

TANZANIA / JUDGMENT

ezekehiah tom olochu

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1 January 2020

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA LABOUR DIVISION AT
DODOMA REVISION APPLICATION NO. 8 OF 2023 (Originating from the award of the
Commission for Mediation and Arbitration at Dodoma in the Labour Dispute No. CMA/
DOM/121/2020/53 EZEKIAH TOM OLUOCH..... APPLICANT
VERSUS CHAMA CHA WALIMU TANZANIA..... RESPONDENT

JUDGMENT

Date of the last order: 24/9/2024. Date of Judgement: 23/10/2024. KHALFAN, J. This matter traces its origin back in 1993 when the applicant was employed as a secondary school teacher by then the Ministry of Education and Culture. He was stationed at Tambaza High School within Ilala municipality. In 1994, the applicant became a member of the respondent which is a registered trade union. It is on record that, in 1998, the applicant left his teaching work by way of secondment and was employed by the Worldwide Fund for National Conservation and was posted to work at Mang'ula in Kilombero district in Morogoro region for a period of two i years. Later in 1999 up to 2000, the applicant was employed by Wildlife Conservation Society of Tanzania (hereinafter referred to as the "WCST") by way of another secondment. It should be borne in mind that, during those two secondments, the applicant was still a respondent's member. In 2000, the applicant contested and was elected as a deputy general secretary of the respondent for a period of five years. Hence, he left his job at Wildlife Conservation Society of Tanzania and joined the respondent. His first term ended in 2005 and he was re-elected on the same position in 2005-2010, 2010-2015 and 2015-2020. His three first terms were smooth but things became sour in his last term of 2015-2020. On 23/3/2017, the applicant received a letter from the permanent secretary, the President's Office Public Service Management which informed him that he was removed from the public service. Later, on 23/5/2017, the applicant received a letter from the respondent informing him that he was suspended from his position of deputy general secretary since he was removed from the public service as per the letter dated 23/3/2017 above. Later, on 4/10/2017, the applicant received a letter from the respondent which dismissed him from the office. It is on the record that, the applicant was irked by the steps taken by the respondent for dismissing him from his position as the general secretary of the respondent, hence he expressed his dissatisfaction by filing Labour Dispute No. CMA/DSM/KIN/R.1246/17/1141 before the Commission for Mediation and Arbitration at Kinondoni Dar es Salaam. I have keenly gone through the decision in that dispute, which after hearing the parties,

was decided in the applicant's favour. It was declared that, the applicant's dismissal from the employment by the respondent was invalid since his employment with the respondent was not determined by his employment with the government. Hence, the respondent was ordered to either reinstate the applicant or pay him all of his wages until his tenure in office ended in May 2020. It appears that, the respondent did not reinstate the applicant. The applicant therefore preferred an application for execution before the High Court Labour Division at Dar es Salaam in which he claimed to be paid monthly salary up to May 2020 making a total sum of TZS 169,390,946/=. It is on the record that the applicant was awarded a sum of TZS 126,199,544/=. 3 This application at hand originated from the award of the Commission for Mediation and Arbitration at Dodoma in Labour Dispute No. CMA/DOM/121/2020/53 (hereinafter referred to as the "CMA"). Essentially, as it could be gathered from the record, after the applicant had completed his service with the respondent in May 2020, following the decision in the Labour Dispute No. CMA/DSM/KIN/R. 1246/17/1141, the applicant sued the respondent for an assortment of reliefs as follows:

