

**IN THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION NO. 941 OF 2019**

**BETWEEN**

**SIMON JOSEPHAT..... APPLICANT**

**VERSUS**

**DAR ES SALAAM WATER AND DEWARAGE  
CORPORATION..... RESPONDENT**

**JUDGEMENT**

*Date of last order: 24/06/2021*

*Date of Judgement: 05/07/2021*

**M. Mnyukwa, J.**

The applicant namely Simon Joseph was employed by the respondent, Dar es Salaam Water Sewerage Corporation (henceforth the DAWASCO). The applicant was terminated on the grounds of dishonesty. Aggrieved by the termination of his employment contract, the applicant referred the matter to the Commission for Mediation and Arbitration (CMA) labour dispute No. CMA/DSM/ILA/R.495/17 which upon hearing both parties, it decided in favour of the applicant. Dissatisfied with the Award of the CMA delivered on 8<sup>th</sup> November 2019, the applicant has preferred the present application for Revision. The applicant was represented by Mr. Sammy Katerega, personal representative while Mr. Mohammadou Evarist Majura. Learned counsel appeared for the respondent. With leave of the court the matter was urged orally.

Upon being served with a copy of an application for revision by applicant, the advocate of the respondent filed a Notice of opposition

along with a counter affidavit. Later on the respondent filed a notice of preliminary objection on the ground that the CMA entertained the labour dispute between the parties while it had no jurisdiction to do so.

Submitting on the objection the counsel for respondent urged that respondent is a government entity established under Dar es Salaam Water and Sewerage Act, GN. No. 139/2005. Thus the government of Tanzania owned DAWASCO which is responsible for the provision of water and sewerage services to the public. Therefore, the complainant was a public servant in terms of section 3 of the Public Service Act, Cap 298 R.E 2019 (henceforth the Act) and Regulation A1(51) and (52) of the Standing Order for Public Service of 2009.

It was their submission that section 32 (A) of the Act requires a public servant prior to seeking remedies for a labour law, exhaust all remedies as provided for under the Act. He submitted that the remedy for appeal if one is unsatisfied with the decision of the Disciplinary Authority is to refer the matter to the public service commission, if aggrieved by the decision of the public service commission he may appeal to the President of the United Republic of Tanzania. That procedure is in accordance with section 25 of the Act which reads together with Regulation 60 (5) of the GN. No. 168/2003.

He went further to submit that though section 2 (1) of the Employment and Labour Relations Act, Cap 366 R.E 2019 (henceforth ELRA) applies to employees including those in public service of the Government of Tanzania Mainland, but the intention of the legislature in enacting section 32(A) of the Act was to override section 2 of the ELRA.

Thus, as far as a public servant is concerned the ELRA is a general law and the Act is a specific law. He supported his argument with the case of **Tanzania National Roads Agency vs Brighton Kazoba and Julius Charles**, Labour Revision No. 16 of 2018 at Iringa (unreported). He therefore insisted that the applicant is a public servant and therefore CMA entertained the matter without jurisdiction.

In reply the personal representative of the applicant submitted that section 32 (A) of the Act and section 31(2) of the same Act as amended by GN. No. 3 of 2016 provides that a public servant should exhaust the remedy available. However, the law has got an extra room to accommodate other provision. The law does not oust the power of the CMA. The specific and general law can be used altogether to settle the dispute.

It was their submission that a public servant as defined under section 3 of the Act may have an exception to section 32 (A) of the Act. The laws and regulations establishing DAWASCO do not provides further avenue for employees to forward their grievances after the final decision has been made. He stated that if there is any other Disciplinary authorities apart from that available in the respondent office, then it was the duty of the respondent under the Code of Good Practice, GN. 42/2007 to inform the applicant the right to appeal to such authority. Therefore, it is not a sin to refer the dispute to CMA and later to this court. He added that since the employer did not use the Act to charge the applicant for disciplinary offence, it is an afterthought to demand him to use of the Act. Also it is double standard for respondent to use ELRA to charge the applicant, then expects an appeal to be filed in

accordance with the Act. He pray the preliminary objection to be overruled and the court should proceed with the main suit.

In rejoinder, the respondent reiterated what he had submitted in chief and insists that the definition of public servant and public office under the Act is very clear. The executive agency is part of a public service office and their employees are public servants.

Upon careful consideration of the rival submission and the records, the issue before this court was whether CMA had jurisdiction to entertain the dispute between the parties.

I am mindful of the fact that the issue of jurisdiction is one of the fundamental aspects in the administration of justice. It is the power and authority given to a certain body or court to entertain a matter before it. The issue of jurisdiction is conferred by the statute and goes into the root of the matter. It is a trite law that any decision given out by a body or court which had no jurisdiction, that decision is null and void.

In the instant revision, the personal representative did not urge much on the issue of the applicant being a public servant though he referred this court to who is a public servant according to the Act. His discussion centered much on the power of the CMA to hear and determine the labour dispute between the parties.

On the other hand the respondent's counsel insisted that CMA had no jurisdiction to hear and determine the matter between the parties because the applicant is a public servant and did not comply with the requirement of the Act.

The question of whether the applicant is a public servant can be resolved by the subsidiary legislation to the Gazette of the United Republic of Tanzania dated 20<sup>th</sup> May 2005. The Order established the Gazette is cited as "Public Corporation (DAWASCO) (Establishment Order), 2005". (herein after to be referred as the Order) Section 4(1) of the Order states that:-

"There is hereby established a public corporation to be known as the Dar es Salaam Water and Sewerage Corporation."

Therefore, DAWASCO is a public corporation by virtue of the above section capable of suing and being sued. As a public corporation it is controlled by the Government. This can be appreciated by the definition of the public corporation as it is provided under the Public Corporation Act, Cap 257 R.E 2002 (henceforth Public Corporation Act). In its interpretation section that is section 3 public corporation is defined as;

**"Means any corporation established under this Act or any other law and in which the government or its agent owns a majority of the shares or is a sole shareholders."**

Therefore, ownership is one among the criteria of the public corporation. A public corporation in which the Government own majority of shares is controlled by the Government in many aspects. In the case of **Godfrey Ndigambo vs Tanzania Ports Authority**, Revision No 772 of 2019, at Dar es Salaam (unreported), the court developed some criteria of public corporation. As far as our case is concerned, some of the few examples are drawn to show that DAWASCO is a public corporation. In the Order that established DAWASCO, under section 6(2) it is only the Treasury Registrar who shall be entitled to subscribe for or



hold any share in DAWASCO. Also the payment of any further share or shares shall be made to the manner which the Minister responsible with water after consultation with the Board and the Minister for finance may determine. The above suggests that the government owns the majority of the share or is a sole shareholder. This is one among the characteristics of the public corporation as it is provided under section 3 the Public Corporation Act.

Furthermore section 9(1) of the Public Corporation Act provides that if the government is a sole shareholder in a public corporation the responsible Minister shall appoint the members of the board. This correspond with the Order establishing DAWASCO in which under section 7(1)(b) states that the board member of DAWASCO shall consist of not less than six other members who shall be appointed by the Minister.

In the above circumstances it is clear that DAWASCO is a public corporation entrusted among other functions with the duty to operate water supply and sewerage services in DAWASA designated area as it is provided under section 5(a) of the Order.

Is DAWASCO a public service office? This question is answered by the Act. When referring to section 3 of the Act, a public service office is defined as:-

**"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..."**

From the above definition, one may not hesitate that DAWASCO is a public service office since it has been given power by the Order establishing it to operate water supply and sewerage service in DAWASA designated area. Therefore, it is a government entity responsible for the delivery of water and sewerage services to the public. This is by virtue of section 3 of the Act cited above, that is to say the employees of DAWASCO are public servants because they are holding or acting in the public service office. For that purpose, the applicant in this case is a public servant.

