IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

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

CIVIL APPEAL NO. 437 OF 2020

CCBRT HOSPITAL ..... APPELLANT

VERSUS

DANIEL CELESTINE KIVUMBI ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, Labour Division at Dar es Salaam)

(Mwipopo, J.)

dated the 7th day of August, 2020
in
Revision No. 925 of 2018

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JUDGMENT OF THE COURT

18th July & 6th September, 2023

NDIKA, J.A.:

Section 37 (5) of the Employment and Labour Relations Act, Cap. 366 ("the ELRA") expressly prohibits any employer from taking a *"disciplinary action in form of penalty, termination or dismissal"* against an *"employee who has been charged with a criminal offence which is substantially the same until final determination by the Court and any appeal"* therefrom. Before the High Court, Labour Division at Dar es Salaam (Mwipopo, J.), the issue was whether this provision, in its breadth, bars an employer from taking any disciplinary action against an employee once a criminal complaint is made to the police triggering investigation against the employee into the matter. The

learned judge answered the question in the affirmative, but the appellant, CCBRT Hospital, now assails that holding on four grounds.

It is pertinent that we set out the essential facts of the case to provide the context in which the above question arises.

The respondent, Daniel Celestine Kivumbi, was employed by the appellant as a Nurse Auxiliary from 28th November, 2007. In 2010, he was re-designated as Nurse Attendant. It occurred that on or about 11th September, 2015 three patient monitor machines worth TZS. 20,000,000.00 were stolen from the Eye Theatre and the Orthopedic Theatre at the hospital. The incident was immediately reported at Oysterbay Police Station, Dar es Salaam who instantly initiated investigations into the matter. Following initial internal investigations that implicated the respondent in the theft, on 17th September, 2015, he was arrested and later detained at the police station for five days.

On 22nd September, 2015, the respondent was released from police custody, but he was on the same day greeted by a notice of suspension from work with full pay pending further investigations. On 29th September, 2015, he was served with a notice of disciplinary hearing slated for 1st October, 2015. The notice informed him of two charges: one, stealing or unauthorized

possession of three patient monitors belonging to the appellant; and two, major breach of trust and dishonesty.

Apart from denying the charges at the hearing, the respondent boldly stated that he was not prepared to respond to the charges but that he would only present his arguments and evidence before a court of law. Despite his indifference to the proceedings, the hearing went ahead as scheduled and culminated in the disciplinary committee finding him guilty as charged. On 6th October, 2015, his employment was terminated. Resenting the firing, he unsuccessfully appealed to the appellant's Chief Executive Officer. Unrelenting, he lodged an unfair termination claim in the Commission for Mediation and Arbitration ("the CMA"). The CMA dismissed the claim as it found the termination substantively and procedurally fair.

Still determined to pursue justice, the respondent sought a revisal of the CMA's award before the High Court, Labour Division. Although the High Court found the allegation of theft of the patient monitors wanting, it held that the charge of major breach of trust and dishonesty was sufficiently established. On that basis, the court took the view that the termination was substantively fair.

Regarding the fairness of the procedure employed in the termination, the court held that the termination was procedurally unfair on reason that the appellant initiated parallel proceedings in form of criminal and disciplinary measures contrary to the dictates of section 37 (5) of the ELRA, which bars institution of disciplinary proceedings during the pendency of proceedings over a criminal offence, that is substantially the same as the disciplinary offence. The court relied on two of its previous decisions: **Stella Manyahi & Another v. Shirika la Posta**, Revision No. 2 of 2010; and **Chai Bora Limited v. Allan Telly Mtukula**, Revision No. 38 of 2017 (both unreported) interpreting the above provision to the effect that once a criminal complaint is made to the police setting the criminal investigation machinery into motion, an employer cannot initiate disciplinary proceedings against the employee over substantially the same offence. In particular, the court extracted the following passage from **Stella Manyahi** (*supra*):

> *"When an employee is accused of [a] criminal offence which is also a breach of disciplinary code and the employer has taken the bold step of reporting the incident to the police and the police investigation is commenced, other disciplinary proceedings should not be mounted. No proceedings for imposition of a disciplinary penalty should be*

instituted pending the conclusion of the criminal proceedings and of any appeal therefrom."

So far as **Chai Bora Limited** (*supra*) is concerned, the court quoted from it the following holding:

"As a matter of procedure, a criminal action commences by reporting of the crime to [the] police and disclosing the name of [the] suspect, if any. In as much as reporting of a crime is an investigation step for putting a criminal allegation into motion, narrow interpretation of [the] provision to exclude criminal complaint to the police would defeat a policy objective behind the law. In my opinion, therefore, unless the criminal complaint is withdrawn before the initiation of the disciplinary proceeding, termination of the service of employee on the same facts reported to the police amounts to double jeopardy."

