IN THE HIGH COURT OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CAUSE NO. 50 OF 2022

IN THE MATTER OF AN APPLICATION FOR PREROGATIVE ORDERS OF CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF THE DECISION OF THE PRESIDENT OF THE UNITED REPUBLIC OF TANZANIA ON TERMINATION OF THE APPLICANT

BETWEEN

DEMETRIA MELKIOR HYERA.....APPLICANT

VERSUS

ATTORNEY GENERAL.....RESPONDENT

RULING

Date of Last Order:07/11/2022

Date of Ruling: 01/12/2022

BEFORE: S.C. Moshi, J.

The application is made under section 2 (3) of the Judicature and Application of Laws Act (Cap. 358 R.E 2019), section 18 (1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310 R.E 2019) and Rule 8 (1) (2) and (3) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedures and Fees) Rules, GN No. 324 of 2014. The applicant is praying for the following orders:

1. That, this Honourable Court be pleased to make a prerogative order of CERTIORARI to quash the decision of the President of the United Republic of Tanzania on termination of the Applicant.
2. That, this Honourable Court be pleased to make a prerogative order of MANDAMUS compelling the President of the United Republic of Tanzania to reinstate the Applicant to a senior Curriculum developer.
3. Costs to be provided for.
4. Any Other relief (s) this Honourable Court may deem just and fair to grant.

The application is supported by applicant's affidavit and applicant's statement of facts. The respondent opposed the application, she, in that respect filed a counter affidavit and a reply statement.

At the hearing of the application, the applicant was represented by Mr. Richard Clement, advocate whereas the respondent was represented by Mr. Boaz Msoffe, State Attorney.

Mr. Richard Clement submitted inter alia that, it's shown in statement of facts at paragraph 21, that the president disregarded the fact that the appointment, disciplinary, and staff development committee and the council of Tanzania Institute of Education acted beyond their powers or authority (ultravires). He said that, according to Regulation 35 of the Public Service Regulations of 2003 which are currently repealed by GN No. 444 of 2022, the authority responsible for taking disciplinary measures against public servants is Chief Secretary and the President. He argued that, the cited provision does not give powers to the Appointment, Disciplinary and Development Committee to take disciplinary actions. Therefore, the committee and council had no powers to discipline the applicant.

He also said that, the Public Service Disciplinary Code of Good Practice, GN NO. 53/2007 at item 11.2 provides that, relieve of duty shall not be more than three months. However, Annexure DMH3 to the affidavit, paragraph 6 shows that the applicant was interdicted on 2/5/2017, and on 1/11/2017 he

was relieved from duty by the council of Institute of Tanzania Education (per para 12 of the affidavit, Ann. BMH 7). The inquiry started on 18/9/2018. So, counting from the date of interdiction on 2/5/2017 to 18/9/2018 the period is more than 14 months. Also, counting from 1/11/2017 when he was relieved from duty is more than 9 (nine) months. The act is contrary to item 11/2 of GN No. 53/2007.

He said that, item 11.2 demands that after expiry of three months, the disciplinary authority has to seek extension of time from the permanent secretary per item 11.4; and the extension of time shouldn't be more than two months. However, in the present case, both the authorities; the Appointment, Disciplinary and staff Development Committee and the Council, did not seek extension of time. They interdicted the applicant for 14 months and relieved him for nine (9) months. Therefore, after three months, their authority over the applicant had seized. Hence; whatever was done after expiry of three months was done beyond their powers as they had no authority.

He pointed out that, the Tanzania Institute of Education, staff Regulations of 2011, was approved for use by Attorney General. Director of

Treasury; the letter is part of the regulation, at pg. 8 of the Regulation, it directed that the regulations would come into operation on 1/7/2022.

