IN THE COURT OF APPEAL OF TANZANIA

AT MWANZA

(CORAM: NDIKA, J.A., KITUSI, J.A. And MAIGE, J.A.)

CIVIL APPEAL NO. 369 OF 2019

1. THE INSPECTOR GENERAL OF POLICE
2. THE ATTORNEY GENERAL } **.....APPELLANTS**

VERSUS

EX- B 83565/SGT SYLIVESTER NYANDA.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Mwanza)

(Gwae, J.)

dated 17th day of June, 2015

in

Civil Case No. 10 of 2004

.....

JUDGMENT OF THE COURT

2nd & 05th December, 2022.

KITUSI, J.A.:

The respondent was an employee of the Police Force, hereafter referred to as, the Force. After 28 years of service when he had reached the rank of Station Sergeant and stationed in Mwanza, the Regional Police Commander dismissed him from the Force. It was after conducting a hearing under the procedure obtaining in the Force. The respondent's appeal to the Inspector General of Police (IGP), the first

appellant, was unsuccessful. He decided to invoke the court's jurisdiction by filing Civil Case No. 10 of 2004, the subject of this appeal.

At the High Court, the respondent pleaded that his dismissal from the Force was unlawful and prayed the court to declare so. He also prayed to be granted specific and general damages. He was successful. First, the High Court declared the termination unlawful holding the first appellant's decision to be *ultra vires*. Secondly, it granted him specific and general damages, the details of which are not of immediate relevancy.

The appellants seek to challenge that decision through a memorandum of appeal comprising of 5 grounds of appeal.

In terms of background to the matter, there is no dispute that the respondent was suspected to have assaulted a fellow police officer as a result of which disciplinary proceedings against him were preferred. These culminated into his dismissal from the Force, as already alluded to. Subsequently, he was charged in court along with two others, vide Criminal Case No. 199 of 1998. However, the charges against him were withdrawn by a *nolle proseque*, although the case proceeded in respect of the other accused. These were also acquitted, in the end.

So, the respondent's chief complaint as pleaded at paragraph 7 of the plaint was:-

> *"That the first defendant's decision to dismiss the plaintiff from the military police force before and or after the court's decision of "acquittal and nolle" was incompetent, irrational unfair, ultra vires and or unreasonable due to the fact that the plaintiff was innocent of all the frivolous and vexatious criminal charges the first defendant's agents had fabricated against the plaintiff".*

In 5 of the joint written statement of defence, the appellants responded to the complaint in paragraph 7 as follows: -

> *"That the contents of paragraph 7 of the plaint are totally denied and the defendants state that the plaintiff has misconceived them. The defendants further state that the dismissal was based on the findings of martial court (disciplinary board) of the police force and not proceedings referred to by the plaintiff".*

During the trial, two main issues were agreed for the determination by the court, namely whether the dismissal from the Force was unlawful and secondly, whether the first appellant acted *ultra*

vires in dismissing the respondent. We pause here to observe that the two issues would essentially mean one and the same thing, in our view.

At the High Court, the respondent adduced evidence mainly to demonstrate his innocence in respect of the criminal charges that had been levelled against him. He stated that the charges were borne out of ill will. In his testimony, the respondent showed that he is aware that on 19/03/1994 John Bugombe a police officer, was assaulted. Prior to that according to him, there had been a brawl between him (respondent) and another police officer known as PC Abel, resulting in the latter insulting him. According to the respondent, the bruised relationship between him and PC Abel caused the latter to falsely report that the assault on John Bugombe had been perpetrated by him, the respondent. One Athumani Hussein Makinda (PW2) also a police officer, supported the respondent that the naming of him as the culprit was ill-motivated.

In defence, Salum Ally (DW1) who was the Public Prosecutor in the criminal case against the respondent, stated that the criminal charge had been preferred against him after the Court Martial had already convicted him and dismissed him from the Force. DW1 stated that the respondent ought to have appealed to higher authorities to challenge the decision of the Court Martial. Inspector Deus Shatta (DW2)

supported DW1's testimony and further testified that the respondent's appeal to the IGP was not successful and also that his acquittal in the court of law did not affect the finding of guilt by the Court Martial.

The learned trial judge, Gwae, J. castigated the decision of the first appellant dismissing the respondent because, he said, it proceeded from a complaint that had not been meticulously investigated. The learned judge took the view that the proceedings of the Court Martial should have been produced in court by the appellants; "*.....so that the same could be ascertained and objectively assessed....*".

