IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 101 OF 2020

ZAKARIA KITUA.....1st APPLICANT

JOHN D LUKUWI .....2nd APPLICANT

CORNEL J HOLLOTA.....3rd APPLICANT

FATUMA H. KITEMO.....4th APPLICANT

GANATIO C. CHIHWALO.....5th APPLICANT

GABRIEL B. SAKALA..... .....6th APPLICANT

MUHSIN M. MELLA.....7th APPLICANT

GEOFREY D. LYOBA.....8th APPLICANT

VERSUS

TANZANIA POST CORPORATION..... RESPONDENT

(From the decision of the Commission for Mediation & Arbitration of DSM at Ilala)

(Igogo: Arbitrator)

dated 7th February 2020

in

REF: No. CMA/DSM/ILA/R.902/17/1050

JUDGEMENT

25th October & 20th December2021

Rwizile J.

The applicants are challenging the award made by Commission for Mediation and Arbitration- (the Commission) that dismissed their claims before it. Normally, claims before the Commission are

commenced in CMA-F1. It was their claim that termination of their employment was unfair and so merited terminal benefits.

Facts, the culmination of which is this application, may be told as hereunder, and happily enough they are not disputed. The applicants, who were all standard seven leavers, were each employed at different time and post. Their contracts of employment were in between 03rd January 2006 to 30th June 2009. They were employed on permanent terms as exhibit TPC1-collectively.

In 2017, the government appeared to inspect certificates with the aim of removing employees employed after a 2004 Circular that set the minimum education qualification to be atleast form four. Following that directive -exhibit TPC3 and TPC4, since the applicants had not attained the required level of education, they were suddenly removed from the payroll and terminated as per exhibit TPC6-collectively. They were however, paid some terminal benefits.

Not satisfied with what happened, they unsuccessfully filed a labour dispute with the commission. When dismissing their dispute, the commission held that the applicants were employed by the respondent against Circular No. 1 of 2004, because they had not attained form four level of education. Relying on section 23(1)(e) of the Law of Contract

Act, it held their contracts of employment *null and void ab initio* because they were against public policy.

The applicants were not satisfied with the award, hence this application. The affidavit sworn by Zakaria Nzinya Kitua for all applicants, supporting this application has raised 5 points for determination coached in the following terms;

1. The Hon. Trial Chairperson erred in law and in facts when she found that the applicants were servants within the description of **Waraka wa Serikali Na. 1 wa 2004**. The Hon. Chairperson did not take into consideration that most of the applicants were employed after the year 2004.
2. The Hon. Trial Chairperson erred in law and on facts when she found that the applicants failed to improve their education level to form four level and thereby misdirect herself to find that the applicants' employment was **Null and Void abinitio**. This finding is not supported by any evidence that the applicants were indeed asked to improve their levels of education.
3. The Hon. Trial Chairperson erred in law in the interpretation of **Section 23(1)(e) of the Law of Contract Act Cap 345 RE 2002** and thereby misdirected herself to find that the applicants

were employed against a Public Policy which she termed **"sera ya nchi".**

4. The Hon. Trial Chairperson misconstrued and misinterpreted the High Court (Labour Division) decision in **Salehe Komba & Revocatus Rukonge vs Tanzania Posts Corporation Rev.12/2018 by Matupa J** and in the course misdirected herself to find that the applicants were Public Officers.
5. The Hon. Trial Chairperson erred in law when she neglected to examine the two remained issues thereby failed and or neglected to deal and decide on the question of termination of applicant's employment.

To argue their application by written submission, one Agnes Mtunguja argued that the respondent, a corporate sole, has powers to hire and fire its employees without seeking any government directive, as it did in this matter. She said, such powers are under section 3 and 7 (g) of the Tanzania Posts Corporation Act. Referring to the decision of this court Matupa J (as he then was) in the case of **Saleh Komba and Another vs TPC,** Labour Revision No. 12 of 2018 (unreported) at page 6, where it was held that since TPC has control over its staff, the respondent was not mandated to apply Circular No. 1 of 2004. It was therefore her view that the Commission erred in disregarding the

decision of the court which is binding on the commission. Concluding this point, she was of the argument that the applicants did not hold Public Offices as envisaged in the Public Service Act. Therefore, the Circular was not applicable in their employment.