He said that, Regulation 10.2 (a) (ii) establishes an authority for appointment, disciplinary and staff development committee to take disciplinary action to employees with salary scale PGSS/PTSS 6 – 9 and PHTS 1 – 4. The committee had authority to relieve her from duties per Reg. 10.4 of Tanzania Institute of Education, Staff Regulations. However, Annexure DMH7 shows that the applicant was relieved from employment by the council of Tanzania Institute of Education instead of the committee. Therefore, the council acted beyond their powers as it' is not a disciplinary authority of the applicant per the Regulations.

He also argued that, according to Regulation 10.7 4 (b) the authority to prepare charges are given to the Director General of Institute of Education. However, in applicant's case the charges were prepared by the appointment, disciplinary and staff development committee.

He submitted further that, Regulation 10.5 of the Tanzania Institute of Education Staff Regulations of 2011, at para (b) says that where an employee is interdicted by the Director General (DG), the DG is required to charge the staff within thirty (30) days. However, annexure DMH3 which is

attached to paragraph 6 of the affidavit, shows that, the applicant was interdicted on 2/5/2017, and he was served with charges on 30/7/2018, that's 14 months from the date of interdiction per annexure DMH5, at para 8 of affidavit. He argued that, that's contrary to Regulation 10.5 (b) of Tanzania Institute of Education Staff Regulations 2011.

He said that, under regulation 10.2 (a) (ii), the applicant was supposed to be terminated by the Appointments, Disciplinary and Staff Development Committee (committee) and the same had to be ratified by the Council of Tanzania Institute of Education (council), however, the applicant was terminated by the council without involving the committee.

He prayed the court to quash the decision, and order that the applicant be reinstated to his employment, and a disciplinary proceeding be conducted by a proper authority in accordance with the law. He cited the case of **Ezekiah T. Oluoch Vs. The Permanent Secretary, President's Office Public Service Management and 4 others,** pp.29-30, Civil Appeal No. 140/2018, Court of Appeal, in which the Court of Appeal quashed the decision which terminated the appellant on the ground that, the authority exceeded its powers.

He submitted on 2nd and 4th grounds, and 20 (b) in the statement of facts that; he said that, these are basically based on one of the grounds which was stated in **Sanai Murumbe and Another vs. Muhere Chacha** (1990) TLR 54 that, one of the conditions for grant of certiorari is that the court, or public authority or tribunal has not taken into account matters which it ought to have taken into account. He said that, the reason for applicant's employment was the fact that the applicant had given approval for mass production of the books. However, reading through annexure R.A to counter affidavit, paragraph 4.1, it doesn't show that, the applicant had mandate to give approval for mass production.

He said that, before terminating the applicant, the authority ought to have satisfied itself if the applicant was assigned a duty of giving approval of mass production; the steps for preparing the books are enumerated in Annexure DMH4, which is Education circular No. 4 of 2014. The circular has set three steps: At page 2 of the circular:

(A) (1) provides for book writing, which the applicant falls (Also R. 1 of the counter affidavit; at para 4.1).

A. (2) validation of contents; the experts verifies if contents are correct

A. (3) Approval; this is done by commissioner for Education. He verifies the quality and standard of books. If satisfied he forwards them to Minister of Education who would issue an approval for books to be used.

He argued that, it is obvious that, the writer of the book cannot approve mass production if all these steps have to be observed as the approval has to be issued by the education minister.

He submitted further that; the evaluation of the books was done in accordance with the Tanzania Institute of Education Guidelines for Evaluation of Books of 2015. It is necessary to point out the extent of errors. The evaluation by the Ministry of Education, did not abide with the guidelines. The Controller and Auditor General (CAG) in his report of 2018 pointed out that the Books were not evaluated in accordance with the guidelines, therefore their results were not reliable as they could cause loss to the government. The CAG also did specific auditing regarding to writing of books for 2014 – 2017, the CAG reported that the guidelines for evaluating the books were not followed.

He said that, the applicant appealed to the president, one of the grounds in the appeal was challenging the decision of the Public Service Commission for not applying the guidelines for evaluating the books

(Annexure DMH12). However, the decision by president did not consider that argument.

