IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., SEHEL, J.A., And KAIRO, J.A.)

CIVIL APPLICATION NO. 350/01 OF 2022

ABDALLAH A. MOHAMED & 1,133 OTHERS ..... APPLICANTS

VERSUS

THE HONOURABLE ATTORNEY GENERAL ..... FIRST RESPONDENT

THE BOARD OF TRUSTEES OF PUBLIC SERVICE

SOCIAL SECURITY FUND ..... SECOND RESPONDENT

(Application for review from the Judgment of the Court of Appeal of Tanzania at Dar es Salaam)

(Msoffe, Rutakangwa And Kalegeya, JJ.A)

dated the 11th day of September, 2007
in
Consolidated Civil Appeals No. 105 and 81 of 2015

.....

RULING OF THE COURT

9th & 30th November, 2022

NDIKA, J.A.:

The applicants seek a review of the judgment of the Court dated 11th September, 2007 in Consolidated Civil Appeals No. 105 and 81 of 2015. In essence, they fault the said judgment pursuant to rule 66 (1) (a) and (e) of the Tanzania Court of Appeal Rules, 2009 ("the Rules") on the grounds that it was based on a manifest and palpable error on the face of the record and that it was procured illegally. To elaborate the said grounds, Mr. Eric Mora

Magige, learned counsel for the applicants, swore an affidavit. In opposition to the application, the respondents lodged an affidavit sworn by Mr. Nicander Kileo, learned Principal State Attorney.

To appreciate the context in which this matter has arisen, we provide a brief background to the dispute.

The applicants were employed by several organizations in the country. As part of their respective contracts of service, their employers were required to remit contributions to the Parastatal Pensions Fund ("the PPF") a part of which had to be deducted from each employee's monthly salary. The PPF scheme was intended to provide the covered employees with social security benefits upon retirement in accordance with the provisions of the Parastatal Pensions Act No. 14 of 1978 ("the Act"). In the course of time, section 26 (2) (a) and (b) of the Act was amended by section 9 of the Parastatal Pensions (Amendment) Act No. 25 of 2001 by introducing a new element to the effect that:

> *"... no pension shall be payable:*
>
> *(a) to a member unless he has attained the age of fifty years and has retired from service; or*

(b) to a member who has retired from service and is on receipt of monthly pension until he has attained the age of fifty-five."

Resenting the said amendment, the applicants petitioned the High Court of Tanzania, Main Registry vide Miscellaneous Civil Cause No. 76 of 2003 for a declaration that section 26 (2) of the Act, as amended, was unconstitutional for violating the basic rights guaranteed under Article 23 (1) and (2) of the Constitution of the United Republic of Tanzania, 1977 ("the Constitution") and for abrogating the constitutional principle of the rule of law. The petition was particularly anchored on three grounds that section 26 (2) of the Act is:

(a) patently unreasonable as it abridges the applicants' constitutional rights of receiving just and favourable dues out of their labour;

(b) unconstitutional for it abridges what is guaranteed under the Constitution that labour alone creates the material wealth of human society, is the only source of well-being of the people and the measures of human dignity; and

(c) unfair and unconstitutional for operating retrospectively contrary to the constitutional principle of the rule of law.

A full bench of the High Court heard the matter and concluded that section 26 (2) (a) of the Act met all the tests set by this Court in **Director of Public Prosecutions v. Daudi Pete** [1993] T.L.R. 22 and **Kukutia ole Pumbun & Another v. Attorney General & Another** [1993] T.L.R. 159 and, therefore, it was not unconstitutional. However, section 26 (2) (b) was not spared as the High Court observed, among others, as follows:

> *"... We find this part of the amendment to have a retrospective effect. As seen above the subsection affects people who are already on receipt of and enjoying monthly pension lawfully earned. We think this is a right capable of being protected under Article 23 (1) and (2) of the Constitution which provides for just remuneration for work done ....*
>
> *"It is a celebrated, age-long firmly established rule of interpretation that no enactment can take away rights of an individual."*

The High Court, then, referred to several authorities and took the view that retrospective application of a statute is generally not favoured; and that the established rule of statutory construction is that a retrospective operation is not to be given to a statute to impair an existing right or obligation. In the premises, the court declared section 26 (2) (b) of the Act, as amended,

unconstitutional. Pursuant to Article 30 (5) of the Constitution and section 13 (2) of the Basic Rights and Duties Enforcement Act, Cap. 3 R.E. 2002, the said court directed the Attorney General to cause the offensive provision to be removed from the statute within six months from 30th March, 2005, the date on which it handed down its ruling.

