IN THE HIGH COURT OF TANZANIA

LABOUR DIVISION

AT DAR ES SALAAM

CONSOLIDATED REVISION NO. 415 OF 2020

BETWEEN

KAZUMARI AMANI .....1ST APPLICANT
JOHN B. ELISANTE .....2ND APPLICANT
ARON S. LUSINGU .....3RD APPLICANT
RASHID ISSA KILINDI .....4TH APPLICANT
JOHN MUSHI .....5TH APPLICANT
NATHAN EDWARD .....6TH APPLICANT

VERSUS

TANZANIA PORTS AUTHORITY.....RESPONDENT

AND REVISION NO. 435 OF 2020

BETWEEN

TANZANIA PORTS AUTHORITY.....APPLICANT

VERSUS

KAZUMARI AMANI .....1ST RESPONDENT
JOHN B. ELISANTE .....2ND RESPONDENT
ARON S. LUSINGU .....3RD RESPONDENT
RASHID ISSA KILINDI .....4TH RESPONDENT
JOHN MUSHI .....5TH RESPONDENT
NATHAN EDWARD .....6TH RESPONDENT

(Arising from Labour Dispute No. CMA/DSM/TEM/04/2017/305/17 from the Commission for Mediation and Arbitration of Dar es Salaam Zone - Temeke)

JUDGEMENT

K. T. R. MTEULE, J.

12th April 2022 & 22nd April 2022

These consolidated Revision applications arises from the decision of Hon. Kokusima, L., the Arbitrator, which was delivered on 4th Day of September 2020 in Labour Dispute No.

CMA/DSM/TEM/04/2017/305/17 in the Commission for Mediation and Arbitration (CMA) at Dar Es Salaam. The dispute was referred to the Commission by the employees against the employer, Tanzania Ports Authority **(TPA)** following employer's decision to terminate their employment.

A brief historical background of the dispute is extracted from applicants' affidavit and counter affidavit, submissions and the CMA records as follows. The Applicants were employed by the Tanzania Ports Authority as Operational Clerks on different dates and grades (A-C) from 1st April 2011. They were terminated on 05th December 2016 for the reason of misconduct being alleged to have committed negligence which resulted into a loss to their employer to the tune of TZS 1,783,302,525.49/= and TZS 11,149,831,845.05/=. Following the termination, on 3rd January 2017 the employees referred the dispute to the Commission for Mediation and Arbitration which delivered the award in their favor, on the reason that the procedure for termination was not adhered to and termination was not a proper sanction. The commission ordered the employer to pay various amounts covering 24 months compensation to each employee and the amounts payable to each employee depended on amount of

earning for each one. The entire total sum awarded was **TZS 128,766,720.00**. Both parties were not satisfied with the CMA's Award consequently, they filed revision applications in this Court. The employees filed Revision No. 415 of 2020 while the employer, TPA filed Revision No. 435 of 2020. On 26th August 2021 the two Revision Applications were consolidated by this court following parties' prayer for convenience purposes.

The employees (Applicants) had a total of 3 legal issues arising from material facts in Revision No. 415 of 2020. The legal issues are as follows:-

i) Whether the trial Commission directed itself properly to order 24 months remuneration as compensation despite the fact that the applicants sought for reinstatement without loss of remuneration.

ii) Whether it was proper for the trial commission to rule out that the respondent has lost trust while in fact at no point in time the respondent averred that it would not reinstate for the reason of loss of trust on the applicants.

iii) Whether the trial Commission directed itself proper to give an order on the relief which was not sought by the applicants.

On the other hand, Revision No. 435 of 2020 which was filed by the

employer contains four legal issues arising from material facts. The said legal issues are as listed hereunder:-

i) That the Hon. Arbitrator erred in law by entertaining the matter in which it had no jurisdiction and went further to overrule the preliminary objection raised by the applicant on point of jurisdiction.

ii) That the Hon. Arbitrator erred in law and facts by misdirecting herself and failed to understand the differences between the Inquiry Committee (Disciplinary Committee) and the Disciplinary Authority and their duties and as a result, reached to a wrong conclusion blaming the participation of the Chairperson of the Inquiry Committee on notifying respondents on the attendance of proceedings while the chairperson did her work according to the law.

iii) The Hon. Arbitrator erred in law and facts by giving her award in favour of the respondents by stating that the loss alleged was not proved and there was unfair termination to the extent that the applicant (Employer) failed to issue fair sanction proportionate to the gravity of the misconduct while the report adduced proved the loss occurred and procedures and sanction were proper.

iv) That the Hon. Arbitrator erred in law and facts by awarding the respondents the total sum of 128,766,720 as salaries to the respondents while there was no any evidence adduced before the Commission to prove the same and the arbitrator acted ultra vires on giving her award.