He said that, it is stated in Ground 21 (c) and (d) that, the applicant first appealed to the Public Service Commission (PSC) (annexure DMH II paragraph 17 of the affidavit), and later to the President (Annexure DMH 12; at paragraph 18). In both appeals; none of the two authorities determined all of her grounds. They only confirmed employer's decision. The authorities were supposed to answer all her grounds of appeal so, by not doing that, they denied her a right to a fair trial.

He lastly submitted on ground 21 (e); he said that Annexure BMH4, Education Circular No. 4 of 2014 provides for the Procedure of writing a book at item A (1), A (2) and A (3). Writing involves different panels. The applicant was involved in the first step. Then followed validation of contents and approval. Since the applicant was not involved in the other steps, there ought to be a collective responsibility. However, action was taken against the applicant only, all others who were involved remained with their employment positions.

He said that, immediately after terminating applicant's employment, the President's office vide Ministry of Education ordered the same books

which were subject to applicant's termination to come to use. It is clear that, by this letter, the evaluation that was done at the first time was not reliable and the Ministry failed to trust its report and ordered the same books to be used. He prayed the court to quash the decision of Madam President and reinstate the applicant to employment so that Justice can be done for the procedure to be complied with.

Mr. Boaz Msoffe in his reply submission started by correcting applicant's advocate regarding the submission on DMH 3. That, the advocate said the applicant was 'interdicted', however, DMH3 para three directs that, "umezuiliwa kutekeleza majukumu yako ya mtumishi" that she is 'relieved' from performing the duties, that's not disputable. The law, that's Public Service Regulations of 2003 differentiates the two actions, to be relieved from duty is provided under Regulation 37 and interdiction is stipulated under Regulation 38; so, she was not inter dictated; had she been interdicted she would have been served with charges. Hence, the argument that she stayed for nine months is irrelevant; as she was relieved under Regulation 37 which has no time limit.

He faulted the **Tanzania Institute of Education Staff Regulation, 2011**; he said that, they are non-existence because for Regulations to have

force of the law, according to **The Institute of Education** Act, Cap. 142 R.E. 2002, they have to be published. Section 21 (1) provides that, the Council may make Regulations subject to consent of the Minister for Education, and S. 21 (2) provides that, the Regulations must be published in a gazette. However, applicant's advocate did not cite any Government Notice nor did he say if they have been approved by the Minister. He contended that; a letter cannot give force to the Law.

He prayed the court to disregard the regulations as the court may only take judicial Notice on law not any other document. He pointed out that, the court has already ruled that the Regulations have no legal effect; in **Stomin Hudson Msaka vs. Attorney General,** Miscellaneous Cause No. 32 of 2022, Main Registry, pages 11 – 12. He prayed the court, not to take on board the submissions relating to those Regulations.

Regarding ground 21 (a) that, the president disregarded the fact that the committee and that the council acted beyond their powers. He argued that, first, this ground, did not feature in applicant's appeal to the president (Annexure DMH 12 to the affidavit). So, the applicant can't fault it, it's like condemning the President unheard. He alternatively argued that, the

committee and the council acted within their powers as Section 7 (2) empowers the committee to promulgate decrees regulating the discipline.

He contended that, it is argued that the applicant was punished for an offence that he didn't commit, that is to approve the books. However, at para 10 of the affidavit of the applicant, the applicant admits that she signed a dummy on behalf of the Panel. The act of signing a dummy led to mass production. Even the charge leveled against her (Annexure DMH5 and DMH5) shows that she signed the dummy (sumpuli Kifani) on behalf of the panel. Consequence to that, the PCCB wrote a letter ordering all the books with errors to be destroyed (paragraph 11 of the counter affidavit Annexure R. 3); also, there was disposal and forfeiture order from Tanzania Police Force.