Dealing with the second point, it was argued that to hold that applicants' contracts of employment contravened public policy was a misconception. She submitted further, that the alleged circular is not in any way a public policy within the meaning of the same in the Black's Law Dictionary, 8th edition, which in the broad sense, public policy refers to principles and standards regarded by legislature or by courts as being of fundamental concern to the state and the whole society or in its narrow sense one should not be allowed to do anything that would injure the public policy.

It was therefore submitted that the circular was inapplicable here and this court was asked to rely on the case cited thereby holding that the contracts were not void ab initio as found by the commission. In her view, the 3rd and 4th grounds are clearly argued as above.

The last ground argued is issue number 5, it was her view the Commission ought to consider section 37(1)(2) (a) and (b) of the Employment and Labour Relations Act (ELRA), which illegalizes unfair termination. Therefore, if the employer does not prove that a reason

for termination is valid and the same reason is fair, then employment is unfairly terminated.

According to her, the reasons for termination in this case were stated in the circular as to have not attained form education. The same, she said stem from the circular that did not apply to the applicants. Therefore, their employment was unfairly terminated. This court was asked to allow this application.

The respondent that enjoyed services of the Office of the Solicitor General was represented by Mr. Mtae learned counsel. The same was of the view that the submissions by the applicants hinge on two points, *whether the applicants are public servants affected by circular No. 1 of 2004* and *whether the same circular is "the Public Policy"*.

It was argued that the term public servant is defined at para 1(1.1) of the Public Service Management and Employment Policy 1999 (*Sera ya Manejimenti na Ajira katika Utumishi wa Umma)* to include Executive Agencies. But according to para 5.11, the policy sets minimum qualification for employment in the public service to have attained form iv level of education as of May 2004. The learned Attorney, to support his finding referred the case of **AG vs Tanzania Ports Authority and Alex Msama Mwita**, Civil Application No. 87 of 2016, CA

(unreported). The Court of Appeal, at page 9 of the judgement held Tanzania Ports Authority which is a public corporation was under the control of the government notwithstanding its corporate status. In his view therefore, the circular in question applied to the respondent as a public corporation. As to the case of **Salehe Komba** (supra), it was submitted that the same was dealing with jurisdiction of the Commission. It did not refer to the policy in the Public Service of 1999.

Submitting on whether the applicants' contracts were *void ab initio* for being against the public policy. The learned Attorney submitted that it was correct for the arbitrator to rely on the terms of section 23(1)(e) of the Law of Contract Act and the case of **Rock City Tour Ltd vs Andy Nurray** [2014] LCCD76, because the applicants were covered by the circular in question.

To define what amounts to public policy, the respondent relied on two foreign cases that interpreted section 35(2) of Arbitration Act of Kenya, which are cases of **Christ for All Nations vs Apolio Insurance Co. Ltd** EA 366(2002)262, where it was said that an award would be set aside if proved to have been inconsistent with the constitution or other laws of Kenya, whether written or unwritten or inimical to the national interest of Kenya or contrary to justice and morality.

While in the **Tanzania National Roads Agency v Kundai Singh Construction Limited**, Misc. Civil Application No. 171 of 2012, High Court of Kenya at Mombasa, where the words *contrary to public policy or against public policy* were considered by the court to have no precise meaning and so were held to connate that which is injuries to the public, offensive, with elements of illegality and that may be violative of the basic norms of the society. It was therefore submitted that employment of unqualified workers in the public office was against the public policy.

Lastly, it was submitted that the award did not decide on whether termination was fair or not, all what was found is that their contracts were void but the applicants were paid all terminal benefits as the law requires.

When rejoining, it was the view of Agness Mtunguja that the so-called *Sera ya Menejimenti na Ajira katika Utumishi wa Umma, 1999* was not pleaded or relied upon by the Commission. It is evident according to her, that the it was circular No.1 of 2004 that was in question. This court was therefore invited to disregard the same. According to her, even relying on the same, still the applicants were not public servants within either the policy itself or the circular. She took pleasure in the case of Tanzania Posts Corporation Act provisions and the case of

Salehe Komba(supra). Mtunguja went on arguing that the referred case of **AG vs PTA and another** (supra) is in line with the case of **Salehe Komba.** She also stated that the applicants were not public servants within the meaning of the same in the Public Service Act because they were not charged with the duty of formulating government policy and delivery of public service.