- i. TZS 6,812,344.10 as notice for contract termination on 5/6/2020, ii. TZS 6,812,344.10 for leave accrued before the contract that ended on 5/6/2020, iii. TZS 6,307,344.10 per month as subsistence allowance prior to repatriation from the day between the applicant and the respondent that ended on 5/6/2020 to the day the respondent will pay the applicant the transport costs to the place of domicile, iv. TZS 2,000,000/= as golden shake hand which is payable to the employees of the respondent who served it for not less than ten years consecutively,
- v. TZS 9,881,283.74 as compensation for the delayed gratuity and monthly pension paid by the public service social security fund, vi. TZS 1,362,468.82/= for crafting and packing of properties before the repatriation which is 20% of the monthly wage, vii. TZS 10,013,175/= as transportation of luggage to the place of domicile, viii. TZS 2,356,400/- as costs for transportation of the applicant and his family to the place of domicile, ix. TZS 480,000/- as subsistence allowance during the time when the applicant transports his family to the place of domicile,
- x. Certificate of service from 26/5/2000 up to 5/6/2020 for the position of the deputy general secretary of the respondent, xi. Interest to the tune of 20% of the total amount claimed by the applicant and xii. Interest of 12% from the date of judgment to the last date of the payment by the respondent. After hearing the parties, the CMA dismissed the applicant's complaint for several reasons ranging from lack of proof as well as the fact that the respondent was not the last employer of the applicant. The s applicant therefore filed the instant application under sections 91(1) (a), (2)(b)(c) and 94(l)(b)(i) and (f) of the Employment and Labour Relations Act [Cap 366 R.E 2019] and Rules 24(l)(2)(a)(b)(c)(d)(e)(f) (3)(a)(b)(c)(d) and 28(l)(a)(b)(c)(d) and (e) of the Labour Courts Rules 2007 seeking for an order of this court to call for the records, proceedings and award of the CMA and revise and set aside the entire award on the following grounds:

- i. The honourable arbitrator acted ultra vires in the course of determining the dispute which was before him. ii. The honourable arbitrator erred in law and fact in holding that the applicant was employed by both the respondent and I/a/a Municipal council during the same period and that the last applicant's employer was the I/a/a municipal Council. Hi. The honourable arbitrator erred in law in holding that the applicant was recruited from Dar es Salaam without proper assessment of the evidences tendered before him by PW1 and PW2. 6 iv. The honourable arbitrator erred in law in refusing to admit the collective bargaining agreements (CBA) between the respondent and its employees which are public documents.
- v. The honourable arbitrator erred in law in holding that the applicant was not entitled to allowances which he was paid by the respondent after the respondent was ordered to reinstate him. vi. That the honourable arbitrator erred in law in holding that the applicant was not entitled to be paid his claims by the respondent. vii. That the applicant was condemned unheard by the CMA contrary to Article 13(6) (a) of the Constitution. The application is supported by an affidavit sworn by the applicant himself. On the other hand, the respondent filed a counter affidavit sworn by Mr. Thomas Edward Nchimbi, learned advocate for the respondent. By parties' consensus, this application was disposed of by way of written submissions. The applicant appeared in person unrepresented while the 7 respondent was represented by Mr. Thomas Edward Nchimbi, learned advocate. Before dwelling on the parties' rival submissions, I find it compelling to address one important legal issue. It is on record that in CMA form No. 1, the applicant listed some reliefs which were categorised into 2 groups. The first group contained some reliefs which were time barred. Thus, he sought condonation for the said reliefs. It is on the record that, after the CMA had heard the parties on the issue of condonation, it found that the applicant had not disclosed a sufficient reason for extension of time. It is equally on the record that the applicant's effort to challenge the decision which denied him condonation in this court bore no fruits as the application for revision was dismissed by this court. Now among the reliefs in respect of which the applicant sought condonation, is the leave pay listed on item (ii) above. Therefore, since the applicant was denied condonation on such relief, it ceased to exist and the applicant cannot claim it. Equally, the claim on item (v) above regarding the delayed gratuity and monthly pension by the public social security fund, was dependent upon proof of the respondent's contribution to the public social security fund and penalties on all contributions which were delayed by the respondent. It is on the record that the claims regarding the delayed payment by the respondent to the public social security fund was among the reliefs which were filed out of the prescribed period. As I have pointed out earlier, the applicant was denied condonation. Therefore, the claim on item (v) died a natural death. Back to the merits of the application, in his submission on the first ground, the applicant argued that, the CMA had no jurisdiction to re- introduce the issue of employer-employee relationship between the applicant and the respondent since the said issue was determined in the previous matter in Labour Dispute No. CMA/DSM/KIN/R. 1246/17/1141. He argued that, on 16/9/2022, both parties before Hon. Mkombozi, the arbitrator, agreed that the employer-employee relationship was a non- disputed issue and that the contract

between the applicant and the respondent ended on 5/6/2020. He argued that it was improper for the successor arbitrator Hon. Kato to reintroduce the same issue since the CMA was functus officio. To buttress his argument, the applicant referred to the case of *The Attorney General vs. Dickson Paulo Sanga Civil Appeal No. 175 of [2020] TLR 61* and *Scolastica Benedict vs. Martin Benedict*

