

TANZANIA / JUDGMENT

mwl ezekiah tom oluoch vs chief secretary another 2023 tzhc 261 17 february 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (MAIN REGISTRY) AT DAR ES
SALAAM Miscellaneous Cause No. 34 of 2022 MWL. EZEKIAH TOM OLUOCH.....
APPLICANT VERSUS CHIEF SECRETARY.... 1st RESPONDENT ATTORNEY
GENERAL 2nd RESPONDENT

RULING

23/11/2022 & 17/02/2023 MZUNA, J,: The applicant, Mwl. Ezekiel Tom Olouch was employed as a Teacher. At one time he successfully vied for and was duly elected for the post of the Deputy General Secretary of the Teacher's Union "Chama Cha Walimu (CWT)". The post was for five years term. Since he was a Public Servant he sought for secondment. He was granted three years term. Upon its expiry while his term in office as Deputy Secretary General was still subsisting, he sought for extension which however was refused by his employer, the Public Service Commission. He was directed to report to his erstwhile employer of which he never did for good five days. This was followed by disciplinary proceedings. He was terminated and then his name removed from the payroll. He successfully challenged that decision before the Court of Appeal which ordered his reinstatement in the payroll. Seemingly though, he did not report to the Ilala Municipal Council as expected being her employer. The applicant insisted that since he was a Secondary School Teacher who at the time of change of Scheme in 2009 was still at the Chama Cha Walimu with leave without pay, the change did not cover him. So he believes that he is under the Ministry of Science and Technology. To this end, there is also a pending matter Misc Cause No.3 of 2020 which is subject for determination on the status whether he was transferred and what is the status whether he is under the Director of Ilala District council or under the aforesaid Ministry. He filed this application seeking the indulgence of this court to grant the orders of certiorari to quash and set aside the decision of the President of United Republic of Tanzania of 6th October, 2022 vide the letter with reference No. CAB.30/536/PF.637 confirming his dismissal by the Teachers Service Commission. The applicant has come to this court armed with five grounds for judicial review namely; One, the decision of the President was tainted with illegality as it violated the law and his constitutional rights to freedom 2 of association. Two, the applicant

was immune from being dismissed from the Public service for participating in legally recognized activities of Chama cha Walimu Tanzania. Three, the Inquiry Committee Report did not comply with the law. Four, the President's decision was illegal as the 2nd appellate authority failed to prove the charges. Five, the disciplinary action against the applicant did not follow the law. The application proceeded by way of written submissions. The applicant is self-represented whereas Mr. Daniel Nyakiha, the learned State Attorney appeared for the 1st and 2nd respondent. The main issue is whether the application has merit? I propose to tackle the raised review grounds seriatim as presented. Submitting in support of the first ground on illegality of the decisions, the applicant says there was violation of the law and his constitutional right of freedom of Association under Article 20 (1) of the United Republic of Tanzania Constitution. He made reference to the case of Sanai Murumbe & Another v. Muhere Chacha [1990] TLR 54 to emphasize a point among others that there is illegality of procedure or decision as there was failure to follow the law. The case of James Gwagilo vs. Attorney General [1994] TLR 73 was also cited for emphasis. That the applicant's dismissal from the public service violated his constitutional right to freedom of association. The applicant submitted that the reason for his dismissal was his appointment as the Deputy General Secretary of Chama cha Walimu Tanzania which is a legally registered trade union under the Employment and Labour Relations Act as amended in 2004. He therefore sought leave without pay to the Permanent Secretary's Office but the same was not endorsed. Instead, he was given an option whether to choose to return to the public service or to be employed by Chama cha Walimu. The applicant submitted, he was a member of the association with the right to be elected pursuant to Article 7(7.1) (a) of Chama Cha Walimu Tanzania. That whether with or without consent of the employer, upon his being elected he was entitled to serve the entire period of five years from 28th May, 2015 to 5th June 2020 as the Deputy Secretary as per International Labour Organisation (ILO) Conventions which Tanzania is a signatory and some parts of it are domesticated in Tanzania Laws. He therefore, argued that Article 20(1) of the Constitution of the United Republic of Tanzania of 1977 as amended from time to time, section 37(1) of the Employment and Labour Relations Act, 2004, Article 1 of the ILO Convention on the right to organize and collective bargaining convention, Article 1,2,3 of the Workers' Representatives Convention, 1971, Article 2, & 8 of the Convention Concerning Freedom of Association and Protection of the Right to Organize, 1948, Article 4 & 9 of the Labour Relations (Public Service) Convention, 1978 and article 4, 5, and 8 of the Termination of Employment Convention, 1982 were violated. Mr. Oluochi invited this court to consider the international conventions as it was pointed out in DPP vs Daudi Pete [1993] TLR 22. That reference to international instruments is in order when interpreting the Bill of Rights of our constitution. This position was emphasized in Honourable Attorney General vs Reverend Christopher Mtikila, Civil Appeal No. 49 of 2009 (unreported) where the Court of Appeal stated the need to apply international conventions which Tanzania has ratified in interpretation of the bill of rights. He concluded on the first ground by submitting that the President did not consider the law before dismissing the Applicant. Mr. Oluochi proceeded on the second ground that he was immune from dismissal as he was the Workers' representative who participated in legally recognized activities of the CWT. The immunity of the applicant was disregarded by the President before confirming his dismissal by the Public Service. To support his submission, he referred to 5 the