Having decided as stated above, the High Court awarded the respondent six months' remuneration as compensation for unfair termination in terms of section 40 (1) (c) of the ELRA.

As intimated earlier, the appellant challenges the above outcome on four grounds, which we have rephrased, for the sake of clarity, as follows:

1. *The learned judge erred in law in holding that the appellant was prohibited by section 37 (5) of the ELRA to terminate an employee who was under police investigations.*
2. *The learned judge erred in law by equating police investigations with being charged with a criminal offence.*
3. *In the alternative and without prejudice to the above grounds, the learned judge erred in law by interpreting section 37 (5) of the ELRA to include police investigations into a criminal allegation.*
4. *The learned judge erred in law by holding that the respondent was terminated for the same criminal offence that was under police investigations.*

In totality, the above grounds question the interpretation by the High Court by which the criminal investigation process was subsumed into the prohibition under section 37 (5) of the ELRA. This provision states as follows:

> *"(5) No disciplinary action in form of penalty, termination or dismissal shall lie upon an employee who has been charged with a criminal offence which is substantially the same until final determination by the Court and any appeal thereto."*

Arguing for the appellant, Ms. Miriam Bachuba, learned counsel, principally contends that the above provision, on a plain meaning, bars an employer from taking any disciplinary action against an employee who has been charged with a criminal offence that is substantially the same as the offence the subject of the disciplinary hearing. Referring to sections 131, 132 and 135 of the Criminal Procedure Act, Cap. 20 ("the CPA"), Ms. Bachuba argues that the prohibition arises once a charge has been laid in court against the employee. She posits that the provision in issue is very clear and that its literal interpretation should have applied. The High Court, she submits further, erroneously read words into the provision despite its literal interpretation not giving rise to any absurdity or injustice. In support of her argument, she relies on **Calico Textile Industries Ltd. & Another v. Tanzania Development Finance Co. Ltd.** [1996] T.L.R. 257; and **Joseph Warioba v. Stephen Wassira & Another** [1997] T.L.R. 272 on the application of the literal interpretation rule. Further reliance is placed on **Republic v. Mwesige Geofrey & Another**, Criminal Appeal No. 355 of 2014 [2015] TZCA 264 [19 February, 2015; TanzLII]; **Director of Public Prosecutions v. Julieth Simon Peleka (The Administratrix of the Estate of the late Gebu Ichoma Sayi)**, Criminal Appeal No. 94 of 2019 [2020] TZCA 350 [14 July, 2020; TanzLII]; and **Barnabas Msabi**

Nyamonge v. Assistant Registrar of Titles & Another, Civil Appeal No. 176 of 2018 [2019] TZCA 279 [30 August, 2019; TanzLII]. In particular, she cites a passage from **Barnabas Msabi Nyamonge** (*supra*) fleshing out the primacy of the rule on literal interpretation:

> *"It is an elementary principle of statutory interpretation that the plain meaning rule is to be resorted first. That is what we have done. The court will only be entitled to employ other principles of statutory interpretation if the plain meaning rule would lead to absurdity."*

Ms. Bachuba contends further that the High Court's approach was mistaken as it effectively equated police investigation into a criminal allegation as being charged with a criminal offence despite the clear distinction under the CPA between police investigations and being charged with a criminal offence. The legislature, she adds, only intended to bar double punishment by prohibiting disciplinary action where an employee has been charged with a criminal offence.

For the respondent, Mr. Hassan A. Kilule, learned counsel, counters that the High Court properly construed the provision in issue in consonance with its objective of safeguarding every employee's right to fair hearing. He

submits that once the criminal investigation machinery is set into motion after a report of a criminal incident is made to the police, disciplinary action should not take place lest it may prejudice the criminal process. On whether criminal investigation and being charged in court are one and the same process, Mr. Kilule is emphatic that although the two processes are starkly different, they are both interrelated and interconnected. In conclusion, he urges us to uphold the High Court's application of the purposive approach in interpreting the provision in line with the intention of the legislature, as he conceived it, which is to protect every employee as the weaker party to an employment relationship.

It is elementary that the meaning of a statutory provision must, in the first instance, be sought in the language in which the statute is framed, and if that is plain, the function of the courts is to enforce it according to its terms. In this sense, the Court observed in **Mwesige Geofrey** (*supra*) that:

> ***"Indeed, it is axiomatic that when the words of a statute are unambiguous, 'judicial inquiry is complete'.*** *There is no need for interpolations, lest we stray into the exclusive preserve of the legislature under the cloak of overzealous interpretation.* ***This is because:- courts must presume that the legislature says in a statute***

> ***what it means and means in a statute what it says there – Connecticut Nat'i Bank v. Germain****, 112 S. Ct. 1146, 1149 (1992)."*[Emphasis added]