In respect of ground 21(b), he submitted that, the offence was established; and the books were allowed to be used but were taken back due to the errors; the charge showed that the government incurred a loss of T. Sh. 660,910,633. Therefore, a primafacie case was established against her.

As regards ground 21 (e), which relates to the claim that the president's decision did not take into account CAG'S report. He said that, the

CAG's report had never been the basis of disciplinary offence. Even the applicant herself did not use it as a defense.

Mr. Boaz Msoffe submitted further that, the applicant was terminated in 2018. CAG's report is of 2019. Even the commission and the President disregarded it because it was not presented before the inquiry committee, if they did, they would have condemned the committee unheard. Likewise, paragraph 16 of the counter affidavit shows that the CAG report is not conclusive, it is still under review, even the comments of the report is irrelevant (Annexure R. 5 at paragraph 16 of the affidavit, at para 3 of the letter). It was still under review. So, it cannot exonerate the applicant from gross negligence.

He pointed out that, the applicant has used Guidelines for Evaluation of Books of 2015; they have also been referred to by CAG (Annexure DMH4). However, the endorsement of the Minister for Education is lacking; so, they fall within the same fault like the other Regulations. Thus, they have no force of law due to the fact that the guidelines provide that the regulations have to be approved by the Minister.

He replied on ground (c) and (d) of the statement that, the public service commission and the President determined all her grounds and they both

gave reasons for upholding the decision of the committee; this is seen in Annexure DMHC. 12, paragraph 4. He submitted that, all the grounds were determined in their totality

On Ground 21 (f), he said that, there was no collective punishment. She had her own employment. Even the others were punished in accordance to their positions and Law. This claim also does not feature in her initial defense and his affidavit.

He submitted further that, in 2018 the President's office allowed the books to be used; the letter is dated 29/8/2016, in her affidavit she says the permission was given on 26 November, 2018 (DMH 15 which is in Reply to counter affidavit; at para 18, letter written to remove school books with errors; DMH 15. The letter dated 26/11/2018 identified books which had minor errors and major errors; not all books were involved.

He argued that, the applicant has asked the court to quash the decision and reinstate the applicant. However, Judicial review is not an appeal. It looks at lawfulness of the procedure. In this regard, he cited the book of M.P. Jain and S.N. Tain, **Principles of administrative law**, 8th Ed. Vol.2 published by Alexis and Nexis at page 2024 and the case of **Chief**

Constable of North Wells Police vs. Evans, 1982 Vol. 1 weekly Report, WLR at page 1155 and 1160. He also cited the case of **Sanai Mirumbe** (supra); where it was held that, the court is supposed to investigate the lawfulness or unlawfulness of the inferior tribunal.

Lastly, Mr. Boaz Msoffe argued that, there is no law that requires the president to reinstate the applicant. Her prayer fails because the public authorities acted within their powers, there's nothing to fault. They did not violate the applicant's rights and she didn't say which right was violated. He prayed the court to be persuaded by the case of **Stomin Hudson Msaka** (supra) at page 33.

In addition to Mr. Msoffe's submission, Mr. George Magambo, briefly submitted that, looking at the sequence, it seems that the Minister has power to approve everything, however, the commissioner approves the use of books, he doesn't have to know each subject on different expertise, he approved after the experts have done their part; he considers whether the panel was correct, the expertise, and whether it was properly constituted; he then approves the use. Then the book returns to the expert, who has to rectify the dummy and approves for mass production. Once she signs, she approved for mass production. After noting that the book had errors; they

were kept in the storage. Therefore, the offences of causing loss and negligence were proved.

I have considered both sides' submissions, first of all, it is true that the applicant's advocate has cited laws which are non-existent; the Tanzania Institute of Education Staff Regulations, 2011 because the Act puts a mandatory requirement that they should be published, not complying with this legal requirement, they are rendered ineffective, see the case of **Stomin Hudson Msaka vs. Attorney General** (supra). Likewise, **the Guidelines for Evaluation of Books of 2015,** have not been approved by the minister. The guidelines shall become effective upon being approved by the minister. There is no evidence of such approval. So, they meet the same fate as the Regulations.