case of Surafel Beyene & Another vs Republic of Romania & Another [1998] TLR 400 where it was held that:- "Immunity could only cease if the Republic of Romania had waived it, and such waiver must be specified." He insisted that since his membership had never been waived by the CWT either upon his own voluntary resignation, termination or dismissal from employment for lawful cause, he had absolute immunity which bound the President as a matter of rule of law. In the third ground, Mr. Oluochi faulted the competency of the inquiry committee report for non-compliance with the law. The Inquiry Committee ought to have proved three charges against the applicant. It ought as well to have investigated any other factor(s) which contributed to the offence as per Regulation 19 (1) (2) (a)-(c) of the Teachers Service Commission Regulations, 2016. He submitted the aggravating factor for his absence from duty was that he was elected as worker's representative and he was denied leave without pay. It was wrong to find him guilty of three offences. Therefore, the President acted on illegal report which did not comply with the law. On the allegation of failure to prove the charge which the President as the 2nd appellate body failed to consider, the applicant says:- (a) There was discrepancy on the date of absence from duty between the Teachers Service Commission of Ilala Municipal and the charge before the Inquiry Committee. It was reported at the Teachers Commission that the Applicant was absent from 19th February 2020, whereas the charges showed he was absent from 28th May, 2015 to 15th March, 2017, which was not raised before the disciplinary committee. The President did not consider the fact that the Applicant was absent from duty from 17th February, 2020. However, the applicant conceded that he was absent from the public service without leave from the Permanent Secretary. He submitted that the absence from duty alone is not an offence, the President had to adhere to the law making it an offence for the employee who is absent without good cause which is an offence under regulation 11 (1) (d) of the Teachers Service Commission Regulations, 2016. The absence was with good cause upon being elected the Deputy General Secretary of Chama Cha Walimu Tanzania of which the President was fully aware of through the 1st respondent as evidenced by Exhibit ETO 05, 08, 09. His termination was unfair in contravention of S. 37 (1) (3) (a) (ii) (iii) (iv) and (v) of the Employment and Labour Relations Act, 2004. The notice to produce documents was not adhered to by the respondents. So the charge of absence from duty was based on documents, not served to the disciplinary committee and the inquiry committee. The complainant was not disclosed to the applicant, he argued. In regard to the offence of insubordination as the third charge, the applicant submitted that the President did not disclose directive from the Permanent Secretary, President's Office Public Service Management which the applicant did not comply with. If at all it was a letter Ref No. CB.87/164/01 (Exhibit ETO-88) in which the applicant was given seven days to either return to the Public service or to be employed by the CWT, which initiated his removal from office, that removal as well as the said letter were set aside by the Court of Appeal on appeal vide Civil Appeal No. 140 of 2018 (unreported) annexed as "C". Even if it is assumed that the said letter was not set aside still the issuing authority Permanent Secretary, President Office Public Service Management had no jurisdiction to Secondary School teachers save for leave of absence only. The offence of insubordination and the charge was not proved by the Inquiry Committee through Hilda N. Kabissa and Salvatory Kaiza who were the witnesses as they relied on illegal documents including that letter. On the case law of a decision without jurisdiction which he was not duty bound to comply with, he relied