However, earlier in **Joseph Warioba** (*supra*), the Court took the view that whenever the literal and grammatical construction of a statutory provision leads to an absurd and unjust outcome, the court can and should use its good sense to remedy it by applying the purposive construction. In its reasoning, the Court relied upon two English decisions: **Kammins Ballrooms Co. Ltd. v. Zenith Investments (Torquay) Ltd.** [1970] 2 All ER 871 (the House of Lords, as per Lord Diplock); and **Nothman v. Barnet London Borough** [1978] 1 All ER 1243 (the Court of Appeal, as per Lord Denning, MR). In particular, the Court cited with approval the following passage from **Nothman** (*supra*):

> *"The literal method is now completely out of date. It has been replaced by the 'purposive approach.' In all cases now in the interpretation of statutes we adopt such a construction as will promote the general legislative purpose underlying the provision. It is no longer necessary for the judges to wring their hands and say: 'There is nothing we can do about it.'* ***Whenever the strict interpretation of a statute***

gives rise to an absurd and unjust situation, the judges can and shouid use their good sense to remedy it – by reading words in, if necessary – so as to do what Pariiament would have done, had they had the situation in mind." [Emphasis added]

Consistent with the above position, the Court in **Joseph Warioba** (*supra*) declined to adopt the literal approach in interpreting section 114 of the Elections Act, and instead read words into that provision to avoid an apparent absurdity. Similarly, in **Calico Textile Industries Ltd.** (*supra*) the Court applied the purposive construction to a statutory provision on the same ground that literal interpretation of it would have led to an absurdity by enabling a perpetrator of fraud to benefit from his own vice, causing gross injustice to the victim of the fraud.

To recapitulate, we think it is settled that if the words of a statutory provision are unambiguous, that the outcome of applying the literalist approach to that provision is not manifestly at odds with the entire scheme of the statute and that it does not result in a patently illogical or unjust result, the court must give effect to the plain and ordinary meaning of the words. The purposive approach may only be employed to give the provision in issue a harmonious, logical, and fair construction where the strict literal and

grammatical construction of the words demonstrably leads to an absurdity, illogicality, or injustice.

We think that, it cannot be seriously disputed that, in its plain and ordinary meaning, section 37 (5) of the ELRA bars imposition of any disciplinary action in form of penalty, termination, or dismissal upon an employee against whom a criminal charge has been laid in a court of law over a criminal offence which is substantially the same until final determination by the court and any appeal therefrom. In other words, on a plain meaning this provision does not encapsulate what the High Court referred to in **Stella Manyahi** (*supra*) as *"the bold step of reporting the incident to the police"* leading to commencement of police investigations into the criminal allegation. There must exist a criminal charge in court commencing criminal proceedings against the employee.

It is implicit from its reasoning in both **Stella Manyahi** (*supra*) and **Chai Bora Limited** (*supra*) that the High Court was cognizant that, existence of police investigations after a criminal complaint is made does not, upon a strict literal construction, fall within the purview of the provision in issue. This is an outcome that it found objectionable. The court, therefore, declined to apply the literal approach and, instead, resorted to a broad and

liberal construction that would give effect to what it viewed as the legislative purpose underlying that provision. In **Chai Bora Limited** (*supra*), the court was particularly concerned that, a narrow interpretation to exclude a criminal complaint to the police would defeat a policy objective behind the law and that, allowing parallel criminal investigations and disciplinary proceedings would result in the employee being subjected to double jeopardy. The court took a similar stance in **Security Group Tanzania Ltd. v. Athman s/o Abdallah**, Revision No. 260 of 2008 (unreported).

Perhaps, we should interpose and remark, at this point, that we are aware that, the High Court applied the literal approach to the provision in issue, at least, in four decisions: **Geofrey Mwaluhwavi v. Bayport Financial Services (T) Ltd**, Revision Application No. 416 of 2021 [2022] TZHCLD 610 [6 June, 2022; TanzLII]; **The Trustees of Tanzania National Parks v. Majuto O. Chikawe & Another**, Labour Revision No. 15 of 2020 [2021] TZHC 6062 [24 August, 2021; TanzLII]; **Theresia Kibao Diku v. Bugando Medical Centre**, Labour Revision No. 11 of 2021 [2022] TZHC 12804 [12 September, 2022; TanzLII]; and **Jacquiline Mushi v. Stanbic Bank Tanzania Ltd**, Consolidated Revision Applications No. 233 of 2022 [2022] TZHCLD 1027 [25 October 2022; TanzLII]. In **The Trustees of Tanzania National Parks** (*supra*), the High Court considered the approach

and reasoning in **Stella Manyahi** (*supra*) but did not follow it. So was **Chai Bora Limited** (*supra*) cited in **Jacquiline Mushi** (*supra*) but not followed. The court in **The Trustees of Tanzania National Parks** (*supra*) and **Jacquiline Mushi** (*supra*) finally held that criminal investigations cannot be equated with criminal proceedings commenced upon a charge sheet being filed in a criminal court.

