**IN THE COURT OF APPEAL OF TANZANIA**
**AT DAR ES SALAAM**
**(CORAM: MUNUO, J.A., OTHMAN, J.A., And MJASIRI, J.A.)**
**CIVIL APPEAL NO. 27 OF 2010**

1. CLEOPHAS M. MOTIBA
2. FRANCIS MUTASHUBIRWA
3. EPHRAIM MWALUKUTA
4. H.M. STANLEY
5. STEPHEN NSHEMETSE
6. JUVENAL NSANANIYE
7. JUMA DINGUMBI

..... APPELLANTS

**VERSUS**

1. THE PRINCIPAL SECRETARY, MINISTRY OF FINANCE
2. THE ATTORNEY GENERAL
3. TANZANIA REVENUE AUTHORITY

.....RESPONDENTS

**(Appeal from the Judgment and Decree of the High Court of Tanzania at Dar es Salaam)**

**(Mihayo, J.)**

**(dated the 15th day of September, 2009**
**In**
**Civil Case No. 361 of 1999**

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**JUDGMENTOF THE COURT**

8th OCTOBER, 2010 & 7th January, 2011

**OTHMAN, J.A.:**

On 15.09.2009, the High Court (Mihayo, J.) in Civil Appeal No. 361 of 1999 dismissed with costs the claim by the appellants (Cleophas Motiba; Francis Mutashubirwa, Ephraim Mwalukuta, H.M. Stanley, Stephen Nshemetse, Juvenal

Nsananiye and Juma Dingumbi) which, *inter alia,* had sought a declaration that (a) their retirement in public interest was unlawful, (b) that in the eyes of the law they were and continued to be in the service of the respondents (The Principal Secretary, Ministry of Finance (hereinafter referred to as M.O.F), The Attorney General and the Tanzania Revenue Authority (hereinafter referred to as T.R.A) respectively, the 1st, 2nd and 3rd respondents. Aggrieved, they preferred this appeal on 11.05.2010.

At the hearing of the appeal on 8.10.2010, Mr. Barnaba Luguwa, learned Counsel represented the appellants. The 1st and 2nd respondents were represented by Ms. Sia Mrema, learned Senior State Attorney and the 3rd respondent was represented by Mr. Juma Beleko, learned Counsel.

The background leading to this appeal was this. The appellants were at different times employees of the M.O.F. serving in its revenue departments. On 30.6.1996 they were

removed in public interest under section 19(3) of the Civil Service Act, No. 16 of 1989. This they claimed was unlawful as it was made by an incompetent authority (i.e the 1st and 2nd respondents), who had afforded no reasons and constituted punishment. They further claimed that by then they were all employees of the T.R.A., their revenue departments at the M.O.F. having been converted into a government agency.

On their part, the respondents' position was that the appellants were removed in public interest by a competent authority and in accordance with the law. T.R.A disowned the appellants as its employees or that it had been involved in that exercise. To the respondents, the appellants were at all times civil servants and employees of the M.O.F.

In its judgment delivered on 15.09.2009 the High Court (Mihayo, J.) held that the appellants were never employees of T.R.A., which had become operational on 1.7.1996. They had not been automatically assimilated into T.R.A under the terms of **Waraka wa Utumishi Na. 7 wa mwaka 1995**, i.e.

Establishment Circular No. 7 of 1995 governing employees transfered from a government department to a governmental agency. It found out that the appellants had remained employees of the M.O.F. and had been properly removed in public interest by the President under Section 19(3) of the Civil Service Act.

Having carefully considered the entire record, the parties elaborate submissions and the interconnection between the ten grounds of appeal, it is convenient we think that some of the grounds of appeal be consolidated.

We begin with grounds 1 and 2 of the appeal. The first faults the High Court's holding that T.R.A was not operational on 7.8.1995, the date the Tanzania Revenue Authority Act, No. 11 of 1995 (G.N. No. 419 of 1995) came into effect but on 1.7.1996. The second challenges the learned Judge's refusal to interpret clause 11 of the Establishment Circular, which the appellants contended had categorized them as assimilated employees transferred to T.R.A when their

revenue departments at the M.O.F. were converted into a government agency.

Mr. Luguwa vehemently submitted that T.R.A was ready for business on 7.8.1995 as its Commissioners, who constituted its first work force were under section 30(3) of the Tanzania Revenue Authority Act its employees as of that date. It was, he argued, not an empty shell as found by the learned High Court Judge.

