

**THE HIGH COURT OF TANZANIA**

**LABOUR DIVISION**

**AT DAR ES SALAAM**

**REVISION APPLICATION NO. 481 OF 2021**

**BETWEEN**

**TANZANIA ZAMBIA RAILWAY AUTHORITY .... APPLICANT**

**AND**

**WILLIAM MHAME & 36 OTHERS ..... RESPONDENTS**

**RULING**

Date of last order: 22/04/2022

Date of Ruling: 28/04/2022

**B. E. K. Mganga, J.**

Respondents were employed by the applicants at different positions and their employment commenced on different dates. On 31<sup>st</sup> December 2019 applicant terminated employment of the respondents. Being aggrieved with termination, respondents filed Labour dispute No. CMA/DSM/ILA/213/20/186 before the Commission for Mediation and Arbitration henceforth CMA claiming to be reinstated without loss of remuneration.

On 29<sup>th</sup> October 2021, Hon. Mbena, M.S, arbitrator, having heard evidence and submissions of both sides delivered an award that termination was unfair both substantively and procedurally and awarded respondents to be paid TZS 737,654,774/=.

Aggrieved by the said award, applicant filed this application for revision. In the affidavit sworn by Jumanne Mwakyembe in support of the notice of application, advanced seven grounds.

When the application was called for hearing, before counsels have submitted on the grounds raised by the applicant, I asked them to address whether CMA had jurisdiction to determine the dispute.

Submitting on the issue raised by the court, Narindwa Sekimanga, State Attorney, submitted that CMA had no jurisdiction because respondents were Public Servants employed by the applicant who is the Public Corporation. She submitted that applicant was established under Section 4 of the Tanzania Zambia Railway Act [Cap. 143 RE. 2019]. She went on that, section 9 of the said Act provides composition of council for Ministers from both sides and section 11 establishes the Board of Directors of six persons, two of them being Permanent Secretaries responsible for transportation from respective countries. State Attorney submitted further that, in terms of section 19 of the Act, the budget funds of the applicant

are allocated by the Parliaments of the two partner States. Ms. Sekimanga cited the decision of the Court of Appeal in the case of ***Tanzania Posts Corporation V. Dominic Kalangi, Civil Appeal No. 12 of 2022*** (unreported) to support her argument that CMA had no jurisdiction over disputes involving Public Servants. She further cited the case of ***Attorney General V. Tanzania Ports Authority & Another, Civil Application No. 87 of 2016*** CAT (unreported) to cement on her arguments.

On the other hand, Noel Nchimbi, Advocate for the Respondents, submitted that CMA had jurisdiction. He submitted that respondents were employees of the applicant (TAZARA) and were governed by the Tanzania Zambia Railways Act [Cap. 143 RE. 2019] and not Public Service Act [Cap. 298 RE. 2019]. He went on that, section 14(1)(a) and (b) of the Labour Institution Act [Cap. 300 RE. 2019] provides that the function of CMA is to mediate any dispute referred to it on labour law. Counsel for the respondents went on that, CMA had jurisdiction because Cap. 143 RE. 2019 (supra) govern two countries i.e., Tanzania and Zambia due to the agreement entered by the two countries to facilitate transportation by railway. Counsel for the respondents went on that ownership of the railway is provided for under Section 2 of Cap. 143 RE. 2019 and that applicant is not a Public Corporate. Under Section 3 of the Public Corporation Act No. 2

of 1992 requires 51% ownership while in TAZARA, the United Republic of Tanzania owns 50% while the Republic Government of Zambia owns 50%. He went on that section 9 of Cap. 143 R. E. 2019 (supra) provides the composition of Council of Ministers i.e., three Ministers from each country and in terms of section 10 their duty is to consider long term plan and authorize the raising share capital, give directions to the Board.

Mr. Nchimbi submitted further that; respondents were terminated on 31<sup>st</sup> December 2019 due to invalidity of Form Four Certificates. Counsel for the respondents cited the case of ***Deogratius John Lyakwipa & Another V. Tanzania Zambia Railway Authority, Revision No. 68 of 2019***, HC (unreported) wherein this Court held that TAZARA is not a Public Corporation, and its employees are not Public Servants. He submitted further that section 26 of Miscellaneous Amendments No. 1 of 2020 amended the Public Corporation Act by defining Government to including Public Corporation where the government is a share majority. Counsel insisted that in TAZARA, the government is not a share majority hence not a public institution and that CMA had jurisdiction.

Counsel for the respondent submitted further that paragraph 16 of the First schedule to Cap. 143 RE. 2019 (supra) gives powers of collective bargain agreement to be entered by two countries and that employees can

sign the collective bargain agreement without involving the Permanent Secretaries of the respective countries. Counsel went on that; this gives employees of TAZARA autonomous hence cannot be subjected to Public Service Act. To him, the amendments that was made in the Public Service Act conflicts with the TAZARA Act. Counsel argued that there is conflict of three laws namely the TAZARA Act, Cap. 143 of RE. 2019 (supra), Public Service Act Cap. 298 RE. 2019 (supra) and the Employment and Labour Relations Act [Cap. 366 RE. 2019]. Counsel submitted further that the conflict should be resolved in favour of Cap. 366 (supra) so that powers of CMA can be retained. Mr. Nchimbi went on that **Kalangi's case**(supra) is distinguishable in the circumstances of this application.