Both parties to this application were represented. Mr. Dickson Sanga from A & D Law Attorney, Advocate appeared for the employees, whereas the employer was represented by Mr. Charles Mtae, State Attorney from Solicitor General's Office. The hearing of the application proceeded by a way of written submission. I thank both parties for complying with the Court's schedule. All the submissions are valued, and they will be taken on board in considering the issues of this revision.

In his submissions, Mr. Dickson Sanga, Advocate for the employees Applicants in Revision No. 415 of 2020 decided to consolidate the Applicants legal issues No. 1st and 3rd. These two legal issues centered on propriety in awarding 24 moths salary instead of the pleaded reinstatement without remuneration basing on un-pleaded loss of trust. He submitted that in the eyes of law the trial commission did not act properly by awarding 24 months remuneration as the applicants prayed for reinstatement without loss of remuneration as per CMA Form No.1. He stated that since it is an established principle of law that parties are bound by their own pleadings, then the court could not grant something not prayed by the parties. Supporting his application, he cited the case of **Linus**

Chengula v. Frank Nyika, Civil Appeal No. 131 of 2018, Court of Appeal of Tanzania, at Iringa, (unreported).

Regarding loss of trust Mr. Dickson Sanga submitted that the trial arbitrator erred in law by awarding 24 months compensation instead of reinstatement, in absence of evidence adduced by the respondent so as to prove the allegation of loss of trust contrary to Section 110 of the Evidence Act, Cap 6 R.E 2019. Bolstering his position, he cited the cases of **Fabcast Schools v. Agnes Mathew Hape,** Revision No. 34 of 2019, High Court of Tanzania, at Dar es Salaam, (unreported) and **Abdul Karim Haji v. Raymond Nchimbi Alols and Joseph Sita** (2006) TLR 420. On that basis, he is of the view that the trial Commission was wrong to order 24 months remuneration something which was not pleaded.

Opposing the application as to whether the trial CMA directed itself properly to order 24 months remuneration, Mr. Charles Mtae relied on **section 40 (1) of the Employment and Labour Relations Act, CAP. 366 R.E. 2019** which allows an arbitrator or labour court upon finding unfair termination, to choose one option among the three given in the provision which are re-instatement, or re-engagement or compensation.

He interpreted the meaning of the word "or" in the three options given in subsection 1 of Section 40 to mean that any available option as mentioned above and as stipulated in items (a), (b) and (c) in that subsection may be awarded. He supported this interpretation by Section 13 of the **Interpretation of Laws Act, Cap 1 RE 2019**.

Mr. Mtae did not dispute the principle of law that parties are bound by their own pleading, however he is of the view that in exercising discretionary power provided under Section 40 of Cap 366 R.E 2019 in awarding compensation the Court will be guided by the circumstance of each case. Strengthening his argument, he cited a range of cases including the case of **Qatar Airways v. Elizabeth M Kuzilwa,** Rev. No. 218 of 2013, High Court of Tanzania, at Dar es Salaam, (unreported). In his view, what was awarded was proportionate to the circumstanced of the case.

Concerning loss of trust Mr. Charles Mtae submitted that the applicant has once committed the offence of gross misconduct of which they were acquitted and reinstated, later on the same applicants joined with other applicants and committed the same offence. In such circumstance he is of the opinion that the employer

lost trust on the conduct of the applicants. He further added that since the employees were working under Public Office there is a need of being honest, with integrity and trustful. Cementing his position, he cited different cases including the case of **Bank (NMB) v. David Bernard Haule,** Revision No. 5 of 2013 (LCCS) 2014.

Mr. Charles Mtae, State Attorney, proceeded to submit in support of the grounds of revision found in Revision No. 435 of 2020 starting with the first ground that the Hon. Arbitrator erred in law by entertaining the matter without having jurisdiction over it and went further to overrule the preliminary objection raised by the applicant by holding that the CMA had jurisdiction. He drew the attention of the Court to the Employer's previous unsuccessfully Application for revision to challenge the decision of CMA before this Court on the matter of jurisdiction. He however referred this court to the decision of **Godfrey Ndigabo versus Tanzania port Authority, Revision No. 772 of 2019** in which this court (Hon. Muruke, J.) delivered a judgment with respect to another Applicant's employee and hold that the CMA did not have jurisdiction in a matter similar to the instant one. He prayed for this court to refer the said decision in determining the instant Application.