Furthermore, he submitted that the trial Court had erred in its finding that the effective date the T.R.A. came in force had not made the appellants its automatic employees. They were, he stressed, employees of T.R.A. having been absorbed and transferred to it from the M.O.F. under clause 11 of the Establishment Circular. That initiative came from the M.O.F. At T.R.A., they did not undergo any probation. He relied on **Stella Temu V. Tanzania Revenue Authority,** Civil Appeal No. 72 of 2002 (C.O.A) (unreported).

For the 1st and 2nd respondents, Ms. Mrema resisted the appeal. She acknowledged that the T.R.A. Act came into

effect on 7.8.1995. However, she disagreed that it was operational as of that date. T.R.A. could not operate without the appointment of its Board on 20.8.1995. It was the Board, which under section 20(1) of the Tanzania Revenue Authority Act had the power to appoint staff. Thus, it became operational after 7.8.1995. Not on that date.

Ms. Mrema submitted that the appellants were not seconded or directly transferred to T.R.A. under the terms of Establishment Circular. No proof such as letters of appointment were furnished to show that they were employees of T.R.A. The Establishment Circular was a general government directive addressed to all Ministries.

Mr. Beleko, subscribing to the 1st and 2nd respondents position added that the appellants had admitted in para. 6 of the plaint that T.R.A. became operational on 01.7.1996. They were bound with what they had pleaded. That DW1 (Ludovic Kandege) who knew T.R.A. from his fingertips had testified that the Board was constituted on 20.8.1995 and held its first meeting on 02.9.1995. He distinguished **Stela Temu's case**

to the present one, as the [illegible]

by T.R.A and the issue there had been non confirmation of her secondment to T.R.A. Here, the appellants had no contracts of employment. They were also in the payroll of the M.O.F. not T.R.A.

In rejoinder, Mr. Luguwa reemphasized that **Stella Temu's case** was relevant much as her position and that of the appellants was not the same. He admitted that they were not seconded. They were directly transferred under clause 11 of the Establishment Circular. He submitted that the issue when T.R.A. became operational could not be taken up afresh as it had already been determined by this Court in Civil Appeal No. 17 of 2003 (C.O.A.) (unreported) between the same parties that it was on 07.8.1995.

One of the key questions that divides the parties and vital to the determination of these grounds of the appeal is whether or not the appellants' employer at the relevant time was T.R.A. or the M.O.F.

In its judgment, the High Court held :

"Although the Authority existed from 7/8/1995, it was an empty shell. It was a bus without passengers and without a driver. The process of operationalization commenced with the appointment of the Board on 20.8.1995 and by 1.07.1996, the Authority was ready to commence business as an Authority" .....

"the plaintiffs were never seconded to T.R.A, and there is no evidence to that effect nor did they automatically become employees of the Authority by operation of clause 11 of the Waraka wa Utumishi Na. 7 wa Mwaka 1995."....

"the plaintiffs remained employees of the Ministry of Finance while doing work that was later taken over by the Authority".....

"Be that as it may, the power to hire is vested in the Board. The Board only came in after the effective date. The plaintiffs have no letter of employment from the

Board. They remained the employees of the Government". They were never employed by the Authority".

The appellants' firm position is that they were under clause 11 of the Establishment Circular, T.R.A employees by direct transfer from the MOF to T.R.A when their departments were converted into that government agency.

The relevant part of clause 11 of the Establishment Circular reads:

> **"11. Utaratibu wa uhamisho wa moja kwa moja:**
>
> Uhamisho wa moja kwa moja kutoka serikalini kwenda katika shirika la umma hufanyika baada ya mtumishi aliyeazimwa kumaliza muda wake wa kuazimwa kama ilivyoelezwa katika ibara ya 5 hapo juu. Aidha mtumishi anapojiunga na Shirika la Umma kutokana **uteuzi wa Serikali,** mtumishi huyo hujiunga na shirika linalohusika moja kwa moja bila ya kuwa na muda wa majaribio kwanza. Kwa

madhumuni ya waraka huu, **uteuzi wa Serikali ni pamoja na**:

11.1 Uteuzi unaotokana na Idara ya Serikali kugeuzwa kuwa Shirika la Umma"

.....**(Emphasis added).**

Having anxiously considered the matter, with respect, we are unpersuaded that the appellants at the material time were employees of T.R.A. Going by the terms of the Establishment Circular, there are three categories of employees. Those **seconded** (clause 3) (i.e utaratibu wa kuazimwa) or **attachment** (utaratibu wa kushikizwa) (clause 8,) or **directly transferred** (utaratibu wa uhamisho wa moja kwa moja) (clause 11). It is not the appellants' case that they were either seconded or attached to T.R.A.