on the case of Zakaria Kamwela 8 and 126 Others v. The Minister of Education and Vocational Training and the Attorney General, Civil Appeal No. 3 of 2012 (unreported). It is proceeded further that the inquiry committee assumed the role of the prosecutor as they gave leading questions and not of the quasi-judicial organ or impartial body contrary to Article 13(1) of the Constitution of the Republic of Tanzania. The principles which the quasi-judicial body violated and its resultant effect by coaching and filling in gaps instead of acting judicially are laid down in Ally Linus & Eleven Others vs Tanzania Harbours Authority & The Labour Conciliation Board of Temeke District [1998] TLR 5 and Ahmada Musa Ntimba & Another v. Republic [1998] TLR 268. Mr. Oluochi submitted, the Teachers Service Commission Act, 2015 and its Regulations, 2016 under section 11 of the Act, are not applicable to the teachers employed in the Public service as it applies' to Primary and Secondary schools⁷ teachers employed by the Local Government Authorities including the Municipalities. Since he was not employed by Ilala Municipal, the Act does not apply to him. Alternatively, he says, the disciplinary authority of the applicant was the Teachers Service Commission at the Headquarters. ⁹ On the second ground the applicant alleges the procedural impropriety on the part of the President. That he was condemned unheard contrary to Article 13(6) of the Constitution. It is submitted further that, the decision was made by the President but investigation was conducted by the 1st respondent. He reiterated that he had a right to appear before those who investigated his appeal. He was as well denied copies of documents (Inquiry Committee Report and that of the disciplinary committee responses on his grounds of appeal) which were used by the President to dismiss his appeal. Due to such defect, he never used them to present his appeal before the Teachers Service Commission and before the President. Mr. Oluochi faulted the appointment of the Inquiry Committee at the time when he acted as the Assistant Secretary of the Teachers Service Commission. That the Ilala Municipal Council acted ultra vires when she appointed members of the Inquiry committee contrary to section 16(1) of the Teachers Service Commission. The charges before the inquiry committee were res subjudice to Petition No.3 of 2020, High Court Main Registry, where the same documents especially a letter dated 5th February, 2020 with reference No. TSC/C/0.1409/22 written by Winfrida G. Rutahindurwa then secretary of ¹⁰ the Teachers Service Commission challenged before the Inquiry Committee were also challenged thereto, hence the same had no jurisdiction to entertain the charges. The case of Weftget Widrose Safaris (Tanzania) Limited vs The Minister of Natura Resources & Tourism & Attorney General, Misc Commercial Cause No. 89 of 2016 was cited in support. In emphasizing his point, he says given the fact that his termination was dependent on the said letter which the Court of Appeal nullified it, definitely even the decision to terminate him could not stand. Mr. Oluochi, submitted further that his right to be heard was violated by the disciplinary committee, Teachers Service Commission. Further that the rule against bias was violated by the inquiry committee, where its members were strangely appointed to safeguard the interest of the institutions which dismissed the applicant. Similarly, biasness existed by the disciplinary committee, Teachers Service Commission which determined the applicant's first appeal. Bias on the part of the Chief Secretary, prior to his dismissal by the Public Service by the Teachers Service Commission of Ilala Municipal Council. He was removed from the Public Service by the Permanent secretary, President's Office Public Service Management. ii Moreover, the Applicant submitted, the President disregarded his grounds of

