

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
IN THE DISTRICT REGISTRY OF SHINYANGA
(LABOUR DIVISION)**

AT SHINYANGA

APPLICATION FO REVISION NO 3 OF 2020

*(Arising from the decision of the Commission for Mediation & Arbitration
of Shinyanga by Doris A. Wandiba. (Arbitrator) dated on 12th
December,2019 in Labour Dispute No. CMA/SHY/223/2018.)*

BARIADI TOWN COUNCIL.....APPLICANT

VERSUS

DONALD NDAKI.....RESPONDENT

JUDGMENT

Date of Last Order: 3^d March, 2020

Date of Judgment: 29th May, 2020

MKWIZU, J:

Respondent was a civil servant. He was employed as a teacher from 1st July, 2018 to 30th July, 2017 when his employment came to an end by the operation of the law. His employer delayed in effecting transport payment on retirement. Respondent successfully registered his complaint with the Commission for Mediation and Arbitration via Labour dispute No CMA/SHY/223/2018. In its decision dated 25th December,2019, the CMA was first satisfied that the respondent was entitled to subsistence and transportation costs to Nyakato (Chato), his area of domicile immediately after his retirement. It thereafter

concluded that, because the payment was not effected since 30th July,2017 thus, entitled to 29 months subsistence allowance at the rate of 1,235,000/= per months which is equal to 35,815,000/= and allowance to the tune of 47,500 from the date of the award to the time of full payment of the transport allowance.

Aggrieved by the above award, applicant, BARIADI **TOWN COUNCIL** filed a revision application in this Court challenging the award by the Commission for Mediation and Arbitration. The application is by Notice of Application, Chamber Summons and supported by an affidavit deposed by the one, Kheri Shabani Mbegu under Section 91(1) (a),91 (2) (b) and (c), 94 (1) (b) (i) of the Employment and Labour Relations Act, No.6 of ,2004 ,Rules 24 (1), 24 (2) (a), (b), (c), (d). (e), (f) , 24(3) (a), (b), (c), (d) and 28 (1) (c), (d) (e) of the Labour Court Rules,2007.

Paragraph 17 of the affidavit in support of the application laid down five grounds of revision to wit: -

- a) That, whether the commission for Mediation and Arbitration has mandate/power to hear and determine labour disputes that involves Public Servants.
- b) That, whether the commission for Mediation and Arbitration may commence hearing of the labour disputes without parties filing opening statements.
- c) That, whether the decision made by the commission for Mediation was following the procedure.
- d) That, whether the commission for Mediation and Arbitration has defect material to merits of the case for holding that the respondent was not being paid transportation on retirement instead applying (sic)the applicant has been paid the whole transportation on retirement.
- e) That, the Applicant has good chance of success in this application if the said award will be set aside.

At the hearing, applicant had the services of Ms. Magdalena Mbuga, her solicitor, while the respondent fended for himself.

Submitting in support of the revision, Ms. Magdalena directed her complaints on four major points that, *one*, the CMA decision is wrong in ordering the applicant to pay the respondent transport allowance which was already paid. *Two*, that it was wrong for the CMA to order the respondent to be paid half per diem instead of transport allowance to Nyakato. *Three*, that, the respondent was a civil servant whose claim ought to be referred to Public Service Commission under **section 32A of the Public Service Act No 8 of 2002 as amended by Act No 3 of 2016** and *four*, that the respondent's place of domicile is Mwanza and not Chato where he is now want to be returned back to.

She at the end, requested the court to allow the revision, revise the CMA's award and the respondent be ordered to refer his dispute to the Public Service Commission.

In response to the revision, Respondent submitted that he retired from public service on 30th July, 2017, he was not paid his transport allowance until 29th, November, 2017. He elaborated that, instead of being transported back to the area of his domicile Chato, he was paid transport allowance to Mwanza. Although he agree to have initially designated

Mwanza to be his domicile, he said, he had changed and the records confirms that position.

On whether the CMA was wrong to entertain the matter as he is a Public servant, he stated that, his public service ended with his retirement and therefore at the time of lodging this claim, he was no longer a public servant and therefore the CMA was justified in entertaining the matter.

He urged the court to dismiss the revision.

In her short rejoinder, Ms. Magdalena, registered her concession to the fact that at the time of filing his complaint at the CMA, respondent was no longer a Public servant. She added that, because respondent was paid his transport allowance in November,2017,it was not fair for the CMA to order payment of the subsistence allowance from July 2017 to 2019. She in addition reiterated her earlier prayers.

I have given the records and parties submission a careful scrutiny, I think this court is enjoined to determine first whether the respondent was a public servant at the time he filed a complaint with the CMA and whether

the CMA had jurisdiction to hear and determine the dispute, then, the issue as to what reliefs parties are entitled to will follow.

Section 3 of the Public Service Act No. 8 of 2002 read together with **section 3 of the Teachers Service Commission Act No. 25 of 2015** defined a Public Servant as "*a person holding or acting in a public service office*". By this definition, a public servant is a person working or employed in a public service office.

The question that follows is whether the CMA had jurisdiction to entertain a labour disputes involving Public Servant. This takes me to the **Public Service Act, Cap 298 R.E 2002 as amended by section 32A of the Written laws (Miscellaneous Amendment) Act No. 3 of 2016.**

"32A. A Public servant shall, prior to seeking remedies provided for in labour laws, exhaust all remedies as provided for under this Act."

This is the law. A public servant has no other option than to fully utilize all the remedies available under the Public Service Act before exploring other avenues for dispute settlement. See the case of **Faima Siraji V. Mbeya**

Urban Water and Sewerage Authority, Labour revision No. 47 of 2017

(Unreported).

As the record would reveal, and as averred to by the applicant's solicitor in her affidavit in support of this revision, respondent retired from public service on 30th June, 2017. He was not, on retirement, transported back to his place of domicile and that his claim was not heeded to by the applicant, regardless of several follow ups hence this matter.

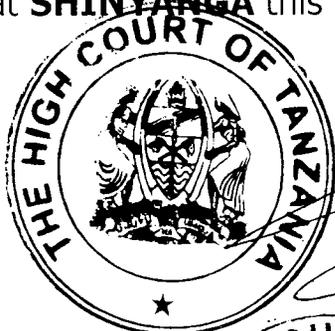
Respondent, Mr. Donald Ndaki has submitted that his dispute arose while he was no longer a public servant. One would ask a question as to how did the cause of action arise? Certainly, the respondent's cause of action arose from his employment contract in which he was serving as a public servant, meaning that, without the Respondent's public service there would be no the aforementioned claim. This being the position therefore I find the respondent argument wanting in merit. Any claim arising out of the delivery of public service envisaged under the section 3 of the Act is covered under the Public Service Act regardless of the complainant's

employment status at the time of lodging the claim. The test, in my view should be the base of the cause of action.

The respondent cause of action arising out of his employment contract as a public servant could not escape the needles of the Public Service Act. The Commission for Mediation and Arbitration therefore determined labour dispute number CMA/SHY/223 /2018 without jurisdiction. Any matter that is adjudicated without jurisdiction, ought to be quashed.

I, for the above reasons allow the revision, quash the proceedings in labour dispute No. CMA/SHY/223 /2018 and set aside the award. Respondent if still interested can pursue his claims in appropriate forum.

DATED at **SHINYANGA** this 29th day of May, 2020.



E.Y. Mkwizu
E.Y. MKWIZU
JUDGE
29/5/2020

Court: Right of Appeal is explained



E.Y. Mkwizu
E.Y. MKWIZU
JUDGE
29/5/2020