According to the terms of clause 11 of the Establishment Circular, direct transfer from the Government to a Parastatal Corporation takes place after a seconded employee has completed the period of his or her secondment as provided in

clause 5, or when an employee joins the Parastatal following appointment (i.e. **uteuzi**) by the Government in which case he directly joins the Parastatal without any probationary period. For the purposes of that Circular, appointment by the Government, includes appointment arising from the convertion of a Government department into a Parastatal.

Having combed through the record, there was no evidence that the appellants were the subject of any appointment **(i.e. uteuzi wa serikali)** by the government. Moreover, both PW1 and PW2 had neither letters of appointment from the M.O.F nor from T.R.A. PW2 had no T.R.A. identity card. Both said their salaries were paid by the M.O.F., not T.R.A. The M.O.F. issued PW2's salary slip. We wonder and this was unexplained how the M.O.F. could have payed a staff who was not its employee. The appellants by their own admission also never complained to T.R.A, but to the M.O.F. PW2 said he had no reason for doing so!

Furthermore, **Stella Temu's case**, is clearly distinguishable on its facts and it does not aid the appellants.

She, the Court found, had been seconded to T.R.A. under clause 3 of the Establishment Circular and continued to be an employee of the M.O.F. Her engagement with T.R.A. was not a direct transfer under clause 11, now relied upon by the appellants. She had a letter from T.R.A. (Exh. P1) offering her probationary service. The appellants had none. **Stella Temu's case**, therefore, could not be the horse the appellants could comfortably ride to ground their case.

The appellants argued, in vain, that on the effective date T.R.A. became operational (i.e. 07.8.1995) they had constituted its work force. First, the issue when T.R.A. became operational having been litigated and settled by this Court in Civil Appeal No. 17 of 2003 between the same parties cannot be reagitated anew. The Court held that it came into operation of 07.8.1995, the date of commencement of the T.R.A. Act, as published in G.N. No. 419 of 1995. Second, the mere fact that T.R.A. became operational on 7.8.1995 does not make the appellants its direct employees in the absence of sufficient evidence that they were appointed by the

Government and covered within any of the three categories of employment set out in the Establishment Circular. The trial Court was therefore justified to hold that the effective date of the T.R.A. Act did not make the appellants its automatic employees. We wish to add that on that day they were also not deemed T.R.A. employees as were the M.O.F. Revenue Commissioners under section 20(3) of the T.R.A. Act. When all the material is considered, in our respectful view, the learned judge was entitled to the findings he arrived at. Accordingly, there is no merit in grounds 1 and 2 of the appeal.

Next, we address grounds 5,6,8,9 and 10 of the appeal. The central question that runs through these grounds of appeal is whether or not the appellants were removed in the public interest under section 19(3) of the Civil Service Act in accordance with due process and the law.

Mr. Luguwa emphatically submitted that the decision to remove them in the public interest under section 19(3) of the Civil Service Act was unlawful. The appellants were not civil

servants as defined in section 2 thereof to have been lawfully removed. They were T.R.A. employees. Refering to the **Principal Secretary (Establishment) and The Attorney General v. Hilal Hemed Rashid and Four Others,** Civil Appeal No. 66 of 2002 (C.A) (unreported) he submitted that only public servants can be removed in the public interest. Moreover, the decision was not taken by the rightful authority (i.e. the President) but by an incompetent one. It also constituted a punishment. They had neither been charged with any offence under section 19(1) (a) nor offered an opportunity to answer it under section 19 (2) (b). Relying on **Ikindila Wigal v. R.,** Criminal Appeal No. 60 of 2000 (C.A) (unreported) and **Tanzania Air Service Ltd v. Minister for Labour, The Attorney General and the Commissioner for Labour** [1996]T.L.R. 217 (H.C.) he argued that the appellants had a mandatory right to know the reasons for their removal.

Challenging the removal letters (Exh. P2) dated 25.6.1996, Mr. Luguwa submitted that they ought to have

been written by the hands of the President if he had taken the decision under section 19(3). If at all delegated under section 17, it could only be to the Principal Secretary, not to someone else on behalf of (i.e. k.n.y) the Principal Secretary, such as one Mr. M. Mwanda, who signed the letters on his behalf. It was *ultravires*. The maxim '*delegatus non potest delegare*' prohibited a further sub delegation. He complained that the screening process in the **DOKEZO SABILI** was not conducted by the M.O.F. but by the T.R.A Board under section 5(2) (d) of the T.R.A. Act. It was done secretly without the appellants' involvement.

