

**IN THE HIGH COURT OF TANZANIA
LABOUR DIVISION**

AT DAR ES SALAAM

REVISION NO. 564 OF 2019

TEMEKE MUNICIPAL DIRECTORAPPLICANT

VERSUS

NIXON NJOLLA.....1st RESPONDENT

MARIAM CHIMBALA 2nd RESPONDENT

JUDGMENT

Date of last Order: 31/03/2020

Date of Judgment: 30/04/2020

Z.G.Muruke, J.

The respondent, NIXON NJOLLA and MARIAM CHIMBALA were employed by the applicant as medical assistants. They worked with the respondent until 29th October, 2007 when they were authorized to go for further studies at International Medical and Technological University (IMTU) as they requested. On 21st April, 2019 the applicants were terminated from their employment for absenteeism. They referred the matter to the CMA where decision was on their favour on the reason that termination was substantively and procedurally unfair. Aggrieved by the same the applicant filed this application seeking to set aside CMA's award hence this judgment.

The application was supported with the affidavit of the applicant's principal officer Thomas Mahushi. Challenging the application, the

respondents filed a joint counter affidavit sworn by them. The application was disposed by way of written submissions, gratefully both parties complied with the schedule.

Submitting on the application, the applicant counsel stated that, the arbitrator failed to consider the applicant's evidence. Prior charging them, investigation was conducted as required by the law, referring Rule 13(1) of the Employment and Labour Relations (Code of good Practice) GN 42 herein to be referred as the Code.

Before 24th September 2009, the respondents were IMTU students until 25th September, 2009 where they were discontinued from their studies, thus, supposed to report back to their working stations but they failed to do so. The applicant decided to call for a disciplinary hearing, where different ways of notifying and summoning the respondents were done as per exhibits TMC 7, TMC8 and TMC 9, but they proved failure hence the Disciplinary meeting was done in their absence, and reached decision in terms of exhibit TMC10. Therefore, the respondents were afforded with their rights to be heard but they opted not to appear.

Applicant's counsel further contended that, the disciplinary hearing decision exhibit TMC 10, punished all the charged employees involved not only the respondents. The Arbitrator wrongly held that other employees were not given the same punishment. The decision for terminating the employment of the respondents was substantively and procedurally fair as required under Section 37 (2) of the Employment and Labour Relations Act. Cap 366 RE. 2019 and Rule 12 (5) of the Code.

Regarding the award, the applicant's counsel stated that, the arbitrator failed to consider the evidence adduced by the applicant and reached to erroneous decision by awarding the respondent both reinstatement without loss of salary to the tune of Tshs. 75,275,000/= each respondent and disturbance damages to the tune of 100,000,000/= each.

He argued that, the evidence is very clear that the respondents absconded from work hence the award was unjustifiable referring the case of Tanzania **Breweries Limited v Nancy Morenje**, Rev.No.182/2015 where it was held that;

"In the rule of law for damages to be granted they must be certain that there must be clear evidence of such injured feelings..."

Responding to the applicant contentions, the Respondents prayed for dismissal of the application on the grounds that , the applicant in his submission dated 28th November, 2019 referred the name of the applicant as Temeke Municipal Council, while the applicant is Temeke Municipal Director.

The respondents submitted that the termination of the respondent was never preceded by the preliminary investigation. The respondents were never discontinued at the university rather they faced financial difficulties which resulted in to failure to pay their university fees. 73 days alleged to have absconded, from employment they were at IMTU continuing with their studies. Due to the financial problem they were

facing they were out of the university as were restricted by university for not paying fees, they thus returned back to the applicant, unfortunately they were restricted not to appear at applicant office including Temeke hospital as per exhibit P9. The applicant did not take note of the situation and decided to continue with the disciplinary hearing.

Further, on procedural aspect, they submitted that the applicant failed to adhere to the procedures for termination as they were not informed of the charges contrary to Rule 13(3) of the Code. Failure to inform them of the same led them not to appear before the Committee to defend themselves and they were not given the results of the Disciplinary Hearing. Also the Disciplinary Committee involved two chairpersons and without other member of the committee which they find it unfair referring the case of **Zanzibar Teleco Limited v Kuluthum Seleman Kabichi** Rev.No. 341/2013.

