IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

REVISION APPLICATION NO. 571 OF 2020

(Originating from Labour Dispute No. CMA/DSM/ILA/349/19/172)

BETWEEN

MBARAKA IDD MCHOPA..... APPLICANT

VERSUS

TANZANIA RAILWAYS CORPORATION..... RESPONDENT

JUDGMENT

Date of Last Order: 14/12/2021

Date of Judgment: 26/01/2022

I. Arufani, J.

The applicant was employed on 19th December, 2009 by the respondent Tanzania Railways Limited (Now known as Tanzania Railway Corporation) as a Principal Accountant. He served the respondent on various capacities until 15th February, 2019 when his employment was terminated while holding the position of Acting Chief Supplies Manager. Aggrieved with termination of his employment, the applicant decided to knock the door of the Commission for Mediation and Arbitration (CMA) where he raised various claims against the respondent basing on unfair termination of his employment.

In response to the applicant's claims the respondent raised a point of preliminary objection that the CMA had no jurisdiction to entertain the matter. The CMA overruled the said point of preliminary objection in the ruling delivered on 27th May, 2020 by Hon. Muhanika, J. Arbitrator and left the matter to proceed on merit. Having heard the parties on merit of the matter, the CMA through the award issued on 10th December, 2020 by Hon. Matalis, R. Arbitrator dismissed the applicant's claims basing on ground that the CMA had no jurisdiction to entertain his claims.

The applicant was dissatisfied by the decision of the CMA and filed the present application in this court beseeching the court to revise the award issued by the CMA. The application is supported by the affidavit affirmed by the applicant and it was opposed by the counter affidavit sworn by Saverina Nyarubamba, the respondent's Principal Officer.

The grounds upon which the applicant is beseeching the court to base to revise the award are five and they are listed at paragraph 14 of his affidavit. Generally, the applicant wants the court to determine whether it was proper for the Arbitrator to determine the

matter basing on point of jurisdiction of the CMA to entertain the matter while that point of law had already been determined by his predecessor in the preliminary objection raised earlier in the matter by the respondent. Another ground is whether it was proper for the Arbitrator to determine the matter basing on his own feelings and assumption instead of basing on evidence adduced before the CMA to determine whether termination of the applicant's employee was unfair or not.

During hearing of the application, the applicant appeared in the court unrepresented and the respondent was represented by Ms. Happiness Nyabunya, Learned Principal State Attorney. Following the prayer made to the court by the applicant and supported by the Principal State Attorney, the application was argued by way of written submission.

The applicant argued in his submission that, Hon. Matalis, Arbitrator erred in finding the applicant was a public servant and the CMA had no jurisdiction to entertain the matter. He argued that, the issue of the status of the applicant and jurisdiction of the CMA to entertain the matter had already been determined by his

predecessor, Hon. Muhanika, Arbitrator in the point of preliminary objection raised by the respondent. He argued that, the said predecessor Arbitrator found that, under section 3 of the Public Service Act the applicant was not a public servant and overruled the preliminary objection raised by the respondent.

He went on arguing that, as the issue of jurisdiction of the CMA to entertain the matter had already been determined by the CMA it was not proper for the successor Arbitrator to rule out the CMA had no jurisdiction to entertain the matter. He referred the court to section 3 of the Public Service Act which define the Public Servant as a person holding or acting in public service office. He submitted that, as the respondent is a corporation formed under the Tanzania Railways Corporation Act, Act No. 10 of 2017 and its section 4 (2) (a) states the respondent is able to sue and be sued, the respondent is excluded from being public service office.

He referred the court to the case of **Deogratius John Lyakwipa & Another V. Tanzania Zambia Railways Authority**, Revision No. 68 of 2019 where the issue of whether the applicants were public servants was determined and stated they were not public

servants. He submitted that the Arbitrator misdirected himself in revising the issue of jurisdiction of the CMA which was determined by his predecessor. He submitted further that, the power to revise decision of the CMA is given to the High Court Labour Division and added that, the Arbitrator acted contrary to the existing labour law perspective.