Ms. Mrema on her part submitted that the decision to remove the appellants was lawfully taken by the President under section 19(3) and as revealed in the **DOKEZO SABILI.** He had endorsed a non binding proposal in that direction from the Principal Secretary, M.O.F. The reasons for the decision were contained in paragraph 1 of the letters. It was to reduce the size of the Government. It was not a punishment. It could only have been one, if the appellants were not paid

their terminal benefits or had been charged and convicted of an offence under the Disciplinary Code. The letters were a legally accepted format for communicating the decision of the President. It's author, one M. Mwanda was not the one who made the decision.

It is critical for the determination of these grounds of appeal for us to reproduce one of the impugned identical letters (Exh. P2) by which the appellants were removed in the public interest under section 19(3) of the Civil Service Act. It reads:

**"JAMHURI YA MUUNGANO WA TANZANIA**
**WIZARA YA FEDHA**

Ndugu C. Motiba
Finance Management Officer – Bukoba
K.K. Kamishna,
Idara ya Kodi ya Mauzo na Kodi za Ndani,
**WIZARA YA FEDHA – DSM**

**KUH: UPUNGUZAJI WA WATUMISHI WA SERIKALI TAREHE 30 JUNI 1990**

**Serikali imeamua kupunguza watumishi wake ikiwa ni njia mojawapo ya kupunguza gharama za uendeshaji wa shughuli zake na kuongeza ufanisi kazini.**

2. Kutokana na uamuzi huo wewe ni mmoja wa watumishi wanaopunguzwa kazini kuanzia tarehe 30 June, 1996 kwa utaratibu wa kustaafishwa kwa manufaa ya umma chini ya kifungu (19(3) cha sheria Na. 16/1989 ya utumishi Serikalini na Kifungu 8(d) cha Sheria ya Pensheni (sura ya 371).
3. **Kwa kutambua utumishi wako, serikali itakulipa haki zako unazostahili kwa kipindi chote cha utumishi wako hadi tarehe 30 June, 1996. Vilevile, serikali itakulipa kifuta jasho kwa kiwango cha mishahara minne kwa kila mwaka kamili wa utumishi wako kazini kwa kipindi kisichozidi miaka kumi.**
4. Matayarisho ya haki zako yanafanywa na utalipwa kabla ya tarehe 31. Julai, 1996.

Nachukua nafasi hii kwa niaba ya serikali kukushukuru kwa utumishi wako serikalini. Nakutakia kila la kheri katika kazi na maisha yako ya baadaye.

Wako,

(M. Mwanda)
Kny; KATIBU MKUU **(Emphasis added)**

Nakala kwa:Katibu Mkuu,
Idara Kuu ya Utumishi
**DAR ES SALAAM**

Kamishna Mkuu,
Mamlaka ya Mapato,
**DAR ES SALAAM"**

A pertinent question arising is who took the decision to remove the appellants in the public interest under section 19(3). A plain reading of the **DOKEZO SABILI** (Exh. P5)

dated 11.4.1996 from the Principal Secretary, M.O.F. to the President reveals that he had on 19.04.1996 agreed with and approved the non binding proposal to remove the appellants in the public interest. The authority under section 19(3) was simply not delegated to the Principal Secretary, M.O.F. or further on to M. Mwanda. The removal letters as correctly submitted by Ms. Mrema only constituted a transmission of the decision. There was also no evidence on which it could be concluded that the T.R.A. Board was the one that removed them in the public interest.

Were no reasons afforded? Again, paragraph 1 of the letters explained why they were removed in the public interest. The Government had decided to reduce its workforce as one of the means of reducing the costs or expenditure of its activities and in order to increase office productivity. In our respectful view, reasons were clearly provided.

The appellants also complained that their removal constituted a punishment. With respect, we do no see how

this could have been a punishment given the fact that in addition to their benefits and entitlements, they were paid **"kifuta jasho"** amounting to four months salaries per year of employment up to ten years of service.

Mr. Luguwa complained that no disciplinary charge or opportunity to answer it as provided for in section 19(1) and (2) of the Civil Service Act was given to the appellants. As provided for in that Act, removal, dismissal or termination are not legally the same. The disciplinary procedures contained in section 19(1) and (2) are not applicable when the President exercises his powers under section 19(3) to remove a civil servant in the public interest. They deal with dismissal and termination, not removal.