Being aggrieved, both the Board of Trustees of the Parastatal Pensions Fund and the Attorney General appealed separately to this Court vide Civil Appeal No. 81 of 2006 and Civil Appeal No. 105 of 2006 respectively. The appeals were consolidated and determined as one appeal on a sole ground of appeal faulting the High Court for holding that section 26 (2) (b) of the Act, as amended, violated Article 23 (1) and (2) of the Constitution. For ease of reference, Article 23 provides in Swahili as follows:

> *"**23**.-(1) Kila mtu, bila ya kuwapo ubaguzi wa aina yoyote, anayo haki ya kupata **ujira** unaolingana na kazi yake, na watu wote wanaofanya kazi kulingana na uwezo wao watapata malipo kulingana na kiasi na sifa za kazi wanayoifanya.*
>
> *(2) Kila mtu anayefanya kazi anastahili kupata malipo ya haki."* [Emphasis added]

The above text can be loosely translated as follows:

> *"**23**.-(1) Every person, without discrimination of any kind, is entitled to **remuneration** commensurate with his work, and all persons working according to their ability shall be remunerated according to the measure and qualification for the work.*
>
> *(2) Every person who works is entitled to just remuneration."* [Emphasis added]

In determining the appeal, this Court construed the controlling words, *"ujira"* under Article 23 and *"pension"* under section 26 (2) (b) of the Act, in their natural and ordinary meaning. The Court concluded that Article 23 guarantees the protection of *"ujira"* but not *"pension."* We think it would be instructive to let the relevant part of the Court's judgment speak for itself:

> *"From the above definitions two points occur to us. **One**, 'ujira' in the context of **Article 23 (1)** means a salary. And a salary is the sort of payment which is usually paid monthly by an employer to an employee. **Two**, 'ujira' and 'pension' mentioned under **section 26 (2) (b)** do not mean one and the same thing. These are different kinds of payments. **Whereas 'ujira' is a salary paid to someone who is in active employment, a pension is a payment made to an ex-employee.**"* [Emphasis added]

Consequently, the Court held that the High Court erred in finding that section 26 (2) (b) infringed Article 23 because the said provision, as amended, did not abrogate the applicants' right to *"ujira"* or remuneration under Article 23 in any way.

The Court noted that the High Court arrived at the erroneous decision based on the retrospectivity of the impugned provision because it resorted to the rules of statutory construction, which should not have been invoked. Such rules, the Court stressed, need not be resorted to where the provisions of a statute are plain and unambiguous. On that basis, the Court observed that the retrospectivity of the disputed provision was not the crucial and momentous issue that the High Court had to deal with.

As pointed out at the beginning, the instant application is grounded on two complaints, which we reproduce as follows:

1. *That the decision of this Honourable Court is tainted by an apparent error on the face of the record that the Court ignored or abandoned the very crucial point of law subject of deliberation and discussion before the High Court, that is, the retrospectivity of section 26 (2) (b) of the Parastatal Pensions Act No. 14 of 1978 as amended by*

the Parastatal Pensions (Amendment) Act No. 25 of 2001, which this Court adjudged to be not the crucial and momentous issue to be dealt by the High Court at the material time.

2. *That the decision of this Court was illegally procured when it treated more than one separate issue to be one and proceeded to determine an issue which was not brought before it.*

At the hearing of this matter, Mr. Magige appeared for the applicants together with Mr. Charles Leonard Yotham, learned counsel. The respondents, on the other hand, had the services of Messrs. Andrew Rugarabamu and Nicander Kileo, learned Principal State Attorneys, along with Ms. Nyambilila Ndoboka, learned Senior State Attorney, and Mr. Rashid Mohamed, learned State Attorney.

Before we delve into the substance of the application, we wish to place two preliminary matters on record. First, ahead of the hearing we granted the applicants' unopposed prayer for addition of 115 persons who were respondents in Consolidated Civil Appeals No. 105 and 81 of 2015 but were not parties to this matter at the time. Accordingly, by our order the said persons were cited as applicants, raising the number of applicants to 1,134.

Secondly, it is necessary to note that the Board of Trustees of Public Service Social Security Fund, the second respondent herein, is cited in the place of the defunct Board of Trustees of the Parastatal Pensions Fund as a successor in accordance with section 85 of the Public Service Social Security Act, No. 2 of 2018.

