252/8 dated 10th April, 2018, PSC/CSD/CSC.22/90/01/57 dated 24th July, 2017 and DPC.2357/20 dated 20th February, 2017 respectively.

(b) An Order of Mandamus directing the respondents to recognize the applicant in employment with full remuneration in his position of Accountant Grade II from 20th February, 2017 to the present day and the days to come until his employment is lawfully determined.

(c) An Order directing the respondents to stick to quasi-judicial approach and not to be swayed by irrelevant considerations, if any.

(d) Any other relief that may meet the good ends of justice.

The application was supported by his sworn affidavit.

Ms. Gati Museti State Attorney filed a counter affidavit on behalf of both respondents challenging the application.

With leave of this Court the application was disposed of by way of written submissions. I thank both parties for adhering to the schedule.

It is on record that the applicant who was formerly employed by the 3rd respondent, **The National Audit Office** was terminated from employment on 20/02/2017 after he was found guilty of the disciplinary charges facing him, that is:-

- (i). Forgery of receipt with No. 501 dated 17/05/2015 of Tshs. 13,475,000/= contrary to Regulation 100(1)(e) of the Public Finance Act of 2001 (RE. 2004).

- (ii). Committing acts involving moral turpitude contrary to Regulation 42(1) and (5) of Part A of the First Schedule of the Public Service Regulations.
- (iii). Using public funds entrusted to you for your own good without the consent of the prescribed authority contrary to Regulation 42(1) and (5) of Part A of the First Schedule of the Public Service Regulations 2003.
- (iv). Gross negligence in performing the duties assigned to you contrary to Regulation 42(1) and (8) of Part A of the First Schedule of the Public Service Regulations, 2003.

Aggrieved by the decision he appealed to the 2nd respondent, **The Public Service Commission** which upheld the decision of the 1st respondent. His appeal to the 1st respondent **The Chief Secretary, President's Office** was again dismissed. He has thus decided to knock at the doors of this Court.

Submitting on the application the applicant has challenged the procedures used in handling the matter by the 1st respondent in that:-

- (i). Hearing of the inquiry committee was delayed by a few days contrary to Regulation 47(10) of the Public Service Regulation.
- (ii). That he was served with additional charges during the hearing and was denied the right to prepare himself.
- (iii). That he was not provided for with copies of the Audit Reports 2013/2014 and 2015/2016; Voucher No. 38/5/2015 and receipt No. 0501 by the inquiry committee contrary to Regulation 48.
- (iv). The Inquiry Committee was composed of unknown persons including Police Officers who did not have knowledge of the said issue contrary to Regulation 46(10) of the Public Service Regulation.
- (v). That he was denied an opportunity to raise mitigating factors.
- (vi). That there was a contradiction between the charge and the sentence. That the conviction was based on an offence which he was not charged with.
- (vii). That the decision of the 2nd respondent was prematurely issued as the minutes of the alleged committee were not signed.
- (viii). That the decision of the 1st respondent was null and void as there was no evidence that the signatory was delegated the

same. That the signatory could not be a delegatee as a delegatee could not delegate the same as per the maximum "*delegations non protest delegate*".

- (ix). That the respondents counter affidavit was defective for offending the provisions of Order 19 Rule 15 of the Civil Procedure Code Cap. 2002 citing the case of **Ignazio Messina Vs. Willow Investments**, Civil Appl. No. 21 of 2001 to that effect.

He thus prayed for the application to be granted.

In their reply the respondents argued that:-

- (i). The issue of the delay in conducting the inquiry was not stated in the applicant's affidavit so ought to be disregarded as held in the cases of **James Funke Gwagilo Vs. Attorney General** [2004] TLR 161 and **Madam Mary Silvanus Quorro Vs. Edith Donath Kweka**, Civil Appeal No. 102 of 2016.
- (ii). The law allows for parties to file additional charges as provided for in Regulation 47(8) and 9 of the Public Service Regulations.
- (iii). That the applicant had access to the said documents and that he did not adduce any evidence in respect of the same apart

from the fact that this was never raised in his appeal. That he was accorded a fair hearing and they complied to Regulation 61(3) of the Public Service Regulation.

- (iv). That the inquiry committee was well constituted and the applicant has not indicated the appropriate number. That Regulation 46(5) of the Public Service Regulation allows the committee to seek assistance of persons conversant with professional or technical matter likely to arise in the cause of the proceedings.
- (v). Responding to ground (v) and (vi) it was submitted that the Disciplinary Authority acted judiciously while dealing with the matter and in accordance with Regulation 48 of the Public Service Regulation.
- (vi). The allegation that the decision of the 2nd respondent was invalid and prematurely communicated is baseless as it has to be distinguished with the signing of the minutes which does not validate a properly constituted meeting.
- (vii). That the decision of the applicants appeal was issued by the President of the United Republic of Tanzania in accordance to

Regulation 60(5) of the Public Service Regulation and communicated to him by one H. Lugembe on behalf of the Chief Secretary.

- (viii). That the affidavit cannot be vitiated by the omission of a letter (s) to be said to be a lie. That the case of **Ignazio Messina Vs. Willow Investment** (supra) is distinguishable from this matter. It was further submitted that it ought to have been raised as a preliminary objection and not within such submissions.

They thus prayed for the dismissal of the matter as the applicant enjoyed a fair hearing as it was held in the case of **Henry Zephyrne Kitambwa Vs. The President of the United Republic of Tanzania, Attorney General and National Audit Officer**, Misc. Civil Application No. 33 of 2018

In his rejoinder the applicant retaliated his submissions stating that:-

- (i). At paragraph 9 of his affidavit it was stated that the applicant was served with a notice on 02/11/2016 and hearing commenced on 06/01/2017 beyond the sixty (60) days and

without being granted an extension of time by the Minister and contrary to Sections 44 and 46 of the Law of Limitation Act.