On the **second** issue Mr. Charles Mtae submitted that there was a misconception on the concept of Inquiry and Inquiry Committee as laid down in **Regulation 45 (1) and (2), Reg. 46 (1) and (6), Regulation 47 (1) and (3) (5) (6) (8) and (11)** of the Public Service Regulation 2003. He stated that from the above regulations, a Disciplinary proceedings in public Service is done through inquiry, and the task of the Disciplinary Authority is to appoint the Inquiry Committee. He further stated that the employees claimed that, they had been fired or terminated by the inquiry Committee (herein referred as **"Kamati ya Uchunguzi wa Shauri la Nidhamu").** In Mr. Mtae's view, this argument is refutable by the records tendered during the hearing of the matter, on the ground that the role played by the Committee was to give the opinion regarding the allegation raised against the accused persons. He submitted that the sanction or decision of the Disciplinary hearing was given under Regulation 48 (8) of the public Service Regulation, 2003. He stated that nowhere these two bodies collided in performing their duties hence the trial arbitrator was not right in faulting the said procedure basing on her interpretation of the law.

According to Mr. Charles Mtae, the procedure for termination should

not be followed in a checklist form or fashion rather each party has to be accorded with a right to be heard and defend his case as was discussed in the case of **Tatu S. Mohamed and Aisha B. Ramadhan v. A 3 Institute of pressingly Studied,** Revision No. 308 of 2019, High Court of Tanzania, Labour Division, at Dar Es Salaam, (unreported) as well as in the case of **Justa Kyaruzi v. NBC Ltd.,** Revision No. 79 of 2009 High Court Labour Division at Mwanza.

On third issue Mr. Charles submitted that, the Hon. Arbitrator erred in law and facts by giving her Award in favor of the employees by stating that the loss alleged was not proved and there was unfair termination to the extent that the employer failed to issue fair sanction proportionate to the gravity of the misconduct, while the report adduced proved the loss which occurred.

It was further submitted by Mtae that the nature, sensitiveness and public interest of employer's activities requires its employees to act at high degree of honesty, integrity and trust. He maintained that the employees' actions resulted a huge amount of loss not only detrimental to the employer, but also to the Government and general public at large. He stated that at the CMA, evidence was tendered to

prove the alleged loss including **Exhibit p. 4 and p. 1** which showed the loss which was occasioned by the employees. According to him, the said evidence was corroborated by the employer's witnesses who testified but yet the trial arbitrator held that the employer failed to issue fair sanction proportionate to the gravity of the misconduct.

Lastly, it was submitted by Mr. Charles that the Hon. Arbitrator erred in law and facts by awarding the employees the total Sum of TZS 128,766,720.00 as salaries to the Respondents while there was no any evidence adduced before the Commission to prove the same. In his view, the arbitrator acted ultra vires in giving her award as no evidence was produced to justify the total sum of TZS 128,766,720.00 as salaries of employees. In Mr. Mtae's view, the absence of such evidence, to award such amount was contrary to law. Mr. Mtae thus prayed for the award to be revised.

Mr. Dickson Sanga, employee's Counsel, replied to the employer's submission regarding Revision No. 435 of 2020. Regarding the first issue, he argued that the CMA is vested with jurisdiction to entertain the matter to all employees including those in public service of the government of Tanzania except those who are working in Tanzania Peoples Defence Forces as per Section 2 (1) of Cap 366 R.E 366. He

argued that they are aware of Section 32A of the Public Service Act which makes it clear and in mandatory terms that public servants shall first, exhaust all remedies under public Service Act before seeking remedies provided in the law. He however submitted on the other hand that there is a number of cases which have interpreted the aforesaid provision that the amendment does not oust jurisdiction of CMA to entertain employment disputes of the public servants.

Supporting the stand, he referred this court to the case of **Patrick Magologozi Mongera v. The Board of Registered Trustees of Public Service Pension Fund,** Revision No. 90/2016, High Court of Tanzania, at Dar es Salaam, (unreported) and the case of **Salehe Komba and Revocutus Rukonge v. Tanzania Posts Corporation,** Revision No. 12 of 2018 at Mwanza (unreported).