With regards to the issue of the Arbitrator to base his decision on his personal feelings and assumption instead of the evidence, the applicant argued that, the evidence adduced before the CMA proved the respondent had no valid reason for terminating him from his employment and they didn't follow the required legal procedures. He argued that apart from using irrelevant law (Public Service Act) to conduct disciplinary hearing from the beginning the respondent did not conduct disciplinary hearing and the applicant was not given an opportunity of being heard and to make his defence.

He argued that there is no evidence adduced before the CMA to show that disciplinary hearing was conducted and witnesses were examined to cause him to be convicted on the offence charged, leave alone the fact that he was not called to attend the disciplinary

hearing. He referred the court to section 37 (2) of the Employment and Labour Relations Act (ELRA) which states that, it is a burden of an employer to prove termination of an employee was made on fair reason and the required procedures were followed.

He also referred the court to Rule 13 (5) of the Employment and Labour Relations (Code of Good Practice) Rules, GN. No 42 of 2007 which requires evidence to support the allegations against the employee to be presented at the disciplinary hearing. He argued that, although he submitted his defence two months before the report of the inquiry committee being issued but the respondent's decision to terminate his employment was arrived without considering his written defence.

He referred the court to the case of **Alex Eriyo and 4 Others V. Bank of Africa**, Labour Revision No. 3 of 2020 HC at Mtwara (unreported) where the court discussed two phases of conducting disciplinary hearing before the Disciplinary hearing Committee. It was stated in the cited case that there is a stage of reading charge to the accused employee, calling witnesses and tendering of documentary evidences which is required to be conducted in the presence of the

accused employee. It is stated the second phase is that of hearing the defence of the employer which start with reading the response submitted to the employer by the accused employee.

The applicant submitted that, if the Arbitrator analyzed the evidence adduced before the CMA properly, he would have not arrived to the decision he reached. He argued further that, he was suspended from his employment for a period of more than one year contrary to Rule 27 (4) of the GN. No. 27 of 2007 which requires period of suspension to be reasonable. At the end he prayed the court to revise the award of the CMA and grant him the reliefs sought in the CMA form No. 1.

In response the Principle State Attorney argued in relation to the issue of jurisdiction of the CMA to entertain the matter that, while Hon. Muhanika, Arbitrator was set to decide whether the CMA had jurisdiction to deal with the matter which a party has not exhausted the local remedy available but he misdirected himself in deciding whether the CMA had jurisdiction to entertain the issue of unfair termination arising from the respondent. She argued further that, on the other hand Hon. Matalis, Arbitrator decided the issue about

whether the CMA had jurisdiction to deal with matter which local remedies has not been exhausted and stated the party is required to exhaust local remedy first.

The Principal State Attorney argued that, the issue of jurisdiction of the CMA to entertain the matter was raised for the second time at the trial stage by the applicant in his closing submission. He argued that, as that was a point of objection and was about jurisdiction of the CMA, Hon. Matalis had no other option than to determine that issue which was different from the one determined by Hon. Muhanika, Arbitrator. She argued that, the successor Arbitrator was right in determine the issue of jurisdiction at the trial as by virtue of Section 32A of the Public Service Act it needed some facts to establish whether the applicant exhausted internal remedies provided under the Public Service Act.

She stated that, the impugned award shows clearly that the applicant admitted that he didn't respond to the charge levelled against him and he didn't appear before the Disciplinary hearing Committee. She cited in her submission the case of **Godfrey Ndigabo V. Tanzania Prots Authority**, Revision No. 772 of 2019

where the court insisted that, before a public servant seek for remedies under the labour laws, he must first exhaust all remedies provided under the Public Service Act.