The evidence on record supports the learned judge's finding that the appellants were removed in public interest by the President acting under section 19(3) and *vide* the **DOKEZO SABILI** on 19.4.1996. In view of what we have stated in grounds 1 and 2 of the appeal and the above, the appellants were employees of the M.O.F. Falling under

section 2 of the Civil Service Act, they could be the subject of removal in the public interest under section 19(3). Accordingly, there is no merit in grounds 5,6,8,9 and 10 of the appeal.

The additional challenge by Mr. Luguwa in grounds 3 of the appeal is that the learned trial judge had erred in relying on his personal research rather than on the evidence on record to find out that the Commissioner General of T.R.A. was appointed on 1.10.1995.

Ms Mrema and Mr. Beleko submitted that the learned judge had the discretion to research any fact which could be publicly procured. That as the Commissioner General's appointment was announced publicly the learned judge was entitled to take 1.10.1995 as the date of his appointment.

This ground of appeal is straight forward. Given that the finding is neither borne out by the evidence on record nor was the source of the information (i.e. whether from the Government Gazette or any other official source) disclosed, judicial notice of which could have been taken, with respect,

it was an error for the High Court to have held so. This ground of appeal is sustained.

Ground 4 faults the learned Judge for not having warned himself before relying on the evidence of DW1 (Kandege) and DW2 (Mchoro) that they had been issued with letters of engagement by T.R.A., which documents were not produced.

Mr. Luguwa submitted that the High Court assumed that DW1 and DW2 had letters of engagement. By comparison it considered that the appellants who did not have them had not proved their case.

Ms. Mrema submitted that the appellants, who were represented by learned Counsel had an opportunity to cross examine DW1 and DW2 on that fact. They are now estopped from blaming the trial court. Mr. Beleko on his part, added that there was no evidence that DW1 had any grudge with the appellants for him to be disbelieved.

Our respectful examination of the record does not show that the learned Judge arrived at the finding he did in the

manner alleged. It was PW1's own evidence that he had not been issued with a letter of engagement by T.R.A. This ground has no legs to stand on.

Next, the alleged fault in ground 7 of the appeal is that the learned Judge had refused to allow one Juvenal Nyambele to testify as his evidence could not have changed anything. As he was in Court during the trial the trial Court stated that his evidence could not have been independent.

Mr. Luguwa submitted that J. Nyambele's presence in Court during the trial did not render him an incompetent witness. He could have clarified the letter reference No. NG/C/S4/7/142 dated 30.04.1996 (Exh. P6.) wherein he is said to have instructed the District Commissioner, Ngara District to direct PW3 to handover his office. The appellant, he urged, had been prejudiced.

Ms. Mrema submitted that the appellants were under an obligation to ensure that J. Nyambele was not in Court during the trial if they had wanted him to testify. The presence affected his credibility. The appellants had an option to

produce the District Commissioner which they did not pursue. The trial Court had no option but to disqualify J. Nyambele. Mr. Beleko on his side submitted that J. Nyambele's non production as a witness had no bearing in the case. The recipient of the letter, i.e. PW3, who had tendered it was not a party to the suit.

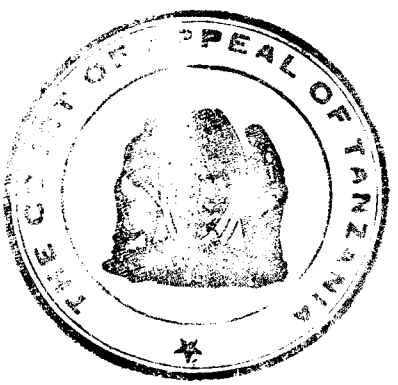
It is trite law that the presence of a potential witness in court before the subsequent receipt of his testimony does not by that fact alone render him an incompetent witness under section 127(1) of the Evidence Act, Cap 6 R.E. 2002. This may affect the weight to be attached to his testimony and credibility. With respect, to that extent the High Court erred. However, we would agree equally with Ms. Mrema that once the appellants had surrendered the open opportunity to call and examine the District Commissioner the letter's author they could not now be heard to validly complain. Moreover, it is not apparent on the impugned removal letters (Exh.2) that J. Nyambele was connected with them as he was with

partially made out.

In the final analysis and for the foregoing reasons, the appeal is without merit. It is hereby dismissed with costs.

**DATED** at **DAR ES SALAAM** this 30th day of December, 2010.

E. N. MUNUO
**JUSTICE OF APPEAL**



M. C. OTHMAN
**JUSTICE OF APPEAL**

S. MJASIRI
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.

J. S. Mgetta
**DEPUTY REGISTRAR**