Regarding impartiality of the Committee Mr. Dickson Sanga averred that the trial arbitrator directed herself properly as she stated clearly that inquiry Committee and Disciplinary Authority are quite different and the chairperson of the inquiry Committee cannot at the same time hold Disciplinary Authority as that would be contrary to **GN. No. 42 of 2007** which requires that the chairperson of disciplinary hearing should be impartial and he should not be involved in the trial

commission decision. He justified this assertion by referring at pages 14 and 15 of the CMA award.

On third ground in respect of reason for termination Mr. Dickson Sanga argued that the trial arbitrator decided in the favour of employees as the employer failed to prove the case. He states that the trial Commission clearly stated that the loss alleged was not proved at all. He referred to the maxim "he who alleges must prove" as per **Section 110 (1) and (2) of the Evidence Act Cap 6 R.E 2019**. He added that despite this legal duty, the employer did not fulfill their duty and are now before this honourable court trying to fault the clear and non-ambiguous position reached by the trial arbitrator. Mr. Dickson challenged the employer's argument that the trial arbitrator did not look at the gravity of the misconduct, arguing that this point is misconceived, as the trial arbitrator made it clear at page 16 of the award that the employees were not aware of their duties as they were not given job description.

Regarding reliefs, Mr. Dickson Sanga submitted that the law is very clear that the arbitrator may exercise discretion and award any amount depending on the circumstances of each case. It is therefore, the trial arbitrator directed herself properly in awarding the

Respondent with the total Sum of TZS 128,766,720/=. They thus prayed for the Employer's application in Revision No. 435 of 2020 to be dismissed.

From the submissions and the pleadings, this Court is called upon to determine the following issues:-

i) Whether the Commission for Mediation and Arbitration had jurisdiction to entertain the matter?
ii) Whether reason for termination was valid and fair.
iii) Whether the termination was in accordance with a fair procedure.
iv) What remedies are entitled to the parties?

In the determination of the first issue as to whether the CMA has jurisdiction, I have gone through the record and decision of the CMA. It is apparent in the record that the jurisdiction of the Commission was challenged therein by a way of Preliminary Objection but the Arbitrator found that the CMA has jurisdiction and proceeded with the determination of the matter. The CMA decision was challenged in this Court vide Revision No. 601 of 2018 which was struck out for contravening Rule 50 of GN. No. 50 of 106 of 2007. However, in my since that Revision was not heard on merit, the order which struck it out do not bar this court from deciding it on merit although the

Applicant in Revision No. 435 of 2020 indicated doubt on the power of the court on this issue. Since it was not determined at this Court on its merits as to whether CMA has jurisdiction or not, I think it is suitable to be addressed as it has once again surfaced in these consolidated revisions, specifically in Revision No. 435 of 2020.

Battling on whether the CMA had jurisdiction of not, Mr. Charles Mtae contended that the Hon. Arbitrator erred in law by entertaining the matter to which the CMA did not have jurisdiction. In reaction, Mr. Dickson Sanga maintained that the CMA is vested with jurisdiction to entertain the matter to all employees including those of public service of the government of Tanzania except those who are working with Tanzania Peoples Defense Forces as per Section 2 (1) of the Employment and Labour Relation Act. Cap 366 R.E 366.

For the purpose of understanding, this Court finds worth to give the meaning of a Public Servant. Section 3 of the Public Servant Act provides as quoted hereunder:-

> *"Public servant for the purpose of this Act means a person holding or acting in a public service office".*

What is a *public service office* can be construed from the same Section 3 of the Public Service Act, which states:-

"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 service 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;*

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

From the above provisions, what is needs to be addressed is whether Tanzania Ports Authority falls outside the definition of a public service. There is already a jurisprudence which have dealt with a similar corporation. Most recently is the case of **Tanzania Posts Corporation versus Dominic A. Kalangi, Court of Appeal Civil Appeal No. 12 of 2022**. In this case, the public entity which was involved is the Tanzania Posts Corporation which is established and

governed by a specific Law just like the instant corporation which is Tanzania Ports Authority. In this case, the Hon. Justices of Appeal had the following to say:-

