

**IN THE HIGH COURT OF TANZANIA  
LABOUR DIVISION  
AT DAR ES SALAAM**

**REVISION NO. 383 OF 2020**

**TANZANIA POSTS CORPORATION ..... APPLICANT**  
**VERSUS**  
**FLUGENCE KIKULA ..... 1<sup>st</sup> RESPONDENT**  
**FRANK CHAMBUA..... 2<sup>nd</sup> RESPONDENT**

(From the decision Commission for Mediation & Arbitration of DSM at Kinondoni)

(Belinda: Arbitrator)

dated 14<sup>th</sup> March 2019

in

CMA/DSM/KIN/R.915/17/12

**JUDGEMENT**

14<sup>th</sup> February & 04<sup>th</sup> March 2022

**Rwizile, J**

The applicant being aggrieved by the decision of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/DSM/KIN/R.915/17/12 filed the present application.

The dispute arose from the facts that; the respondents were employed by the applicant on 19<sup>th</sup> May, 2019 and on 20<sup>th</sup> October, 2019. In 2016 the Government commissioned the applicant to verify if all of her employees had valid academic and professional certificates. After

verification, it was discovered that the respondents had no form four certificates contrary to the Government Circular No. AC/45/260/01/5 dated 19<sup>th</sup> May, 2004 titled "*Utekelezaji wa Miundo ya Utumishi*" *Sera ya Menejiment na Ajira katika Utumishi wa Umma Toleo la Mwaka 1998* and Public Service Act 2004.

Following the verification process, the Government directed all public servants whose employment started after 20<sup>th</sup> May, 2004 and without having form four and form six certificates be removed from the pay roll. The respondents were issued with the termination letters. Dissatisfied by the decision, they filed a dispute with the CMA. They were all to be paid TZS. 4,430,128.8 for being unfairly terminated. Aggrieved by the CMA award, they filed this application. The application is therefore supported by the affidavit of Erick Maximillian, a principal legal officer of the applicant. The respondents opposed by filing a joint counter affidavit. The applicant whose representation was by the Jacqueline Kinyasi learned Stated Attorney argued by written submissions only three issues namely

- i. Whether the Hon. Arbitrator had original jurisdiction to entertain the dispute before the respondents' exhausting remedies provided for under the Public Service Act.*

- ii. Whether the Hon. Arbitrator was right to determine the dispute against the Specified Public Corporation (Applicant) without joining the Official Receiver and without leave of this court.*
- iii. Whether the Hon. Arbitrator failed to analyse, evaluate, appreciate and consider the evidence of both parties to the case as validated the void ab initio employment contracts.*

The respondents who were represented by Kheri Kusemwa, learned Advocate also replied. Arguing in support of the application, Ms. Jacqueline submitted that the applicant is the Public Corporation established under section 3 of the Tanzania Postal Corporation Act, 1993. It is controlled by the Government. She Based her arguments in the case of **Attorney General v Tanzania Ports Authority and Alex Msama Mwita**, Civil Application No. 87 of 2016 (Unreported) at page 9 where it was held that Tanzania Ports Authority was the Public Corporation under the control of the Government notwithstanding its corporate status. The learned Attorney submitted that the respondents, who worked with the applicant were employed in a public institution, they were therefore public servants.

She strongly submitted that section 32(a) of the Public Service Act [CAP 298 R.E. 2019] requires a public servant prior to seeking remedies under labour Laws to exhaust all remedies provided for under the Act. She went far as to cite section 25 of the Act read together with Regulation 60(5) of G.N. No. 168/2003 providing for remedies available. Ms. Jacqueline went on to submit that in principle, specific law overrides the general law. For that matter, she added, specific law here is the Public Service Act and not Employment and Labour Relation Act. It was her view, that the respondents were Public Servants terminated for lack of qualification as per *Sera ya Menejimenti na Ajira katika Utumishi wa Umma, 1999*.

Dealing with the second issue, Ms. Jacqueline submitted that, the applicant as a Public Corporation under the G.N. No. 543 was placed under the Bankruptcy Act, [Cap. 25 R. E 2019]. She referred to section 9 which requires leave of the court, before instituting claims, which was not done. In her view the applicant was a debtor and respondents were creditors. So, the respondents were required to seek leave before instituting any matter in court, as held in the case of **Abubakari S. Marwilo and 172 others v National Insurance Corporation and 2 others**, Civil Appeal No. 13 of 2019, Court of Appeal of Tanzania, (unreported). She continued to submit that as provided under section

43(1) of the Public Corporations Act, 1993, the applicant by being declared a specified corporation, the Parastatal Sector Reform Commission (PSRC) become an Official Receiver.