As for the issue of the Arbitrator to use his personal feelings or assumption to issue the award instead of the evidence adduced before the CMA, the Principal State Attorney argued that, the applicant has not established how the Arbitrator used his personal feelings and assumption to issue the award. She argued that, the offences levelled against the applicant and the record of the matter shows it is not only wrong but misleading for the applicant to state he was not charged and his disciplinary matter was not heard and determined. She argued further that, the applicant was served with charges he was facing but he failed to appear and defend his case before the disciplinary hearing committee and caused the matter to proceed ex parte against him.

She referred the court to section 32A of the Public Service Act (Added in the Act by written Laws (Miscellaneous Amendments Act) Act No. 3 of 2016) read together with Regulation 60 (2) of the Public Service Regulations, 2003 which are very clear about the need of an

employee to exhaust available remedies and stated that was well explained at page 8 to 10 of the award. She argued that, at the hearing before the CMA, witnesses and exhibits were produced, including the exhibits to show the applicant was called to attend hearing of his matter before the disciplinary hearing Committee. She argued that, the outcome of the arbitral award is based on facts, issues, evidence and law as analyzed by the Arbitrator.

She went on arguing that, although the Arbitrator went through all those stages but as the crucial issue was exhaustion of the available remedies which had been raised by the parties and after finding there was an alternative remedy which was effective and speedy there was no need of going to other issues which was intended for determination of substantive and procedural matter. She argued that, as the applicant admitted he failed to appear before the disciplinary hearing the Arbitrator was not only right but bound to rely on section 60 of the Evidence Act, Cap 6 R.E 2002 to determine the matter. At the end she prayed the court to dismiss the application in its entirety.

In his rejoinder the applicant reiterated most of what he stated in his submission in chief. He argued further that, there is no evidence to prove he was called before the disciplinary hearing committee to make his defence. He argued that, although he failed to appear before the inquiry committee but that was not enough to deprive him his right of being called before the disciplinary hearing committee. He stated there is no witnesses mentioned in the inquiry committee report was called to appear before the CMA.

As for the issue of being civil servant he stated that, as that issue had already been determined in the point of preliminary objection raised by the respondent it was contrary to the law for Hon. Matalis, Arbitrator to direct himself to the issue of jurisdiction of the CMA to entertain the matter. He argued that, the case of **Godfrey Ndigabo** (supra) cited in the submission of the respondent is distinguishable from the case at hand. He stated in that case the matter had already been referred to the Public Service Commission and other several reasons which distinguishes that case from the present case. He prayed the court to quash the CMA award and ordered for his reinstatement and other reliefs sought in the CMA F1 he filed before the CMA.

The court has carefully considered the rival submissions from both sides and after going through the record of the matter it has found proper to start with the issue of propriety of the successor arbitrator to determine the matter basing on issue of jurisdiction of the CMA to entertain the matter while that issue had already been determined by his predecessor on point of preliminary objection raised by the respondent. The court has found that, as argued by both sides the issue of jurisdiction of the CMA to entertain the matter was first raised as a point of preliminary objection by the respondent. The respondent contended that, the CMA had no jurisdiction to entertain the matter as the applicant had not exhausted all local remedies available under the Public Service Act.

As shown at the outset of this judgment, the said point of preliminary objection was determined by Hon. Muhanika, Arbitrator in the ruling delivered on 27th May, 2020 which overruled the preliminary objection and stated the CMA had jurisdiction to entertain the matter and left the matter to proceed on merit. After the matter being heard on merit by Hon. Matalis, the successor Arbitrator, he dismissed the applicant's claim basing on the ground that the CMA had no jurisdiction to entertain the matter as the applicant was a

Public Servant and he had not exhausted all internal mechanism provided under the Public Service Act and its Regulations.

The court has considered the submission by the Principal State Attorney that, Hon. Muhanika, Arbitrator determined the preliminary objection basing on unfair termination of employment of the applicant and the successor Arbitrator, Hon. Matalis determined the matter basing on ground of the CMA to lack jurisdiction to entertain the matter on the ground that the respondent had not exhausted the available local remedies but find the Principal State Attorney's submission is not supported by the ruling delivered by Hon Muhanika.