> *"In the premises, it can hardly be gainsaid that, having been established by an Act of Parliament and being wholly or substantially owned by the Government, the Tanzania Posts Corporation is a public service institution whose principal duty is among others, to provide the public with a national and international postal and other services. (See section 8 of the said Act). This is in line with section A. 1 (52) of the Standing Orders for the Public Service, 2009 (GN. No. 493 of 2009) made under section 35 (5) of the Public Service Act, which provides in part that:-*
>
> > *"For purposes of the Public Service Act - Public Service means the system or organization entrusted with the responsibility of overseeing the provision or directly providing the general public with what they need from their government or any other institution on behalf of the government as permissible by laws and include the service in the civil service; the health service; the executive agencies, the Public institutions service and the operational service", [emphasis address].*
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> *As we take it, the import of the above-quoted provisions together with a more elaborate exposition attached to it, is that the employees of the Tanzania Posts Corporation are public servants."*

The above provision has clearly indicated that any public institutions services including the operational services falls within the confines of a public Service. Tanzania Ports authority being a public institution service cannot be outside the prescription of a public service.

From the foregoing, I differ with Mr. Dickson Sanga's argument that by having its own law, (Tanzania Revenue Authority Act, CAP 399 R.E 2019) Tanzania Ports Authority cannot be guided under the Public Servant Act. From the guidance given in the above authority on the Tanzania Posts Corporation, I agree with Mr. Mtae that the Employer in the instant Application, Tanzania Ports Authority is a public service office.

Having found that the employer is a public service office, what follows is to find out as to whether the Applicants are public servants. The interpretation given in the case of **Tanzania Posts Corporation** supra, has included operational services in the description of public service office. In that regard, the employees (the Applicants in Revision No. 415 of 2020) are public servants regardless of having worked with the employer who has a specific law to govern its operation. Notwithstanding the existence of that specific law for

the employer, so long as the office provides public service, employment disputes arising therefrom are governed by the Public Service Act.

In **Tanzania Posts Corporation** supra, the Hon. Justices of Appeal explained further thus:-

> *"From the foregoing analysis and conclusions, we entertain no doubt whatsoever that, the respondent in the present case was a public servant and therefore, upon termination of his contract of service and, on being aggrieved by the said termination, the provisions of section 25 (1) (a) and (b) of the Public Service Act would have come into play. In other words, this is an issue which was governed by the above- quoted provisions of the law which states that:-*
>
> > *"Where:-*
> >
> > *(b) a Permanent Secretary, Head of an Independent Department, Regional Administrative Secretary of a local government authority exercises disciplinary authority as stipulated under section 6 by reducing the rank of a public servant who had been promoted or appointed on trial, or reduces the salary or dismisses the public servant, that public servant may appeal to the Commission against the decision of the disciplinary authority and the Commission may confirm, vary or rescind the decision of that disciplinary authority;*
> >
> > *(c) a public servant or the disciplinary authority is*

aggrieved with the decision in (a) and (b), that public servant or disciplinary authority shall appeal to the President, whose decision shall be final". [Emphasis added].

Notably, section 3 of the said Act defines the term "Commission" to mean "a Public Service Commission established by section 9 and includes any department or division of the Commission"

From the above-quoted provision, it is unambiguously clear that all disciplinary matters or disputes involving public servants are exclusively within the domain of the Public Service Commission whose decision is appealable to the President. As correctly submitted by Ms. Kinyasi and as amply demonstrated above, the CMA has no jurisdiction to adjudicate upon such matters.

From the above words, the circumstances of the instance Revision application, squarely fits the description given in the cited case of Posts Corporation. Consequently, I am bound to follow the wisdom of the Justices of Appeal by holding that the Commission for Mediation and Arbitration did not have jurisdiction to entertain the Labour Dispute No. CMA/DSM/TEM/04/2017/305/17 at Temeke.

Having found that the CMA did not have jurisdiction to entertain the matter, I see no reason to proceed with determination of the other

legal issues raised in both applications that is Revision No. 415 of 2020 and Revision No. 435 of 2020. Since the CMA lacked jurisdiction to entertain the dispute, I conclude this matter by allowing Revision No. 435 of 2020 basing on this sole ground of application which is sufficient to put both applications into finality.

Therefore, Revision Application No. 435 of 2020 is granted. I hereby quash the CMA judgment and the proceedings in CMA/DSM/TEM/04/2017/305/17 for want of jurisdiction. Revision application No. 415 of 2020 is hereby dismissed. Each party in both Revision Applications to take care of its own cost.

It is so ordered.

Dated at Dar es Salaam this 22nd day of April, 2022.

KATARINA T. REVOCATI MTEULE

JUDGE

22/04/2022