appeal without assigning reasons why they were rejected. The case of Tanzania Breweries Limited vs Antony Nyingi, Civil Appeal No. 119 of 2014 (unreported) was cited in support where the court held that if a court of law decides to accept or reject a party's argument, it must demonstrate that it has considered the same with reasons for rejecting or accepting it. He is therefore of the firm view that the decisions made against the applicant were null and void. In regard to the fourth ground that the terms of reference for the Inquiry Committee did not include the Applicant's defence, he says the report of the Inquiry Committee had to state reasons why the Applicant was charged pursuant to Regulation 19(2) (b) of the Committee. Terms of reference neglected the Applicant's defence. The report was not balanced which renders a report a one sided defence and therefore a nullity. Basing on his submissions the applicant prays for this court to grant certiorari to quash and set aside the decision of the President dated 6th January, 2022 which was against the rules of natural justice and illegal for being arbitrarily decided contrary to governing laws for disciplining teachers employed by the Ministry of Education and that the decision was made without jurisdiction. He further prayed for costs and other reliefs the court may deem fit and just to grant. Responding to the above grounds, Mr Nyakiha the learned State Attorney sternly objected the first ground of illegality of the President's decision. The allegation that the applicant was denied the right to freedom of association is totally misplaced, it does not relate with charges against him one being the absence from duty without leave. He further submitted that the applicant involvement in CWT (Chama Cha Walimu) was not interfered before. The application was denied by his employment authority. When his leave request was denied, he never resumed at his work place as the public servant. The decision for the denial of leave was duly communicated to the applicant. Section 2 of the Teachers Service Commission Act, 25 of 2015 provides that the act shall apply to all Primary and Secondary teachers employed in the public service. Sections No. 4 and 5, established the Teachers Service Commission and empowered to appoint, promote and discipline teachers in the Public Service. The applicant successfully challenged the decision and secured judgment in his favour in Civil Appeal No. 140 of 2018 where the Court of Appeal ordered the proper procedures be followed to determine the fate of the applicant's employment. The applicant was reinstated at work but did not report back to his work place, hence, the offence of absence from duty. Regulation 15 (1) of the Teachers Service Commission Regulation which directs that no formal proceedings will be instituted unless a teacher has been charged with a proper charge stating the nature of the offence, was complied with as the applicant was charged on 6th March 2020. He submitted. That, he was also afforded time to respond on the said charge. It is submitted further that an administrative decision is faulted if it is illegal. The decision is illegal if the authority giving the decision acted in excess of its powers, the decision pursues an objective other than that for which the power to make the decision was conferred and is not authorized by any power and contravenes or fails to implement a public duty. He submitted that the applicant was accorded due process and an opportunity to defend the said charges inclusive of the right to be heard against the charges that were tabled against him. He reiterated that the decision of the Inquiry Committee, the decision of the Disciplinary Authority, the decision of the Inquiry Commission and the decision of the President were all in accordance with the law. Mr. Nyakiha submitted that the case of Rev. Christopher Mtikila v Attorney General (supra) cited by the applicant is distinguishable from 14

this application. There is no any right of the applicant which was violated in the determination of the charges against him. That the applicant cannot be saved under the umbrella of Article 30(2) of the Constitution. He was given a chance to choose either to serve as the Public servant or Chama cha Walimu. On the allegation that the witnesses before the Inquiry Committee were coached and that the report was incompetent he says this argument is without basis. He therefore, finds no reason for this court to quash the decision of the President because his grounds had not met the conditions set out in Sanai Mu rumbe's case (supra). On the issue of procedural impropriety appearing as the second ground, he submitted that the applicant alleged to have been denied the chance to appear before the President for hearing. Mr. Nyakiha pointed out that the appeal before the President of the United Republic of Tanzania was the 2nd appeal. It was not for collecting evidence but to go through the proceedings of the lower administrative authority to determine whether the law was complied with. Therefore^ all procedures were followed as per section 13 of the Teachers Service Commission Act of 2015. 15 In regard to the 3rd ground that the President did not take into account matters which she ought to have taken into account, he says the applicant alleged that the President did not take into account the decision in Civil Appeal No. 140 of 2018 and that the Permanent Secretary did not have jurisdiction to order disciplinary action against the applicant. In that case the Court of Appeal held that the proper procedure should be followed in the determination of the fate of the applicant's employment. The Permanent secretary had the mandate to order disciplinary action against the applicant. Therefore, there is no any authority which had acted ultra vires or breached the law. Mr. Nyakiha submitted on the fourth ground that it should equally fail as the terms of reference was the report used as the term of reference prepared by the inquiry committee to wit, item 1.3 indicated terms of reference. He concluded his submission that the decision of the President was proportional and reached through the established procedures by the law. In his rejoinder submission, Mr. Oluochi reiterated his submission in chief which I have read and carefully considered. I have keenly considered the lengthy submissions of both parties. The main issue is whether the application for judicial review has merit? 16 The law in judicial review is well settled. The Court of Appeal laid the test to be met for judicial review in the most celebrated case of Sanai Murumbe & Another v Muhere Chacha (supra) that:- "The High Court is entitled to investigate the proceedings of a lower court or tribunal or public authority on any of the following grounds apparent on the record;