[1993] TLR 1. In reply, the learned advocate for the respondent argued that the CMA did not act ultra vires in reintroducing the issue regarding the employment relationship between the parties. He argued that the main issue before the CMA is who was the last employer of the applicant because the relief which was sought by the applicant was repatriation costs on which the CMA was obliged to find out who was the last employer. He therefore urged the court to find no merits on this ground. In rejoinder, the applicant essentially reiterated his submission in chief. I have keenly gone through the record. It is reflected that on 16/9/2022, when the parties appeared before Hon. Mkombozi, two issues for determination were framed as follows: whether the applicant was entitled to be paid his claims and what relief for each party. After several adjournments, the matter was fixed for hearing on 8/5/2023 before Hon. Kato. Before hearing had commenced, the learned arbitrator added a new issue as to whether the applicant was an employee of the respondent. In his decision, the learned arbitrator discussed at length the relationship between the applicant and the respondent and at the end, he was of the view that, the applicant was an employee of the respondent. I am at one with the applicant that, the issue whether the applicant was an employee of the respondent, was already determined in the previous matter, namely, Labour Dispute No. CMA/DSM/KIN/R. 1246/17/1141. In that previous matter, it was decided that the applicant was an employee of the respondent till the end of his term which was set to expire in 2020. Although the issue was reintroduced before the CMA, I do not find how the applicant was prejudiced since just as it was in the previous matter, the stance that the applicant was an employee of the respondent did not change. Therefore, I do not find any merits in the first ground of the complaint and I dismiss it. In the second issue, the applicant faulted the CMA for holding that the applicant had employer-employee relationship with both the respondent and the Ilala Municipal Council. He argued that the CMA did not consider other evidences tendered by the applicant such as exhibit ETO-14 which shows that the applicant's contract of service with the government ended on 27/5/2015 as he was dismissed from his employment. He argued that on 28/5/2015, he was no longer a public servant, rather he was employed by the respondent for a fixed term of five years which ended on 5/6/2020. He referred to section 61 of the LIA which expounds the factors for determination of an employer-employee relationship. He referred to the case of *Felecia Migomba vs. CRDB Bank Revision No. 25 of 2010*. In reply, the learned advocate for the respondent readily pointed out that the applicant was the deputy general secretary of the respondent but his employment was terminated on 22/5/2017. He argued that, the applicant was aggrieved with the decision of the respondent hence he filed Labour Dispute No. CMA/DSM/KIN/R. 1246/17/1141. In that dispute, it was decided that, the respondent had the option of

reinstating the applicant or paying him his salaries up to 26/5/2020. He further argued that, the applicant was paid a sum of TZS 126,199,544/=. He contended that applicant's tenure with the respondent officially ended on 26/5/2020. Having considered the parties' arguments, there is no dispute at all whether the applicant was an employee of the respondent. In the Labour Dispute No. CMA/DSM/KIN/R. 1246/17/1141, it was succinctly stated that the applicant's employment with the Ilala municipality had nothing to do with the applicant's employment with the respondent. And the termination of the applicant's employment by his former employer did not affect his 12 employment with the respondent. Therefore, I do not find any merits in this complaint and I proceed to dismiss it. As to the third ground, the applicant faulted the CMA regarding its holding that the applicant was recruited at Dar es Salaam. He argued that, when he was recruited by the respondent in May 2000, he filled form No. 2 (exhibit ETO-17) in which he indicated that, he was recruited from Morogoro municipality. He argued that, Regulation 12 of the Employment and Labour Relations (General) Regulations 2017 demands an employer to provide the employee with statement on a place of recruitment among others as per sections 15(l)(b)(6) and 16 of ELRA. He faulted the CMA for holding that, the applicant's former employer's office was to determine the place of recruitment. He argued that as per exhibits ETO-1, ETO-2 and ETO-3 together with the evidence of the PW1 and PW2, it is shown that, the applicant left the public service and was recruited by the respondent when he was employed by WCST whose working station was in Morogoro municipality. In reply, the learned advocate for the respondent argued that, the applicant's place of recruitment was in Dar es Salaam and this has been 13 proved by the applicant through his affidavit and annexure ETO-4. He argued that, the applicant sought leave from the Ministry of Education and Culture through Tanzania Teachers Service Commission and that the address of the applicant is from Dar es Salaam even the office of the respondent was located at Dar es Salaam. He argued that, even the testimony of DW2 shows that, the applicant said goodbye to his co-workers of WCST and he was going to join the respondent's office at Dar es Salaam. In its decision, the CMA was of the view that, the applicant was employed by the respondent on the reason that, he was a teacher at Tambaza secondary school within the Ilala municipality. It is observed that, the applicant was employed by the respondent from Dar es Salaam and not Morogoro. Having gone through the parties' arguments, I do not find any good reason to fault the CMA regarding the applicant's place of recruitment. It is not in dispute that, the applicant was initially employed by the Ilala municipality as a secondary school teacher. He was later seconded to WCST which is located in Morogoro. The applicant's argument that he left 14 the public service in 1998 and was recruited by the respondent when he was employed by WCST, is not correct, since, in his evidence, as captured from the record, the applicant testified that, he was employed by WCST after obtaining secondment from Teachers Service Commission. His testimony as captured on page 10 of the CMA's record goes thus; "...kwa mujibu wa katiba ya CWT, Naibu Katibu Mkuu anapochaguliwa anakuwa mtumishi wa CWT. Wakati nachaguliwa niiitakiwa kutoa notisi ya mwezi mzima kwa WCST kwa sababu utumishi wangu ulikuwa unakoma na niiipaswa kuhamia CWT-Makao Makuu- Dar es