Adverting to the substance of the application, we address the first ground. In his written submissions, Mr. Magige contended for the applicants that the Court wrongly ignored or abandoned the question of the retrospectivity of section 26 (2) (b) of the Act as amended, which he claimed to be the crucial point in determining the constitutionality of the said provision. In supporting his argument, he referred us to **Makorongo v. Consigilio** [2005] 1 EA 247 where we held that unless there is a clear indication either from the subject matter or from the wording in an Act of Parliament, that Act should not be given a retrospective construction. He maintained that unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute to take away, alter or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure. We understood him to mean that the impugned amendment was

unconstitutional because by operating retrospectively it took away or impaired the applicants' earned benefits.

Mr. Rugarabamu fully supported the Court's judgment. He sturdily argued that the retrospectivity of the disputed provision was not a factor in determining its constitutionality. The main question, he contended, was whether the impugned provision contravened the applicants' right to commensurate remuneration for their labour. He postulated that the applicants' quest for review was actuated by their disagreement with the view of the Court on the appeal. On the authority of, among others, **Majid Goa @ Vedastus v. Republic**, Civil Application No. 11 of 2014 (unreported), he submitted that disagreement or disaffection with the Court's opinion cannot be a legal basis for review.

As a starting point, it is logical and convenient to state that the Court is vested with power under section 4 (4) of the Appellate Jurisdiction Act, Cap. 141 to review its decisions to correct certain errors. The said power is exercisable only upon the grounds stipulated by rule 66 (1) of the Rules:

> *"**66**.-(1) The Court may review its judgment or order, but no application for review shall be entertained except on the following grounds –*

(a) the decision was based on a manifest error on the face of the record resulting in the miscarriage of justice;

(b) a party was wrongly deprived of an opportunity to be heard;

(c) the court's decision is a nullity; or

(d) the court had no jurisdiction to entertain the case;

(e) the judgment was procured illegally, or by

fraud or perjury."

It is evident that the first complaint that the impugned judgment contains a manifest and palpable error fits neatly within rule 66 (1) (a).

What does the phrase "a manifest error on the face of record resulting in miscarriage of justice" mean? It is an issue we have confronted on many occasions. In **Chandrakant Joshubhai Patel v. Republic** [2004] T.L.R. 218 at 225, we examined several authorities on the matter and adopted from **Mulla on the Code of Civil Procedure** (14 Ed), at pages 2335 – 2336, the following abridged description of that term:

"An error apparent on the face of the record must be such as can be seen by one who runs and reads, that is, ***an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions:*** *State of Gujarat v. Consumer Education and Research Centre (1981) AIR GUJ 223] ...* ***Where the judgment did not effectively deal with or determine an important issue in the case, it can be reviewed on the ground of error apparent on the face of the record*** *[Basselios v. Athanasius (1955) 1 SCR 520] ... But it is no ground for review that the judgment proceeds on an incorrect exposition of the law [Chhajju Ram v. Neki (1922) 3 Lah. 127]. A mere error of law is not a ground for review under this rule. That a decision is erroneous in law is no ground for ordering review: Utsaba v. Kandhuni (1973) AIR Ori. 94. It must further be an error apparent on the face of the record. The line of demarcation between an error simpliciter, and an error on the face of the record may sometimes be thin.* ***It can be said of an error that it is apparent on the face of the record when it is obvious and self-evident and does***

> ***not require an elaborate argument to be established*** *[Thungabhadra Industries Ltd v. State of Andhra Pradesh (1964) SC 1372].* [Emphasis added]

See also the decisions of the Court in **Mashaka Henry v. Republic,** Criminal Application No. 2 of 2012; **P.9219 Abdon Edward Rwegasira v. The Judge Advocate General,** Criminal Application No. 5 of 2011; and **Jayantkumar Chandubhai Patel and 3 Others v. The Attorney General and 2 Others**, Civil Application No. 160 of 2016 (all unreported).