- (a) taking into account matters which it ought not to have taken into account;
- (b) not taking into account matters which it ought to have taken into account;
- (c) lack or excess of jurisdiction.
- (d) conclusion arrived at is so unreasonable that no reasonable authority could ever come to it;
- (e) rules of natural justice have been violated;
- (f) illegality of the procedure or the decision I am tasked to determine the four grounds of judicial review advanced by the applicant. The first ground on illegality of the decision of the President's office confirming the dismissal of the applicant by Public Service Commission. It

is argued that the decision violated his constitutional right to freedom of association. He invited this court to apply the International conventions in which Tanzania is a signatory. For the Court to apply the International Standards in particular the International Labour Organisation Convention, Convention Concerning Freedom of Association and Protection of the Right to Organize, 1948, Article 4 & 9 of 17 the Labour Relations (Public Service) Convention, 1978 and the Convention on Termination of Employment (Supra), the following test has to be considered as it is pointed in the case of Kukutia Ole Pumbun and Another v. Attorney General and Another [1993] TLR 159 (CAT) held that: "A law which seeks to limit or delegate from the basic right of the individual on grounds of public interest will not be declared unconstitutional if it satisfies two requirements: (a) that it is not arbitrary; and (b) and the limitation imposed by such law is not more than is reasonably necessary to achieve the legitimate objective" I am of the considered opinion that the decision was in accordance with the law, the limitation that the abscondment for five days from work without the employer's permission/leave served a legitimate aim of maintaining ethical standards of employees. Moreover, he was given a chance to respond to the charge, he was reinstated with the option to either remain to serve as the Secretary General of Chama Cha Walimu or returning to his employer as the public servant. That option was abused, instead, he slept on his rights and chose not to do so. He cannot complain at this late hour. The Applicant has alleged variance on the dates of absence, when should it start to run. He conceded to have been absent from work for 18 four consecutive days without notifying the employer contrary to the Employment and Labour Relations Act. The applicant alleges that the Inquiry Committee acted ultra vires that it had no jurisdiction over the matter. This point stems from the argument advanced by Mr. Oluochi that he was not employed by the Local government (he being neither a Primary School teacher, nor a Secondary school teacher), but was under the Public Service. However, section 2 of the Teachers Service Commission Act, Act No. 25 of 2015 defines the word teacher to mean: - "< ? person registered as a teacher and who pursued a teaching training course in a registered teachers' college or university." I am convinced that since the Act under section 2 it applies to Primary and Secondary school teachers employed in the public service within Tanzania mainland, therefore the Teachers Service Commission acted within the power conferred to it under section 5 (e) that it has the power to determine appeals from the decisions from the disciplinary authorities. The argument that in 2009 all Secondary school Teachers were seconded from TAMISEMI to the Director of Councils except the applicant who was the Deputy Secretary General CWT and was still on leave without pay and that his service particulars were not transferred cannot negate a fact that he was a teacher an employee of the Local Government that is Ilala Municipality. He falls under the definition of a teacher under section 2 of the Act and therefore covered under the governing scheme for teachers. Therefore, the Permanent Secretary, Public Service Commission acted within his mandate. I am of the settled view that there is no illegality on the decision of the President. This ground of appeal is bound to fail. In regard to the second ground, the applicant faulted the inquiry committee for being resubjudicewh Petition No.3 of 2020, High Court Main Registry in the sense that the same documents were challenged before the inquiry Committee. Section 8 of the Civil Procedure