- (ii). That the reasons for having Police Officers in the inquiry committee was not revealed in the respondents counter affidavit. He further raised the issue of biasness and cited the cases of **Juma M. Nkondo Vs. The Industrial Court of Tanzania, Tanzania Oxygen Ltd and The Hon. Attorney General**, Misc. Civil Appl. No. 35 of 2000 and **Naswaro Rao Vs. State of AP** AIR 1959 SC 1376 to that effect.
- (iii). That it was mandatory to be served with a copy of the documents.
- (iv). That there was no indication that the decision was made by the President or his delegatee as there is no copy of the same
- (v). That the issue of the verification clause cannot be raised as a preliminary objection as it is not a pure point of law as stated in the case of **Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd** 1969 EA 696.

- (vi). That there were no exceptional circumstances to invoke the provisions of Regulation 62(2) of the Public Service Regulation.
- (vii). That the case of **Henry Z. Kitambwa** (supra) should not be relied upon for want of jurisdiction.

It can briefly be stated that the applicant is complaining on the composition of the members of the inquiry committee and the procedures taken to conduct the inquiry. Having gone through the application these are my responses to the issues raised:-

- (i). As for the few days delay in conducting the disciplinary hearing, I do agree with the applicant that from 02/11/2016 to 06/01/2017 there was a delay of some few days thus beyond the sixty (60) days as provided for under Regulation 46(10) of the Public Service Regulation. However, this was not stated in paragraph 9 of his affidavit. But again this could not vitiate the proceedings because under Section 60(2) of the Interpretation of the Laws Act Cap. 1 RE. 2019 weekends and public holidays are excluded from the said days so the delay of a few days can be perceived but can also be accommodated.

There was also no need of seeking extension of time from the disciplinary authority, for as provided for under Regulation 46(11) of the Public Service Regulation. This is because the said extension is sought where the inquiry committee has failed to complete the same within the sixty (60) days.

- (ii). As for the composition of the inquiry committee members, I do join hands with the respondents that Regulation 47(7), (8) and (9) of the Public Service Regulation allows parties to invite professional or technical members to assist them. Therefore the said Policeman where properly invited to deal with the technical issues.
- (iii). As for service of the requisite documents the respondents have alleged that the same were sent to the applicant's address but the applicant is praying for proof of the same. This issue ought to have been resolved at the hearing stage and this Court cannot call for such proof now.
- (iv) As for the delegation of the Powers of the President of the United Republic of Tanzania and Chief Secretary it is my belief

that as an Institution, the President's Office has its procedures which cannot be explained in details at this forum. It suffices to say that when one delegates his position for any reason travel, leave or sickness the same is not copied to the public nor to the applicant for that matter. Therefore the applicant was properly notified of the said decision.

- (v) From the record I do agree that there were no exceptional circumstances to invoke the provisions of Regulation 62(2) of the Public Service Regulation.
- (vi) The case of **Henry Z. Kitambwa** (supra) is a decision of the High Court and can be relied upon by this Court. The issue of the jurisdiction cannot be resolved by this Court without having all the evidence required at hand.
- (vii) I am in agreement with the respondents that the contents of the affidavit cannot be vitiated by a mere omission of the letter (s). So the affidavit cannot be said to be defective.

In the final analysis I would hold that the disciplinary authority acted judiciously as the applicant was accorded the right to be heard as held in

the cases of **Mabibo Beer Wines and Spirit Ltd Vs. Lucas Mally aka Baraka Sotres and Commissioner for Customers Tanzania Revenue Authority**, Civil Application No. 160 of 2008 and **Hamisi Jonathan John Mayange Vs. Board of External Trade**, Civil No. 37 of 2009 CAT at DSM which held:-

"The right of a party to be heard before adverse action or decision is taken....against....a party has been stated and emphasized by the Courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be breach of the principles of natural justice."

Moreover it has been held that the various stages in the procedures are not meant to be applied on a checklist fashion, rather they are meant to provide guidelines to ensure that the procedure was fair as was held in the cases of **Bernard Gindo & 28 Others Vs. TOL Gases Ltd**, Rev. No. 18 of 2012, **NBC Ltd Mwanza and Justa B. Kyaruzi**, Rev. No. 79 of

2009 and **NUMET Vs. North Mara Gold Mine Ltd**, Rev. No. 6/2015 to mention just a few.

But again Regulation 62(3) of the Public Service Regulation provides that no finding made by the disciplinary authority shall be reversed or set aside on the grounds only of any irregularity in the appointment of the inquiry committee or the conduct of the disciplinary proceedings; grounds which this application lies upon, meaning it cannot stand. However I believe it is not a very healthy Regulation especially on the part of the conduct of the proceedings.

In the final analysis I herein dismiss the application for want of merit.

S.A.N. Wambura

JUDGE

10/07/2020

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THE HON. ATTORNEY GENERAL 4TH RESPONDENT

Date: 10/07/2020

Coram: Hon. W.S. Ng'humbu, Deputy Registrar

Applicant: Present in person

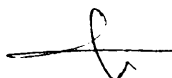
For Applicant:

Respondents: } Absent

For Respondents: }

CC: Lwiza

COURT: The Ruling delivered this 10th July, 2020 in the presence of Mr. Daudi Mitumba Ayoub, the applicant and in the absence of the respondents is certified to be the true copy of the original.



W.S. Ng'humbu
DEPUTY REGISTRAR

10/07/2020