Salaam. Niliandika barua tume ya Utumishi wa waiimu kuwaomba wabatiishe Hkizo waiyonipa kufanya kazi WCST wanipe iikizo ya kufanya kazi CWT..." Thus, the above piece of evidence tells all. The applicant was seconded to the respondent from Teachers' Service Commission whose office is located at Dar es Salaam. Equally, after the applicant's service with the respondent had ended, the applicant was supposed to return to his former employer, namely, the Ilala municipality. Based on the foregoing, I am satisfied that the applicant's place of recruitment was at Dar es Salaam 15 and not Morogoro. Therefore, the third ground lacks merit and it is dismissed. As to the fourth ground of complaint, the applicant faulted the CMA for not admitting in evidence two collective bargaining agreements between the respondent and its employees for the period of 2016-17 and 2018-2019. He argued that those documents were not admitted despite being public documents. In reply, the learned advocate for the respondent argued that, the CMA did not admit the documents which the applicant sought to tender because they were not original, were not stamped by the respondent and they were incomplete. It is on the record that, the applicant sought to tender the collective bargaining agreement but the same was objected by the respondent for the reasons that it was a photocopy. Furthermore, the respondent pointed out that, the document did not look like the original since the latter had 46 pages while the one which the applicant sought to tender had 39 pages. In reply, the applicant maintained that the said agreement should have been admitted since it was included in the notice to produce and the said 16 document was owned by the respondent. In its decision, the CMA rejected the said document for missing some pages. I am of the considered view that, the CMA erred in rejecting such document for the sole reason that it had some missing pages. That should have been challenged through cross examination. It was not an objection on point of law, rather on the fact as to how many pages the collective bargaining agreement contained. Thus, the collective bargaining agreement is admitted in evidence. On the fifth and sixth grounds, the applicant argued that, the CMA erred in not awarding the applicant repatriation costs by the respondent since the respondent was not the last applicant's employer. In reply, the learned advocate for the respondent argued that, the CMA was correct to hold that the applicant was not entitled to be paid by the respondent repatriation costs since it was not his last employer. He further argued that, the applicant's employment with the respondent ended on 26/5/2020 and he later returned to his permanent employer which is the Ministry of Education Science and Technology. He averred that the applicant's last employer was the Ilala Municipal Council. 17 In its decision, the CMA was of the view that, the applicant was not entitled for repatriation costs from the respondent since the respondent was not the applicant's last employer. It further observed that, the respondent was not obliged to repatriate the applicant since, according to the respondent's constitution, the applicant did not retire, therefore, there was no evidence that the applicant had retired. The issue for determination here is whether the respondent was required to pay repatriation costs to the applicant. In the application form, the applicant claimed for repatriation costs at the sum of TZS 17,000,000/= repatriation allowance for five months from June 2020 to October 2020 which is equal to TZS 32,561,720/=. As I have pointed above, the applicant was seconded to the respondent