In rejoinder, Sekimanga, State Attorney for the Applicant, submitted that in terms of section 10(d) of Cap. 143 R. E. 2009 (supra), the council for Ministers approve and submit TAZARA's budget and annual report to the parliaments. She concluded that applicant is governed by the Government hence CMA had no jurisdiction.

I have considered submissions of both counsel in this application and find that it is undisputed that applicant is owned by the government of the United Republic of Tanzania by 50 % and the Government of the Republic of Zambia by 50 %. It is further undisputed that TAZARA was



established after the two countries had entered into agreement to facilitate transportation by Railways. It is also undisputed that there is established council for Ministers to regulate the affairs of the applicant and further that approval of the applicant's budget is subject to approval by the parliaments of the two countries. In other words, applicant is not wholly owned by the government of the United Republic of Tanzania, but she is substantially owned by the government of the United Republic of Tanzania. Counsel for the respondent submitted that since the Government of the United Republic of Tanzania is not owning more than 50%, then the Government of the United Republic of Tanzania is not a majority shareholder hence applicant is not a public corporation. With due respect to counsel for the respondent, that interpretation is not correct. Because Public Corporation is defined under section 3 of the Public Corporation Act, cap. 257 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 shareholder."*

Counsel for the respondent cited section 26 of the Written Laws (Miscellaneous Amendments) act No. 1 of 2020 and submitted that it amended Public Corporation Act by defining Government where the Government is a majority shareholder. With due respect to counsel for the respondent, the said section amended section 16 of the Government

Proceedings Act [Cap. 5] by adding subsection (4) of section 16 which defines the word "Government" to include a Government ministry, local government authority, independent department, executive agency, public corporation, parastatal organization or a public company established under any written law to which the Government is a majority shareholder. That in my view, did not alter the status of the applicant from not being a public corporation.

It is my view that Counsel for the respondents has restricted the interpretation to share ownership alone leaving the other criteria namely establishment by the Act of the parliament. In my view, the mere fact that applicant is owned in equal shares, does not make applicant not to be a public corporation. The Court of Appeal has put clear this issue in the case of ***Tanzania Posts Corporation v. Dominic A. Kalangi, Civil Appeal No. 12 of 2022*** (unreported) wherein it discussed the provision of section 3 of the Public Service Act, and what should be looked at to conclude that an employee is a public servant or not. In ***Kalangi's case*** (supra), the Court of Appeal held that (i) establishment by an Act of parliament, (ii) ownership namely wholly or substantially by the government and (iii) duty or services rendered by the institutions are some of the criteria to be considered. In the application at hand, the functions, and duties of the

applicant, in no doubt, is to facilitate railway transportation between Tanzania and Zambia, stimulate growth of international trade, economic growth and friendship between the two countries. The long title of the Act clearly shows this intention. It reads: -

*"An Act to give effect to the Agreement relating to the Tanzania Zambia Railway made between the Government of the United Republic of Tanzania and the Government of the Republic of Zambia dated 29th September, 1993; to provide for the continued existence of the Tanzania-Zambia Railway Authority; to provide for a Council of Ministers and a Board of Directors; to define the functions and powers of the Authority, the Council and the Board; to provide for and regulate the manner in which the Tanzania Zambia Railway Authority shall be operated; to repeal and replace the Tanzania-Zambia Railway Act, 1975; and to provide for matters connected with or incidental to the foregoing".*

This explains why councils for the ministers was established to ensure that interests of each country are protected by *inter-alia* by approving and submitting to the National Assembly the Authority's annual report in terms of section 10(d) of the Act as correctly submitted by Sekimanga Sate Attorney. In fact, section 5(1) of the Act, provides that it shall be the duty of the Authority to provide, on sound commercial principles of operation a secure, **efficient, and safe system of public transport of passengers** and goods by rail between and within Tanzania and Zambia. I have no doubt in my mind that, applicant is delivering public



service hence her employees are public servants in terms of section 3 of the Public Service Act. As held herein above, applicant is a public institution and in terms of section 31(1) and (2) of the Public Service Act (supra) her employees are governed by the provisions of the Public Service Act, which is why, respondent was affected by the government's policy on verification of academic certificates and qualifications.

Counsel for the respondent submitted that paragraph 16 of the First schedule gives power to the applicant to enter collective bargain without involvement of the respective governments as a justification that her employees are not public servants. With due respect to counsel for the respondent, that contention is erroneous. I have read the said paragraph 16 and find that it has nothing to do with collective bargain in exclusion of the two governments. The said paragraph reads: -

*"16. The Authority may, for the purposes of this Part, give consideration to any representations made by any person or organisation and in particular, but without prejudice to the generality of this paragraph, the Authority may give consideration to proposals made by organisations and associations of, or representing, employees relating to salaries, salary scales, wages, allowances or other conditions of service".*

That paragraph as held hereinabove, does not autonomous to the employees of the applicant in matters of salary etc. and does not exclude employees from being public servants.

Guided by the above Court of Appeal decision in Kalangi's case and for the foregoing, I hereby nullify CMA proceedings, quash, and set aside the award arising therefrom because CMA had no jurisdiction.

Dated at Dar es Salaam this 28<sup>th</sup> April 2022.



B.E.K. Mganga  
**JUDGE**

Ruling delivered today 28<sup>th</sup> April 2022 in the presence of Ms. Narindwa Sekimanga, State Attorney, for the applicant and Denis Lusato Mususa, one of the respondents.



B.E.K. Mganga  
**JUDGE**