The court has come to the above finding after seeing Hon. Muhanika stated at page 3 of his ruling that, the issue before the commission was whether the applicant was a public servant or not. In determine that issue Hon. Muhanika, determined the issue of whether the applicant was an employee bound to follow the procedure of appealing against termination of his employment provided under the Public Service Act and its Regulations or he had an option of going to the CMA and find the applicant was not a public servant. There is nowhere in the ruling delivered by Hon. Muhanika indicated the

preliminary objection raised by the respondent was determined basing on ground of unfair termination of employment of the applicant.

As for the award issued by Hon. Matalis the court has found the successor Arbitrator made his decision basing on ground that, the applicant was a public servant who was bound to follow the procedure of challenging termination of his employment provided under the Public Service Act and its Regulations. That being the position of the matter the court has found the issue determined by the predecessor Arbitrator in the preliminary objection raised by the respondent is the same issue used by the successor Arbitrator to determine the applicant's matter.

To the view of this court and as rightly argued by the applicant that was improper as the successor Arbitrator was functus officio to redetermine the issue which had already been determined by his predecessor. It is the view of this court that, even if the ruling made by his predecessor was to his view not correct but he had no jurisdiction to redetermine the issue which had already been determined by his predecessor. The above view of this court is

getting support from the case of **Emmanuel Ouma V. North Mara Gold Mine Limited**, [2014] LCCD 101 where the court held that:-

> *"... once the CMA has reached a final decision in respect of any matter before it in accordance with its enabling statutes, that decision cannot be revisited because the CMA has changed its mind (for any reason); made an error within jurisdiction, or because there has been a change of circumstances or that the counsel had failed to address an important issue. After reaching its decision, The CMA, like any other judicial or quasi Judicial decision making body, becomes functus officio."*

Basing on the above stated position of the law laid down by this court, the position I fully subscribe, the court has found that, as the issue of the CMA to have jurisdiction of entertaining the applicant's matter had already been determined by Hon. Muhanika who found the CMA had jurisdiction to entertain the matter, the successor Arbitrator, Hon. Matalis was functus officio to revisit the said issue which had already been determined by his predecessor to find the CMA had no jurisdiction to entertain the applicant's matter. In the premises the court is in agreement with the applicant that, it was not proper for the successor Arbitrator to redetermine the issue of jurisdiction of the CMA to entertain the applicant's matter as that

issue had already been determined by his predecessor. To the view of this court that issue would have only been challenged by way of filing revision in the High Court pursuant to section 91 of the ELRA read together with Rule 28 of the Labour Court Rules and not to raise the same issue before the CMA.

Having arrived to the above finding the next question to answer is what should be done in the matter. Under normal circumstances the court was required to quash and set aside the award issued by the successor Arbitrator for being irregular and improper. However, as there are two conflicting decisions which one states the CMA had jurisdiction to entertain the matter and another one states the CMA had no jurisdiction to entertain the matter the court has found it is required to harmonize the said conflicting decisions before deciding which appropriate order should be made in the matter.

The court has found the issue of jurisdiction of any court or quasi-judicial body to entertain a matter is one of the paramount things to be established in any matter before commencement of any trial. The stated position of the law was emphasized in the case of **Fanuel Mantiri Ng'unda V. Herman M. Ng'unda & Two Others**

[1995] TLR 155 where it was stated that, the question of jurisdiction for any court is basic and as a matter of practice the court must be certain and assured of its jurisdictional position at the commencement of the trial.

Although the matter at hand is not a trial but a revision but still the issue as to whether the CMA had jurisdiction to entertain the applicant's dispute can be entertained by the court. The court has come to the above view after seeing the position of the law as stated in number of cases, some of them being the cases of **Issa Omary V. Masood Issa**, Miscellaneous Civil Cause No. 4 of 2001 HC at DSM and **Stanbic Bank (T) Ltd. V. Jayant Patel & Another**, CAT at DSM (both unreported) is that, the issue of jurisdiction of a court or quasi-judicial body to entertain a matter can be raised and determined at any stage of a matter.