Guided by the standpoint in **Chandrakant Joshubhai Patel** (*supra*), we ask ourselves, at first, whether the Court was wrong in discounting the retrospectivity of the impugned provision as a crucial and momentous issue. With respect, we are unpersuaded that the Court's holding was erroneous. In determining the constitutionality of the disputed provision, the Court rightly construed the controlling words, *"ujira"* under Article 23 and *"pension"* under section 26 (2) (b) of the Act, in their natural and ordinary meaning. The Court concluded, rightly so, that Article 23 guarantees the protection of a person's entitlement to just remuneration for his labour (*ujira*) and that *"pension"* is not protected thereunder. By way of emphasis, the Court differentiated *"ujira"* protected under Article 23 and *"pension"* governed by

section 26 (2) (b). That, whereas *"ujira"* is paid to someone in active employment for his labour, a pension is a payment made to an employee who has retired from service. Thus, by imposing a new qualification for entitlement to pension in the scheme as being a member of the fund who has retired from service and has attained the age of fifty-five, section 26 (2) (b) did not abrogate the applicants' right to *"ujira"* guaranteed under Article 23.

We agree with Mr. Rugarabamu that the Court rightly discounted the retrospectivity of the impugned provision as the basis of its constitutionality (or unconstitutionality). For its constitutionality depended on whether it abrogated the applicants' guaranteed right to *"ujira"* under Article 23. At any rate, Article 23 does not impose any restriction on retrospectivity of any law.

Moreover, it is logical that the rules of statutory construction on the presumption for or against retrospectivity of any statute would not apply where a statute explicitly indicates that a particular provision would have a retroactive effect as was the case with section 26 (2) (b) of the Act. On this basis, the Court quite fittingly censured the High Court's improper application of the said rules as the basis for its holding. In the premises, we maintain our view that section 26 (2) (b) did not infringe Article 23 in any way.

Consequently, we are firmly decided that the applicants have failed to show that the impugned judgment contains on its face any obvious, self-evident error let alone one that has occasioned miscarriage of justice. The first ground falls by the wayside.

The complaint in the second ground is essentially an offshoot of the first ground. It is contended that the impugned judgment was illegal because the allegedly crucial issue of retrospectivity of section 26 (2) (b) of the Act was not dealt with and determined and that, instead, a different issue was raised and determined. When pressed by the Court to demonstrate the alleged illegality of the impugned decision, Mr. Magige referred us to the supporting affidavit. In rebuttal, Mr. Rugarabamu, rather tersely, posited that on the face of the record, there is no basis for the claim that the impugned judgment was procured illegally.

We hinted earlier that the complaint at hand is pegged on rule 66 (1) (e) of the Rules sanctioning review of any decision or order of the Court on the ground that it was procured illegally. The Rules do not define the phrase "procured illegally", but as we observed in **Sabato Thabiti & Another v. Republic**, Criminal Application No. 17/04 of 2020 (unreported), the said expression, in its plain and ordinary meaning, signifies a judgment that was

obtained in a way or manner that it is contrary to or forbidden by law. In this sense, the focus is not on the merits of the judgment itself but on the alleged illegality or irregularity in the steps that culminated in the judgment being given or made.

With much respect, it is neither demonstrated in the supporting affidavit nor shown in Mr. Magige's submission that the impugned judgment was obtained illegally or irregularly. The alleged illegality, in our view, appears to be a claim founded on a misconception of the law, if not a spurious allegation made offhandedly. Even if it were assumed for the sake of argument that the Court failed to effectively deal with and determine the question of the retrospectivity of the impugned provision, that would not have amounted to an illegality or irregularity in the determination of the appeal but an error of law. Since the Court was properly seized with the jurisdiction over the matter, that it was properly constituted and that it determined the appeal after it had fully heard the parties on all matters at issue, we hold that the grievance at hand is fanciful, if not thoughtless. We dismiss it.

In conclusion, we hold, as we hereby do, that the applicants have failed to demonstrate that the impugned judgment contains on its face an obvious

and palpable error, nor have they shown that the said judgment was procured illegally. In the event, we dismiss the application. Given the nature of this dispute, we make no order as to costs.

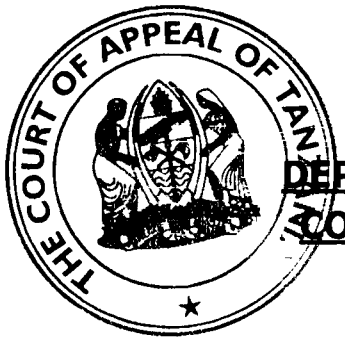
DATED at **MWANZA** this 28th day of November, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

L. G. KAIRO
JUSTICE OF APPEAL

The Ruling delivered on 30th day of November, 2022 in the presence of the Mr. Eric Magige, learned counsel for the applicant and in absence of the respondent via video link, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COUTY OF APPEAL