Given that approach, the decision of the first appellant could not survive the learned judge's scrutiny. He declared it unlawful and *ultra vires.*

One of the grounds of appeal presented by the appellants seeks to challenge the decision of the High Court for having been made by a judge who took over the case from another judge without observing the procedure. Although this ground was abandoned by Ms. Irene Lesulie, learned Principal State Attorney who prosecuted the appeal along with Mr. Lameck Merumba, learned Senior State Attorney, it gives us a clue of what transpired before Gwae, J. took over the case. We think it is not irrelevant to briefly refer to it.

The respondent's case had earlier proceeded before Sumari, J. who recorded the evidence of witnesses for both sides. On 27/03/2014, the learned judge ordered that she would deliver judgment on 15/04/2014, and she lived up to her promise. However, in her judgment, the learned judge dismissed the suit because in the course of composing the judgment, she addressed an issue whether her court had the requisite jurisdiction. Her conclusion was that the High Court had no jurisdiction, hence the dismissal of the suit.

In Civil Appeal No. 64 of 2014 that was preferred by the respondent against the decision of Sumari, J., the Court nullified and quashed that judgment basically because the learned judge disposed of the suit on a point she raised *suo motu* without hearing the parties. It set aside the dismissal order and went on to order as follows: -

> *"We remit the record to the High Court with a direction to continue with the conduct of the case/proceedings as from where it ended on 27/03/2014 before a different judge".*

Thus, the matter was placed before Gwae, J. who wrote the judgment now under discussion. It did not occur to the learned judge that he could first satisfy himself on whether he had the jurisdiction or not, although on 17/06/2015 he took what looked like additional

evidence from the respondent on his age for the purpose of retirement and on his monthly salary.

Before us, the respondent appeared in person to oppose the appeal. By a prior notice, he raised a cross appeal consisting of two grounds of complaint which he sought to address on in the course of opposing the main appeal. We endorsed that scheme.

However, feeling that the issue of jurisdiction still needed to be addressed, we called upon both sides to address it in the course of arguing the appeal and the cross appeal. It is a long-established principle that the issue of jurisdiction may be raised at any time.

On the issue of jurisdiction, Ms. Lesulie submitted that disciplinary proceedings of members of the Force and appeals therefrom are governed by the Police Force and Prison Service Commission Act, 1990 (the Act) and the Police Force Service Regulations, GN. No. 193 of 1998 made under section 22 of the Act. She argued that the High Court had no jurisdiction to entertain the suit aimed at challenging the decision of the first appellant because under section 7 (5) of the Act, the Inspector General of Police is the final disciplinary authority in respect of Force.

The learned Principal State Attorney concluded by submitting that the respondent ought to have proceeded by way of judicial review if he

was still aggrieved by the first appellant's decision. She invited us to invoke rule 4 (2) of the Appellate Jurisdiction Act, Cap 141 (the AJA), to nullify the proceedings and quash the judgment as well as set aside the orders.

The respondent was rather blunt in his submission, naturally because he was unrepresented, so he just insisted that the High Court had jurisdiction to entertain the suit. He could not help reminding us the protracted nature of this litigation, which sentiments we readily share. Yet the question of jurisdiction, being so fundamental, has to be considered first. Perhaps, if this had been properly addressed from the beginning, matters would have taken a different course. We reiterate what the Court stated in **Fanuel Mantiri Ng'unda v. Herman Mantiri Ng'unda & 2 Others** [1995] TLR 155: -

> *"The question of jurisdiction for any court is basic, it goes to the very root of the authority of the court to adjudicate upon cases of different nature. In our considered view, the question of jurisdiction is so fundamental that the courts must as a matter of practice on the face of it be certain and assured of their jurisdictional position at the commencement of the trial. This should be done from the pleadings. The reason for this is*

that it is risky and unsafe for the court to proceed with the trial of a case on the assumption that the court has jurisdiction to adjudicate upon the case. For the court to proceed to try a case on the basis of assuming jurisdiction has the obvious disadvantage that the trial may well end up in futility as null and void on grounds of lack of jurisdiction when it is proved later as matter of evidence that the court was not properly vested with jurisdiction".

We begin by appreciating that jurisdiction is a creature of the statute, and a bedrock of the court's authority. See, The **National Bank of Commerce Limited v. National Chicks Corporation Limited. & 4 Others**, Civil Case No. 129 of 2015 and **Tanzania Revenue Authority v. Tango Transport Company Ltd.**, Civil Appeal No. 84 of 2009 (both unreported). In this case, the question was, and still is, what recourse was the respondent supposed to take after his appeal against the Court Martial's decision had been dismissed by the IGP?