from Teachers' Service Commission. Hence, after the completion of the applicant's service with the respondent, the applicant was required to return to his former employer. The applicant claimed for repatriation costs from the place of recruitment to his village home. It is not in dispute that, the applicant's service with the respondent ended in May, 2020. The respondent was not obliged to pay repatriation costs to the applicant for two reasons. The first reason is that, since the applicant was 18 seconded to the respondent from his former employer, after the applicant's service with the respondent ended, then the applicant was required to return to his former employer who is at Dar es Salaam and not to repatriate him to his place of domicile. Secondly, as rightly pointed by the CMA, the respondent was obliged to repatriate the applicant only if the applicant had retired from service of the respondent as required under section 1.4 of the respondent's constitution. Section 3.3 (1.3.1) gives the circumstances under which an employee can be counted to have retired in the following circumstances: first, where he/she attains compulsory age of retirement as per the law, voluntary retirement after attaining 55 years age or more, retirement on medical grounds after being certified by the medical doctor, retirement for the purpose of promoting good working efficiency after being required to do so by the employer and retirement for the reasons that the general secretary deems fit and approved by the National Executive Committee. It follows therefore that, for the applicant to be paid repatriation costs, he must have retired from the service of the respondent. Unfortunately, he did not prove that he retired. Therefore, the complaint in fifth and sixth grounds fails and it is dismissed. 19 As to the seventh ground, the applicant argued that, the author of the letter dated 5/6/2023 with reference No. PSSSF/DOM/B.1/104/51, was not brought before the commission for the applicant to cross examine him on reliability and credibility of his letter on who was recognised by the PSSSF as the applicant's employer for the entire period of twenty years from May 2000 to May 2020. He submitted that in his form No. 1, he indicated that the respondent was his last employer and he used the last salary he was paid by the respondent. In reply, the learned advocate for the respondent argued that, the said document was initially filed according to Rule 24 (6) of the Rules and the same was dully served to the applicant. He contended that the said document was not objected by the applicant at the time of its admission. I have gone through the record, when the respondent sought the said letter, the applicant objected it for the reason that he was served the same after he had closed its case and therefore, he had no chance of saying anything about the said letter. Hence, the arguments by the learned advocate for the respondent that the applicant never objected such letter, lack basis. Now, it is not in dispute that the said letter was filed before the CMA on 27/6/2023, a day before it was tendered. The applicant claimed 20 that he was served with the said letter on the date the matter came for hearing. I am satisfied that the applicant was denied the chance to say anything regarding such letter. Thus, it is accordingly expunged from the record. Although such letter has been expunged, I reiterate my position regarding the applicant's last employer. Finally, this brings me to the reliefs which the applicant claimed. First and foremost, I reiterate my position regarding the claims in paragraphs (ii) and (v) above that they were time barred and no condonation was granted. The claim of TZS 6,812,344.10/= in

paragraph (i) as notice for contract termination on 5/6/2020 is unmaintainable since the applicant's service with the respondent automatically terminated upon expiry of his tenure and he readily admitted that he was paid all of his salaries after the respondent refused to reinstate him. The claim of TZS 2,000,000/= as golden shake hand which is paid to the employees of the respondent who served it for not less than 10 years consecutively, was not proved by the applicant. The claims in paragraphs (iii), (vi), (vii), (viii) and (ix) which are TZS 6,307,344.10/=, TZS 1,362,468.82/=, TZS 10,013,175/=, TZS 2,356,400/= and TZS 480,000/= which are related to subsistence allowance and repatriation of the applicant 21 and his family to the place of domicile, are not grantable for the reason stated while addressing complaints in fifth and sixth grounds above. Equally, the interests claimed in paragraphs (xi) and (xii) are not granted. I however grant the relief in paragraph (x) that the applicant is entitled a certificate from the respondent in the capacity of deputy general secretary of the respondent. There is no dispute at all that, the applicant served the respondent from 2000 to 2020. Consequently, this application fails and succeeds to the extent shown above. Since this is a labour matter, I will not make an order as to costs. It is so ordered. DATED at DODOMA this 23rd day of October, 2024. F.R. KHALFAN JUDGE 22

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Prepared on 14 October 2026 · Esheria