The State Attorney elaborated that, later on PSRC role was taken over by Consolidated Holding Corporation (CHC). Thereafter, she argued G.N. No. 203 came into force, along with the National Bank of Commerce (Reorganization and Vesting of Assets and Liabilities) (Consolidated Holding Corporation) (Dissolution) Order, 2014. The CHC residual functions, assets and liabilities were taken by and/or transferred to the Treasury Registrar (TR).

She was of the view that, TR was the official receiver of the applicant when the respondent instituted their claims at CMA. She then cited the case of **Hamza F. Kimbengele v Tanzania Posts Corporation**, (Dc) Civil Appeal No.10 of 2011 (unreported). The respondents, she went on were supposed to join Treasury Registrar as a party to the case as the official receiver. That being the case, she said, the arbitrator had no jurisdiction to entertain the matter at hand.

Ms. Jacqueline, submitted on the third issue that the respondent at CMA did not submit form four certificates to prove they were qualified to be employed as public servants. Their contracts, she went on submitting, were entered contrary to public policy and contrary to section 23(1)(e)

of the Law of Contract Act [Cap 345 R.E. 2002]. To support her position, she referred to the cases of **Rock City Tour Ltd v Andy Murray** [2014] LCCD 76 and **Nditeze Wilson and Another v Tanzania Electric Supply Company Limited**, Labour Revision No. 3 of 2021, High Court of Tanzania (Unreported), where it was held that the contracts of employment were void ab initio for having contravened public policy. She prayed, the award be quashed and set aside.

Opposing the application, Mr. Kheri Kusekwa, learned advocate submitted that, in material terms, Tanzania Posts staff are public servants under the Tanzania Posts Corporation Act [ Cap 303 R.E. 2019] in terms of the case of **Attorney General v Tanzania Posts Authority and Another**, Civil Application No. 78/2016. He argued that the Court of Appeal held, the same was under the control of the Government hence the government has interest in it. The learned Advocate continued to cite section 3 of the Public Service Act which excludes certain public offices from its operations and subject them to the relevant laws which established them, as follows: -

- 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 services

He argued that, the above despite being public servants are not subject to the Public Service Act in terms of section 30 of the Act. Therefore, he added, Tanzania Posts Corporation is capable of suing or be sued. Reference was made in the case of **Salehe Komba and Another vs Tanzania Posts Corporation**, Revision No. 12 of 2018.

He submitted that, the purpose for the Public Service Act is to deal with the Public Servants pursuant to section 3(a) and (b). Their disciplinary authority, he added, are under section 25 of the Act and Regulation 60 of the Public Service Regulations 2003 and are subjected to internal remedies provided under section 32A of [CAP 298 R.E. 2019] as amended by Section 26 of Miscellaneous Amendment Act, No. 3 of 2016. The category stated, he added their disciplinary measures are through the Minister for local Government, permanent Secretaries, heads of department etc. The respondents, he commented are not subject of the same process.

The advocate stated that, bankruptcy as submitted by the applicant, are the debts provable. That, respondent's award is not a demand but an

order. He said, the claims are not a debt, rather an entitlement given for a breach of employment contract that resulted from unfair termination.

The advocate finalized by saying that the circular was not meant to regulate the Tanzania Posts Corporation staff. It was his view that the Act was meant for the employees under the Public Service Act.

That is why the applicant employed them even after the issuance of the alleged policy (were employed in 19<sup>th</sup> May 2009 and 23<sup>rd</sup> October 2004 while the circular was issue on 19<sup>th</sup> May 2004). The learned advocate prayed; the application be dismissed.

In re-joining, Ms. Jacqueline stated that the respondents do not dispute that at the time filling a dispute at CMA were under specified law. She said, the requirement of leave before filling the dispute and instituting of the suit against official receiver was not obtained.

She added, what is in dispute, is that their claim was not a debt provable in bankruptcy as held in the case of **Abubakari S. Marwilo and 172** others (supra). In this case, it was held that the outstanding salaries and unpaid benefits claimed constituted the unsecured debt. Ms. Jacqueline continued to argue that the respondents at CMA claimed were entitled to be paid three months salaries and hence their claims were debt provable under bankruptcy.



In conclusion, Ms. Jacqueline stated that the respondents were public servant who were bound to Circular Na. 1 of 2004. By not having form four or form six certificates their contracts were void.