In conclusion, she said, it was wrong to rely on the circular as public policy to hold the applicants contracts *void ab initio* when in fact, they were not covered by the same. I was therefore asked to grant this application.

After considering the parties submissions, relevant laws, CMA and court records, I find the court is called upon to determine the following issues; *whether the applicants are public servants and whether they fall under and were bound by Waraka Na. 1 wa 2004 and whether the respondent fairly terminated the applicants*.

On the first issue as to whether the respondent's employees are public servants. The *public servant* is defined under section 3 of the Ppublic Service Act, 2002 as a person holding or acting in a public service office. The same section provides a meaning of "public service office" as hereunder;

'Public service office" for the purpose of this Act means: (a) a paid public office in the United Republic charged with the formulation of Government policy and delivery of public services other than-

(i) a parliamentary office;

(ii) an office of a member of a council, board, panel, committee or other similar body whether or not corporate, established by or under any written law;

(iii) an office the emoluments of which are payable at an hourly rate, daily rate or term contract;

(iv) an office of a judge or other judicial office;

(v) an office in the police force or prisons service;'

The respondent's counsel persuades the court to invoke section 58 of the Evidence Act, [CAP 6 RE 2019] and take judicial notice on '***Sera ya Menejimenti na Ajira Katika Utumishi wa Umma, 1999'*** which also listed the categories of public servants under paragraph 1 (1.1) which provides;

1. 'FASILI YA UTUMISHI WA UMMA

1.1 Kwa ufafanuzi, Utumishi wa Umma katika Jamuhuri ya Muungano wa Tanzania ni utumishi katika moja ya makundi ya utumishi yafuatayo:-

i. Utumishi katika serikali kuu (Civil Service)

ii. Utumishi wa sheria na Mahakama

iii. Utumishi wa Serikali za Mitaa

iv. Utumishi wa Afya

v. Utumishi wa Polisi, Magereza, Uhamiaji na zimamoto

vi. Utumishi wa kisisasa

vii. Utumishi wa Huduma za Kawaida

viii. Utumishi wa Taasisi na Wakala Tendaji za Serikali zinazojitegemea (Executive Agencies) na vyombo vingine vya Umma

ix. Utumishi wa Bunge'

Now the question to be addressed is whether the respondent's office is listed as one among the public offices mentioned above. From the definition quoted above, it is crystal clear that the respondent's office is a public office falling under section 3 (ii) of the Public Service Act. The respondent's office is a body corporate established under the

Tanzania Posts Corporation Act, [CAP 303 RE 2002]. However, being a corporate body governed by its own legislation does not preclude the respondent's employees from being recognized as public servants. By holding and working in a public office which is within the meaning of public office mentioned under section 3 of Public Service Act quoted above, it follows that the respondent's employees are public servants who are not governed by the Public Service Act. Thus, the first issue is answered in affirmative.

The second and the last issue will be addressed jointly. As it is found that the respondent's employees are public servants, it is my view that they are bound by the Government Circular Na. 1 of 2004 (Waraka Na. 1 wa 2004). According to the circular the minimum qualification for public servants is form four secondary school education. The fact that the applicants did not possess such qualification the respondent had no any other option than to terminate their employment contracts. The record shows that the applicants were employed after the establishment of the Government Circular Na. 1 of 2004. Therefore, their education qualifications had to adhere to the minimum standard stipulated in the relevant document.

The applicants being employed without adhering to the Government Circular No. 1 of 2004, clearly proves that their employment contracts

were *void ab initio* as rightly found by the Arbitrator. Therefore, the applicants cannot claim to have been unfairly terminated because they had no valid employment contracts.

In the result, I find the application with no merit for the reasons stated above. The application is therefore dismissed each party to bear its own costs.

A.K.Rwizile

JUDGE

20.12.2021