To the view of this court, the issue of jurisdiction of the court or quasi-judicial body can be raised by the parties or by the court *suo moto* at any stage of a matter, even at a revisional stage like the one at hand. The court has found the issue of jurisdiction of the CMA to entertain the matter was raised before the CMA and it was used as a

basis for determination of the matter. The court has also found the stated issue has extensively been argued in the submissions filed in this court by both parties. That being the position the court has found it has a duty of determining that issue so as to harmonize the conflicting decisions made by the CMA before landing into final decision to be made in the present revision.

The court has found there is no dispute that, the misconduct caused the applicant to be terminated from his employment as appears in the charge sheet annexed in the list of documents to be relied upon by the applicant were preferred under the Public Service Regulations and his employment was terminated in accordance with the Public Service Act. The issues in dispute which were also considered by both Arbitrators and argued by both sides in the submissions they have filed in this court are whether the applicant was a public servant who was required to pursue his grievances through the Public Service Act and its Regulations or not. If the answer will be in affirmative, the next issue will be whether the CMA had jurisdiction to entertain his dispute.

The court has found the provision of section 3 of the Public Service Act, Cap 298 R.E 2019 defines a public servant to mean a person holding office or acting in a public service office. The question is whether the respondent, Tanzania Railway Corporation is a public service office. Public service office is defined under section 3 of the Public Service Act to include the following offices:-

a) A paid public office in the united Republic charged with the formulation of Government policy and delivery of public services other that:-

(i) A parliament 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 officer;

(v) An office in the police force or prison service;

b) Any office declared by or under any other written law to be a public service office".

From the definition of the term public service office given in the above quoted provision of the law it is crystal clear that, for the respondent to be a public service office it must be established the respondent is charged with a duty of formulating Government Policy

or is delivering public service and is not falling in the offices excluded by the above cited provision of the law. To know the public service office is established for the stated purpose, one has to go through the legislation or instrument establishing the stated institution or office.

The court has found it is undisputed fact that the respondent is a corporate body established by the Railways Act No. 10 of 2017 with the core mandate of providing among other functions an efficient and effective rail transport service in the country. The court has also considered the argument by the applicant that, as section 4 (2) (a) of the Act No. 10 of 2017 states the respondent is a body corporate capable of suing and being sued then is excluded from being public service office which affairs of its employees are governed by the Public Service Act and its Regulations but failed to agree with him.

The court has come to the above view after seeing that, although it is true that the respondent is a corporate body capable of suing and being sued as provided in the cited provision of the law but it is a public corporation which cannot be excluded from the provisions of the Public Service Act. The court has arrived to the

above view after seeing the definition of public corporation provided under section 3 of the Public Corporation Act Cap 257 R.E 2002 is making the respondent to be a government public corporation. That is because the term public corporation is defined under the cited provision of the law as follows:-

> *"Public corporation 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 the sole shareholders."*

If you read the provisions of the Public Corporations Act and specifically sections 6 and 9 you will find the role played by the President and the Minister where the Government is a sole shareholder in a public corporation. The President is the one appoints the Managing Director or Chairman of the Board of Directors and other members of the Board are appointed by the responsible Minister. The responsible minister is charged with a duty of giving Board of Directors of the public corporation directions of general or specific character as to how to perform their functions. The accountability of the public corporation is to the Government and that is provided under part IV of the Public Corporations Act.

That being the characteristics of a public corporation the court has found there is no dispute that the Government is the sole shareholder in the respondent's corporation and the respondent is under the control of the Government. The court has arrived to the above finding after seeing that, as provided under sections 20 (1) and 12 (1) (a) of the Railways Act the Director General and Chairman of the Board of the respondent are appointed by the President. The other members of the Board are appointed by the Minister under section 12 (1) (b) of the Act. As provided under section 14 of the Act the Minister is empowered to give general and specific directions to the Board in relations to its function.