After considering the submissions, I think, this court is called upon to determine the following issues; *whether the commission had jurisdiction to entertain the dispute and what reliefs are the parties entitled.*

To begin with, under section 3 of the Public Servant Act, a public servant is defined as: -

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

The public service office is also defined under the same section as hereunder:

*"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” (emphasis added)*

By this provision of the law, I am of the view that Tanzania Posts Corporation, is governed by a different law. That is, as submitted by the respondent, Tanzania Posts Corporation Act [ CAP 303 R.E 2019]. It is therefore not subject of the Public Service Act.

As in the case of **Salehe Komba and Revocatus Rukonge v Tanzania Posts Corporation** (supra), it was stated that: -

*“To qualify as a public servant, one must be either charged with formulation of Government Policy or delivery of public services. Clearly, the public servants envisaged under the Act*

*are those whose function are directly under Government...The Commission was therefore correct to assume that the officers are regulated by the Act (Act establishing Posts Corporation) or the procedure under the Act..."*

I am of the view that the Commission was right to determine the matter as it had requisite jurisdiction. In my observation, there are two categories of public servants. Those directly falling under the Public Service Act and those who do not fall under the Act by having their own governing law. I think, employees of Tanzania Posts Corporation are in such a category. The employees, though in public service are not governed by the public service Act, even though the applicant is whole owned by the government.

So, the employees who are working under the public organisations fall under the category of public servant. They are only exempted from the terms of the Public Service Act on issues of disciplinary procedure. This is because they are governed by their own regulations. They are therefore not exempted from following Government circulars for public servants, unless the same are expressly providing so. For that matter,

the respondents being the employees of the applicant were bound by stated Government circular.

From the submissions, the proceedings CMA and exhibits, it is not disputed that the respondents were employees of the applicant. They were terminated from employment in 2017 for not having form four certificates. This was because of the *Sera ya Menejiment na Ajira Katika Utumishi wa Umma ya mwaka 1999* (exhibits D4) as the base of employment in public service, which states: -

*"...kiwango cha chini cha elimu chakumwezesha mtumishi kuajiriwa kwa masharti ya kudumu katika utumishi wa umma kutakuwa kidato cha nne..."*

The latter exhibit D5 of 2017 was clear on that, it is entitled *Ufafanuzi Kuhusu Sharti/Sifa ya Kuwa na Cheti cha Kufaulu Mtihani wa Kidato cha Nne na cha Sita katika Ajira kwenye Utjumishi wa Umma* dated 10<sup>th</sup> July, 2017, stated that: -

*"...kama mnavyokumbuka, kifungu Na. 5.11 cha sheria ya menejiment na ajira katika utumishi wa Umma Toleo la mwaka 1998 iliweka sharti kwamba kiwango cha chini cha kuwezesha mtumishi kuajiriwa katika utumishi wa Umma kitakuwa kidato cha nne..."*

*3.0 kufuatia kuwepo kwa changamoto hizi, waajiri wanaelekezwa kutekelezwa kutekeleza mambo yafuatayo: -*

- i. watumishi wote wa Umma ambao masharti yao ya kazi sio ya kisiasa walioajiriwa baada ya tarehe 20 Mei, 2004 na wale ambao wakati wanaajiriwa miundo yao ya utumishi iliwataka kuwa na cheti cha kuhitimu kidato cha nne na cha sita ambao hawajawasilisha vyeti vyao kwa ajili ya uhakiki mishahara yao isimamishwe kuanzia mwezi Julai, 2017. Aidha watumishi hao wachukuliwe hatua kwa mujibu wa Kanuni 42 ya Kanuni za Utumishi wa Umma (Public Service Regulations) za mwaka 2003 pamoja na Kanuni D:12 ya Kanuni za kudumu za Utumishi wa Umma (Standing Orders for the Public Servant) Toleo la mwaka 2009 au hatua nyingine kwa mujibu wa sheria za nchi..."*

There is evidence that the respondents had only attained form two. One was employed in May 2009 and the other on 20<sup>th</sup> October 2004. Both were employed after the circular after the circular came into force. Based on that fact, the court is of the view that, the respondents were

validly terminated. Their employment did not comply with the Government circular.

On dealing with the second issue, it was found that upon termination, they were paid terminal dues. I think, it all met what the law required for them to be paid. The application is therefore allowed. The award is quashed and set aside. Each part to take care of its own costs.



  
A. K. Rwizile

**JUDGE**

04.03.2022

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