Code, Cap 33 RE 2019 provides; No court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other court in Tanzania having jurisdiction to grant the relief claimed." Guided by the aforementioned section I take note that this is not an appellate body to the said Revision No. 3 of 2022 such that one can say they are litigating under the same title. I find that the argument is unassailable because so far, the said Petition was set aside by the Court of Appeal. It is no longer in existence. It does not pass the test set above. This argument is bound to fail. There is also an argument by Mr. Oluochi that he was denied right to be heard, to appear before the President. I agree with Mr. Nyakihia that the matter was before the President for second appeal which does not include collection of new evidence, his presence was not necessary. His appeal grounds were submitted and considered. The decision of the President was based on inquiry report whose members are appointed in accordance with Regulation No. 17 of the Teachers Service Regulation which reads; -(1) A public servant shall not be appointed to be a member of an inquiry committee unless he is-

- (a) in the Senior Grade and above;
 - (b) of a rank higher than the rank held by the accused teacher.
- (2) The inquiry committee referred to under these Regulations shall consist of not more than four and not less than two members.
- (3) In appointing members of the Inquiry, the disciplinary authority concerned shall ensure that it consists of at least one man and one woman. Based on the above quoted provision, the argument that the Inquiry committee was composed of Legal Counsel and Senior Officers from the Office of the Attorney General who by law are allowed cannot be entertained. There were other members as well like Bi Bernadetha Thomas who was the Education Officer as well as Salvatory Kaiza from President's Office Civil Service who in my view were of a "rank higher than the rank held by the accused teacher." There was compliance with the law which from its wording, does not prohibit lawyers to be members of the Inquiry Committee. I therefore find no merit in the second ground. In the third ground, a complaint is on the Inquiry committee report that it failed to consider aggravating factors for his absence in that he was a representative of workers who was denied leave without pay and the like. The reasons for his dismissal were clearly stated that he was found guilty of the offence of absence from work. Even charge on the issue of insubordination the applicant was heard and decision reached thereon. This argument I am convinced was considered. It cannot remedy a misconduct where as in this case insubordination and absence from work were proved after according him the right to be heard (see annexure ETO 20,23,25 and a letter he defied after expiry of the three years leave of absence without pay Ref. No. TSC/C/0.1409/22 OF 05/2/2020). 22 Therefore, the President's decision was in accordance with the law. I find no merit in the third ground as well. On the fourth ground that the terms of reference did not include his defence as argued by the applicant, I have this

to say. The terms of reference as submitted by Mr. Nyakiha was the Inquiry Report. The Applicant was notified charges against him and he was accorded an opportunity to respond. The argument that some documents were not made available to him for his defence is with due respect an afterthought. To conclude, the applicant assumed a misconception that being elected as a Deputy Secretary General presupposes that he was not under the instructions of his employer. Therefore failing to abide to the instructions like choosing either to opt for that job or return to his employer and then failing to report without good cause must be sanctioned. The termination was the ultimate result of 'absenting from work and insubordination. All the procedures including knowing the charge he was facing and right to be heard, were followed to the letter. The international covenants are only guidelines but cannot derogate the known principle of employer's right to hire and fire by a pretext of immunity. The constitution of the United Republic of Tanzania was also abided to. 23 For the reasons above stated, I find no merit in this application for review. This court will therefore neither issue certiorari nor set aside the decision of the President which I find was legal. The applicant has failed to meet the required test for judicial review as well stated in the case of Sanai Murumbe & Another v Muhere Chacha (supra). That said and done, application stands dismissed with no order as to costs. Dated at Dar es Salaam, this 17th day of February, 2023. ,/VM. 6. MZUNA, 24

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