From the above stated characteristics of a public corporation the court has found the respondent is a public service office which is under control of the Government. The court has also been of the view that, although it is stated under section 2 (1) of the ELRA that it applies to all employees including those in the public service of the Government of Tanzania Mainland but to the view of this court that is a general law which is supposed to be resorted when there is no specific law governing the matter.

The court has found that, as it has already been found the respondent is a Government Public service office and as the Government has its own specific law governing affairs of its servants which is a Public Service Act and its Regulations; and as the applicant's employment was terminated basing on the mentioned laws, then the applicant was required to pursue for his rights through the forum provided under the said law and not to go to the CMA which deals with matters not governed by another specific laws.

The court has found the mentioned specific laws provides for how a public servant is supposed to be employed, how his employment is supposed to be terminated and the remedies available for an employee who has been terminated from his employment basing on the mentioned laws. The court has also arrived to the above view after seeing that, the law establishing the respondent (The Railways Act No. 10 of 2017) is not providing for how the affairs of its employees should be governed and there is no any other standing alone law or Regulations governing affairs of the employees of the respondent other than the Public Service Act and its Regulations.

That being the position of the matter the court has found it cannot be said the employees of the respondent are not regulated by the Public Service Act and its Regulations and they are at liberty to go to the general labour law governing employment matters to seek for their remedies. To the view of this court, they are required to exhaust first the remedy available in the specific law governing their employment which is a Public Service Act and its Regulations. The above finding of this court is being fortified by section 32A of the Public Service Act which states as follows:-

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

In the light of the wording of the above quoted provision of the law the court has found that, as the applicant's employment was terminated under the Public Service Act and its Regulations, it was not proper for the applicant to put asunder the law which was governing his employment and used to terminate his employment and go to the remedies provided under the general labour law governing employment matters which is the Employment and Labour Relations Act and its Regulations.

To the view of this court the applicant was required to pursue for his remedies by following the forum provided under section 25 (1) (b) of the Public Service Act and Regulation 60 (2) of the GN. No. 168 of 2013 which requires whoever is terminated from his employment to appeal to the Public Service Commission and not to go to the CMA or anywhere else. The court has considered the position of the law stated in the case of **Deogratius John Lwakwipa** (supra) cited by the applicant to support his submission but find the position stated in the said case is distinguishable from the case at hand.

The court has found the cited case is distinguishable from the case at hand because it was not stated therein that the applicant's employment was terminated under the Public Service Act and its Regulations as it was done to the applicant in the present revision. That makes the court to agreement with the decision made in the case of **Godfrey Ndigabo** (supra) cited in the submission of the respondent where it was stated that, the CMA had no jurisdiction to entertain the applicant's claims because the applicant had not exhausted the remedies provided under the law which was governing affairs of his employment and which was used to terminate his employment.

Having found the CMA had no jurisdiction to entertain the matter the court has found there is no need of belaboring to deal with the second issue relating to the use of personal feeling and assumption to determine the matter instead of the evidence adduced before the CMA as it will not change the finding reached by the court in the first issue. In the premises the court has found that, Hon. Muhanika Arbitrator erred in his ruling dated 27th May, 2020 in finding the CMA had jurisdiction to entertain the applicant's dispute.

The court has also found that, although Hon. Matalis, Arbitrator was right in finding the CMA had no jurisdiction to entertain the matter but as when he made the said decision, he was already functus officio his decision cannot be left to stand. Consequently, the whole proceedings entertained by both Arbitrators and the decisions made by both of them are hereby revised, quashed and set aside for being made by the CMA which had no jurisdiction to entertain the matter. It is so ordered.

Dated at Dar es Salaam this 26th day of January, 2022.

I. Arufani

JUDGE

26/01/2022

Court: Judgment delivered today 26th day of January, 2022 in the presence of the applicant in person and in the presence of Ms. Happiness Nyabunya, Principal State Attorney for the Respondent. Right of appeal to the Court of Appeal is fully explained to the parties.

I. Arufani
JUDGE
26/01/2022