On ground 21 (a), indeed, as contended by Mr. Msoffe, this is a new ground, it did not feature in applicant's appeal to the president, hence it cannot be brought in at this stage. So, the applicant can't fault it, it's like condemning the President unheard. The fact that the appointments, Disciplinary and Staff Development Committee and the Council of Tanzania Institute of Education acted beyond their powers or authority (ultra vires) was not pleaded as one of the grounds in the appeal before the president.

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Regarding ground 21 (b) that, the inquiry committee failed to establish a premafacie case against the applicant; there is evidence showing that, the applicant admits that she signed a dummy on behalf of the Panel. The act of signing a dummy led to mass production. Even the charge leveled against her (Annexure DMH5) shows that she signed the dummy (sumpuli Kifani) on behalf of the panel. Consequence to that, the PCCB wrote a letter ordering all the books with errors to be destroyed (paragraph 11 of the counter affidavit Annexure R. 3); also, there was a disposal and forfeiture order from Tanzania Police Force, and the evidence shows further that, consequence to her actions the government incurred a loss of T. Sh. 660,910,633. Therefore, it is my view that, a primafacie case was established against her.

Ground 21 (C) and (d), it is my view that, the public service commission and the President determined all her grounds of appeal and they both gave reasons for upholding the decision of the committee; this is illustrated in Annexure DMH-11 and DMH 12.

In DMH-11 a letter titled, **"YAHUSU UAMUZI WA TUME KUHUSU RUFAA YAKO KUPINGA ADHABU YA KUFUKUZWA KAZI"**, the commission informed the applicant the reasons for its decision, and I quote the relevant part of the decision hereunder:

"Tume ilibaini kuwa kwa nafasi yako ya Mratibu wa Mitaala kati ya Mwezi Januari 2015 na April, 2017 uliweka Saini kwenye Sampuli Kifani (Dummy) za Miswada ya Vitabu vya kiada vya "English for Secondary School Form One, English for Secondary School Form "Two na " I Learn English Language Standard Three" na kuthibitisha kwamba miswada hiyo haikuwa na makosa yoyote na ilikuwa na ubora wa kuviwezesha kuchapwa kwa wingi (mass production) wakati ukijua sio kweli. Kutokana na kitendo hicho vilichapwa vitabu kwa wingi na kusambazwa shuleni lakini baadaye vilibainika kuwa na dosari nyingi katika maudhui lugha na michoro/picha na hivyo kusababisha visifae kwa matumizi ya shule. Aidha, uzembe huo ulimsababishia Mwajiri wako hasara ya Shs. 660,901,633/ kutokana na kuzalishwa kwa vitabu vyenye dosari kwa wingi ambavyo havikufaa kwa matumizi ya shule".

Also, in DMH 12, which is a letter titled **"YAH. RUFAA KUPINGA UAMUZI WA TUME YA UTUMISHI WA UMMA",** at paragraph 4 (four) the president confirmed the decision and gave reasons for the decision basing on the evidence on the record.

As regards ground 21 (e), relating to the claim that the president's decision did not take into account CAG'S report. It is obvious that, the Controller and

Auditor General report had never been the basis of disciplinary offence and was not produced at the initial proceeding, therefore it could not be discussed at an appellate stage.

On ground 21 (f); the charges which were led to applicant's punishment were levelled against the applicant individually for the offences which she committed as 'Mratibu wa Mitaala', see DMH-5, therefore there was no any irregularity or procedural error in inducing the sentence.

That said and done, I find that the application lacks merits. Consequently, it is hereby dismissed in its entirety accordingly.

Each party to bear its own costs.

S.C. MOSHI

JUDGE

01/12/2022