We wish to observe that, although that question was not expressly raised at the trial, it could be inferred from the apparent theme of the defence case. For instance, when the respondent (PW1) was being cross examined by a State Attorney, he responded: -

"When a police officer is found guilty by court martial, he is discharged from duty. I was discharged as a result of my conviction by the court martial. If a police officer is not satisfied with the decision of the IGP, he can appeal in ordinary court - that is what I did".

And when cross examined by the respondent, DW2 stated the following at page 97 of the record:-

"If you are not satisfied, you can appeal to the IGP or you seek certiorari from the High Court".

Had Gwae, J. addressed his mind to these testimonies, he would probably have reopened the issue of jurisdiction and may be, he would not have proceeded with the determination of the case on the merits.

We say so because apart from the clear indication by the defence in the excerpts reproduced above, that the course taken by the respondent was misconceived, when a number of legislations on disciplinary proceedings in the Force are considered, it becomes clear that the jurisdiction of the ordinary court is ousted.

The first point of reference is section 7 (5) of the Act, which Ms. Lesulie referred us to. It provides in very certain terms:-

"The final disciplinary authority in respect of Police and Prison Officers below the rank of Assistant Inspector is vested in the Inspector General of Police and the Principal Commissioner of Prisons respectively".

The other legislation is the Police Force Service Regulation, GN. No. 193 of 1998 also cited to us by the learned Principal State Attorney. Regulation 18 (3) provides:-

"(3) Any non-commissioned officer or constable aggrieved by any finding of an appropriate tribunal or any award of an appropriate tribunal or a Commanding Officer may, within seven days of the notification to him thereof, appeal to the Inspector General in writing and the Inspector General may confirm or vary any finding of the appropriate tribunal or substitute thereof any finding at which the appropriate tribunal or Commanding Officer could have arrived upon the evidence, including any additional evidence which the Inspector General, in his discretion, admits at the hearing of the appeal, and may confirm or remit any punishment imposed by the appropriate tribunal or a Commanding Officer or may substitute therefore any punishment which the tribunal or such officer could have imposed,

and in all such cases the decision of the Inspector General shall be final".

We have also considered the provisions of the Police Force and Auxiliary Services Act, Cap 322. Section 56 of Cap 322 provides that the final disciplinary authority shall be the Minister responsible for matters relating to the Force.

Although there is no harmony between the first two pieces of legislation on the one hand and the latter legislation on the other, the difference being that the first two provide that the Inspector General of Police is the final authority while the latter provides that it is the Minister, none of the legislations provides for the aggrieved officer to resort to the court by way of an ordinary suit, as it was done in the instant case.

To digress a little, in the written submissions that were presented by the respondent in opposition of the main appeal, he cited Rule 24 (3) of the Labour Institutions (Mediation and Arbitration Guidelines) Rules, 2007, GN. No. 67 of 2007 to support his argument that the burden of proof rested on the employer's shoulders. There could be no better proof of misconception in our view because for one, this was not a labour matter, and for another, the Force is excluded from the

application of labour law regime by section 2 (1) (ii) of the Employment and Labour Relations Act. We think the intention of the legislature in ousting the jurisdiction of ordinary courts in matters touching on the Force, is all the more clearer.

Since jurisdiction is conferred by statute as earlier stated, and none of the three statutes or any other confers the trial court with jurisdiction, the learned trial judge erred in assuming that he had it.

We have consistently maintained the position that "...*where the law provides for a special forum, ordinary civil courts should not entertain such matters".* See, **Elieza Zacharia Mtemi and 12 Others v. The Attorney General and 3 Others,** Civil Appeal No. 177 of 2018 and **Commissioner General Tanzania Revenue Authority v. JSC Atomredmetzoloto (ARMZ)** Consolidated Civil Appeals Nos. 78 & 79 of 2018 (both unreported).

All said, it is our considered finding that the respondent misconceived in believing that he could appeal to the High Court against the decision of the IGP, and the learned judge slipped into the error of assuming that, sitting as an ordinary civil court, he had the powers of subjecting that decision to scrutiny.

It is our considered view that the issue of jurisdiction disposes of the matter. Having concluded that the High Court had no jurisdiction to entertain the suit, we invoke our revisional powers as proposed by Ms. Lesulie. Under section 4 (2) of the AJA, we nullify the proceedings, quash the judgment and set aside the orders resulting therefrom.

In the peculiar circumstances of this matter we do not order costs.

DATED at **MWANZA** this 03rd day of December, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 05th day of December, 2022 in the presence of Ms. Sabina Yongo, learned State Attorney for the Appellants and Respondent present in person, is hereby certified as a true copy of the original.

C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL