IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION NO. 855 OF 2019

TANZANIA ELECTRIC SUPPLY COMPANY LIMITED .....APPLICANT

VERSUS

JAMES MWAKAJWANGA AND 16 OTHERS..... RESPONDENT

JUDGMENT

Date of Last Order: 04/08/2021
Date of Judgment: 10/09/2021

B.E.K. Mganga, J.

The respondents were employees of the applicant. They secured their employment between 2008 and 2009 without having an ordinary Certificate of Secondary School. They were terminated on 24th April 2018 on ground that they had no prerequisite qualifications to be employed in the Public Service as stipulated in Public Service Circular No. 1 of 2004. Having been aggrieved by the said termination, they referred Labour Dispute No. CMA/DSM/TEM/309/18/163/18 that was heard and determined by M. Batenga, Arbitrator, who, on 4th October 2019 issued an award in favour of the respondents. In the said award, the Arbitrator found that there were valid reasons for termination of the respondents but termination was unfair procedurally hence unfair termination. The arbitrator therefore ordered the respondent be paid six

months salaries for the said unfair termination. Aggrieved by the award, the applicant filed this revision application on grounds that:-

1. *The arbitrator erred in law and fact to entertain the matter while she had no jurisdiction*
2. *That the arbitrator erred in law and facts when she held that the termination was unfair on grounds that the procedures before termination was not followed.*
3. *That the arbitrator erred in law and facts when she awarded six months salary to each respondent while the applicant had already paid them their terminal benefits.*

The notice of application was supported by an affidavit of Thadeo Mwabulambo, the principal officer of the applicant. On the other hand, the application is purported to have been resisted to by the applicant, who purportedly filed the counter affidavit of Peter Mnyani, their legal representative. The application was disposed by way of written submissions.

It was argued on behalf of the applicant that Tanzania Electric Supply Company henceforth TANESCO is a public institution and that the respondents were public servants. It was further argued that in terms of section 32A of the Public Service Act, respondents were supposed to exhaust other remedies before referring the dispute to the Commission for Mediation and Arbitration henceforth CMA. It was argued that, respondents violated that provision of the law and that the arbitrator

heard and determined the aforementioned labour dispute while she had no jurisdiction. The cases of ***Alex Gabriel Kazungu and 2 others, v. Tanzania Electric Supply Company Limited, Revision No. 4 of 2020, High Court, Shinyanga Registry(unreported) and Tanzania Electric Supply Company Limited v. Mrisho Abdallah and 4 others, Revision No. 27 of 2020, High Court, Tabora registry (unreported)*** were cited to cement on the argument that the arbitrator had no jurisdiction.

Arguing the issue of jurisdiction, Peter Mnyani, the purported legal representative of the respondents submitted that, the applicant is not a Public Office and that respondents were not public servants hence not covered by the Public Service Act. He criticized the applicant by raising the issue of jurisdiction at this stage. He cited the case of ***Hassan Bundala @ Swaga v. Republic, Criminal Appeal No. 386 of 2015, CAT***, (unreported) wherein the Court of Appeal held that it is now a settled law that as a matter of general principle this court will only look into the matters which came up in the lower courts and were decided; and not new matters which were neither raised nor decided by neither the trial court nor the High Court on appeal. He therefore, prayed the jurisdictional issue be dismissed as was neither raised at CMA. To him this is an afterthought.

Having heard submissions of the parties, I am of the settled view that submissions by Mr. Mnyani that the jurisdictional issue was raised in this application as afterthought is, but with due respect, misconceived. There is a litany of authorities by the Court of appeal that jurisdiction of a court can be raised at any stage even on appeal. Among those cases are ***Shahida Abdul Hassanal Kassam v Mahedi Mohamed Gulamali Kanji, Civil Application No. 42 Of 1999*** (Unreported) and ***R.S.A Limited v. Hanspaul Automechs Limited and another, Civil Appeal No. 179 of 2016***. In the ***R.S.A Limited*** case the Court of Appeal held:-

> *"It is settled law that, an objection on a point of law challenging the jurisdiction of the court can be raised at any stage, it cannot be gainsaid that it has to be determined first before proceeding to determine the substantive matter...Thus, since the jurisdiction to adjudicate any matter is a creature of statute, an objection in that regard is a point of law and it can be raised at any stage. In our considered opinion, it was not offensive on the part of the respondents to raise it in the final submissions which was after the close of the hearing."*

What has been insisted to, by the Court of Appeal is that, once jurisdictional issue is raised, parties have to be afforded right to be heard. Guided by the above court of appeal decisions, I am of strong view that the jurisdictional issue was properly raised, and I am duty bound to decide on it.

I have gone through CMA record and find that PW1 Ferdinand Aloyce Kimaro and DW1 Bruno Novart Tarimo, are the only witnesses who testified on behalf of both the respondents and the applicant. In their evidence, both are on the same footing that the respondents are public servants. Since respondents are public servants, they are covered by the provision of Section 32A of the Public Service Act. The said section provides:-

> *"32A.* ***A Public servant shall, prior to seeking remedies provided for in labour laws, exhaust all remedies as provided 4 for under this Act."***

The said section was added in the Public Service Act in 2016 by section 26 of the the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2016 that came into force on 16th November 2016. The cause of action in the application at hand arose on 24th April 2018 when the respondents were terminated. By virtue of this clear provisions of the law, they were supposed to comply with the provisions provided for under the Public Service Act before referring the dispute to CMA. The record is clear that they did not comply with the procedures provided for under the Public Service Act as such the arbitrator had no jurisdiction to adjudge the dispute between the applicant and the respondents. I therefore, subscribe and associate myself with the positions taken by my learned brother (Mdemu, J) in the case ***Alex Gabriel Kazungu,*** supra

and learned sister (Bahati, J) in the case ***Mrisho Abdallah,*** supra**.** Having found that the arbitrator had no jurisdiction, I hereby quash the award issued and nullify all proceeding at CMA. Since this point has disposed the application, I will not consider other grounds of revision.

I should point out one strange thing I have found in this application. On perusal of the court file, I have found that on 24th January 2020, Mr. Peter Mnyani, signed the counter affidavit and filed it in this court in violation of Rule 44 of the Labour Court Rules, GN. No. 106 of 2007. This is because there is no list of names of the respondents and their signatures appended thereto as consent of the respondents to be represented by the said Peter Mnyani. Whatever the case, the said Peter Mnyani was not a party at CMA or employee of the applicant as such cannot sign and file the said counter affidavit. But as the jurisdiction issue has disposed this application, it suffices to stop here.

It is so ordered

B.E.K. Mganga
JUDGE
10/09/2021