With utmost respect to the applicant's personal representative, the argument that section 32(A) of the Act is not mandatory to be complied with by the public servant, in my well-considered view do not fall within the ambit of the intention of the legislature. The section provides that:-

"a public servant shall, prior to seeking remedies for in labour laws, exhaust all remedies as provided for under this Act."

The above section does not give an alternative to the public servant to seek remedies under the ELRA before exhaust the remedies available under the Act. As submitted by the counsel of the respondent, the Act is a specific law deals with the public servant while the ELRA is a general law.

This is also the principles in statutory interpretation is that the specific law override the general law. Therefore, it was improper for the matter to be heard and determined by the CMA. Being a public servant, the applicant was duty bound to exhaust the remedies available in the Act.

In the case of **Tanzania National Roads Agency vs Brighton Kazoba and Julius Charles**, Revision No 16 of 2018 at Iringa (unreported), the court stated that:-

"the respondent in the present case who were governed by the specific law the **Public Service Act** ought to have referred their grievances to the Public Service Commission which is a built-in mechanism for determining disciplinary disputes between public servants and their employees."

The above stand is also the position in the case of **Godfrey Ndegambo vs Tanzania Ports Authority** (cited supra) in which the court stated that:

"It is a well-established principle of law that the specific law should be firstly invoked before general law. Employers under the public services are strictly required by the law to firstly apply the laws specifically applicable in the public sector before they resort to the other set of laws which applies to the private sector only and which are more general in terms of their application as per section 32A of the Public Service Act (Cap 298)".

As I stated earlier, the applicant as a public servant if dissatisfied with the decision of the Disciplinary Authority was required to address his grievances to the public service commission then to the President of the United Republic of Tanzania if aggrieved by the decision of the public service commission.

On the argument raised by the applicant's personal representative that it is unfair to subject the applicant in the Act while he was charged by using the ELRA, in this aspect, upon careful consider the available record in the CMA file, I did not see any where that the applicant was



charged with the ELRA. On the internal memo dated 3<sup>rd</sup> April, 2017 titled **"KUWASILISHA MAELEZO YA UTETEZI"** part of the contents of that internal memo reads as hereunder:

"Tuhuma zote zilizotajwa hapo juu ni Kinyume na Kanuni na Maadili ya Utumishi wa Umma na Muongozo wa Kanuni za Utumishi kama zilivyoaninishwa katika Kanuni na masharti ya Utumishi wa Shirika  
"DAWASCO Staff Regulations July 2016.

In the above quotation it is clear that the applicant was charged by using the Act which reads together with DAWASCO Staff Regulations.

The Act under section 31(1) provides that

"servants in the executive agencies and government institutions shall be governed by provision of laws establishing the respective executive agency."

However, that servant is also subjected to the provisions of the Act. Furthermore, section 34A of the Act provides that

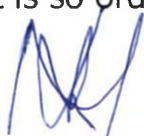
"where there is inconsistency between the Act and any other law governing executive agency, public institutions or other public services offices, the provisions of this Act shall prevail."

This means that an applicant being a public servant his remedies are available in the Act. Therefore it is a duty of the applicant as a public servant to be conversant with the procedure of disciplinary action as they are provided for under the Act.

In the above reasons, I am convinced to conclude that the CMA entertained the matter without having the jurisdiction. I thus dismiss the revision application No. 941 of 2019, upheld the preliminary objection,

and quash the proceedings before the CMA and set aside the Awards arising therefrom.

I make no order to costs. It is so ordered.



M. Mnyukwa

**JUDGE**

05/07/2021

Judgement delivered in the presence of Simon Josephat and Mr. Sammy Katerega, personal representative of the applicant and Mr. Muhammadou Everist Majura, Advocate of the respondent.



M. Mnyukwa

**JUDGE**

05/07/2021