On the relief granted, the respondents argued that the arbitrator was right to award them reinstatement and compensation for general damages as they suffered brain tumor, anguish, agony and failure to maintain their families.

In rejoinder, the applicant's counsel argued that, the respondents wrongly sued the Director of Temeke Municipal Council instead of Temeke Municipal Council as it has its legal personality to be sued referring Section 14(1) of the Local Government (Urban Authorities) Act Cap 288 RE 2002. The Director of Temeke Municipal Council is the employee of the same,

and whatever he is doing is subject to the name of Temeke Municipal Council. The question of legal personality to municipal councils was addressed in the case of **Maulid Shaban v Temeke Municipal Executive Director and Farida Mohamed Said**, Miscellaneous Land Application No. 1030/2017.

Having gone through the parties' submission and records, It is my considered view that there is a great need to settle the concern that has been raised by the respondents as it can dispose of the matter before determining the case on merit. The respondents stated that the applicant in his submission in chief has changed the name of the applicant from TEMEKE MUNICIPAL DIRECTOR to TEMEKE MUNICIPAL COUNCIL. This fact was not disputed as the applicant admit to have changed the same and added that, the respondent were supposed to sue the Temeke Municipal Council and not the director. From the CMA records including the award, it is apparent that the applicant was Temeke Municipal Director. Now the question who is the proper party? Will execution be applicable against Temeke Municipal Director?

First of all, I have to articulate that, the applicant had improperly changed the name of the applicant in his submission in chief. If he found that the respondent's had sued a wrong party, then they ought to have established the same from the CMA as they attended and still argued the case respondent was as Temeke Municipal Director.

Temeke municipal Council, like other urban authorities, is established under the Local Government (Urban Authorities) Act, Cap 288 RE, 2002.

Section 14 (1) of the Local Government (urban Authorities) Act, Cap 288 RE 2002 provides:

(1) Every urban authority established or deemed to have been established under this Part, and in respect of which there is in existence a certificate of establishment furnished under section shall, with effect from the date of commencement of the establishment order, be a body corporate, and shall

(a) have perpetual succession and an official seal;

(b) **in its corporate name be capable of suing or being sued;**

(c) Subject to this Act, be capable of holding and purchasing, or

Acquiring in any other way, and disposing of any movable or immovable property. (Emphasis is mine)

From that provision it is clear that Temeke Municipal Council is a legal entity which can sue and be sued on her own name. That being the case, I find that the respondents sued a wrong party since the director is just the representative of the Council. The director is just executing his duties on behalf of the Council. It is the council as the legal entity whom even the award will be executed against.

In the case of **Tabora Municipal Council Vs Philbert Rwegoshora** Civil Appeal No. 14 of 2008 at Tabora HC, it was held that:

“The judgment debtor is Tabora Municipal Council a body cooperate capable of suing and being sued. The urban council director has an obligation to pay out of the revenue of the council the amount awarded against the Council.”

Also in the case as cited by the respondent **Maulid Shaban v Temeke Municipal Executive Director and Farida Mohamed Said I administratix of the estate of Jabar Said**), Misc. Land Appl. No. 1030 of 2017, it was stated that:

“Temeke Municipal Excecutive Director being sued in lieu of Temeke Municipal Council, only the latter is capable to sue or being sued in their name. This requirement is purely a point of law, the Temeke Municipal Director being the Chief Executive Director cannot be sued instead of the employer Municipal Council. Thus I entire agree with Mr Nyanza that the application was proud under the name of wrong person.”

As claimed by respondents that they sued Temeke Municipal director, and as records support, CMA dispute was filed and determined by under the wrong name of the respondent now applicant. Basing on the above view, I find that the respondents had sued a wrong party. By the power vested in me under section 91(4) of Cap 366 R.E 2019 I hereby quash

CMA's proceedings and the award. Respondents if still interested should follow the procedure.

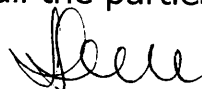


Z.G. Muruke

JUDGE

30/04/2020

Judgment delivered in the absence of all the parties.



Z.G. Muruke

Judge

30/04/2020