This appeal, therefore, turns on whether the High Court, on the authority of **Stella Manyahi** (*supra*) and **Chai Bora Limited** (*supra*), was justified to apply the purposive construction to section 37 (5) of the ELRA in the place of the literalist approach. This issue, we think, takes care of the first and second grounds of appeal, which are interwoven.

To begin with, although the High Court in **Chai Bora Limited** (*supra*) observed that, a narrow interpretation excluding a criminal complaint made to the police would defeat a "policy objective" behind the law, unfortunately it did not expressly explain what policy objective it had in mind. Having reflected on the seven objectives of the ELRA as stated under section 3 thereof and examined the scheme of the entire law, we do not see how a narrow, literal construction of the provision would unavoidably lead to an

illogicality or injustice requiring an employee to be protected from the moment a criminal allegation against him or her is reported to the police.

We are cognizant that in terms of section 3 (a) and (b) of the ELRA, the scheme of that law is intended to *"promote economic development through economic efficiency, productivity, and social justice"* and to *"provide the legal framework for effective and fair employment relations and minimum standards regarding conditions of work."* In **Bidco Oil and Soap Ltd. v. Robert Matonya & 2 Others**, Revision No. 70 of 2009 (unreported), the High Court, Labour Division at Dar es Salaam (Rweyemamu, J.) aptly observed that:

> *"The requirement for both substantive and procedural fairness in employment termination proceedings [is] in pursuance of one of the policy objectives of the labour laws spelled out under section 3 of the Act, which is* ***to ensure observance of fair labour practises in the workplace. Fair practices incorporate observance of basic human rights principles among them the presumption of innocence and the right not to be punished unheard.*** *And without that requirement there would be nothing to prevent employers to terminate employees even on grounds*

which are inherently unfair as spelled out under section 37 (3) of the Act." [Emphasis added]

The High Court in the above case admitted that a dilemma would arise regarding the disciplinary procedure to be employed against an employee whose alleged misconduct or action amounts to both a disciplinary misconduct and a criminal offence and or in whom the employer has lost trust. The court went on observing, quite correctly, thus:

> *"**The issue is of concern because of the difficulty in striking a balance** between an employer's prerogative to manage and maintain workplace discipline including the right not to retain an employee in whom trust has been lost – vital for economic efficiency; and the right of an employee to a presumption of innocence, proof of a misconduct and the right not to be penalised unheard."* [Emphasis added]

We would readily agree with the learned judge that the scheme of the ELRA seeks to strike a balance between an employer's prerogative to manage and maintain workplace discipline, on the one hand, and rights of an employee, on the other. While the former seeks to achieve economic efficiency, the other targets promoting and achieving social justice as well as maintaining fair labour practices and relations. It is our considered view,

therefore, that, like any other provision of the ELRA, section 37 (5) should be interpreted in a manner that strikes a balance between the two somewhat competing but complementary objectives. It would be remiss to suppose that, the said provision only aims to protect an employee's rights because he or she is presumed to be the weaker party in an employment relationship. That is the approach taken in **Stella Manyahi** (*supra*), **Chai Bora Limited** (*supra*) and **Security Group Tanzania Ltd.** (*supra*) without considering any aspects of "economic efficiency."

Certainly, by interpreting that, the prohibition under section 37 (5) applies the moment a complaint is lodged at a police station, the employer's prerogative to manage and maintain workplace discipline is curtailed, placing the employer in an unenviable position. Whenever an employee commits an act that is both a disciplinary misconduct and a criminal offence, the employer would have to choose between conducting disciplinary proceedings and reporting the matter to the police. There are many conceivable occasions on which reporting the matter to the police promptly would be vital and unavoidable before instituting any disciplinary proceedings.

We think it is also significant to note that, the Court of Appeal in the United Kingdom in **North West Anglia NHS Foundation Trust v. Gregg**

[2019] EWCA Civ 387 saw no blatant absurdity in disciplinary or regulatory proceedings coinciding with criminal investigations. Admittedly, the court was not dealing with construction of a provision of the law like ours. Crucially, nonetheless, the court took the view that employers do not have to postpone disciplinary proceedings to wait for the outcome of criminal or regulatory investigations. Closer to home, the Employment and Labour Relations Court in Kenya has held repeatedly that an employer is entitled to institute disciplinary proceedings against an employee independent of criminal proceedings because the two processes are independent of one another – see, for example – **Godwin Barasa Barechi v. Kenya Trade Networks Agency** [2019] eKLR; and **Gladys J. Cherono v. Board of Trustees NSSF & Another** [2021] eKLR. Certainly, the aforesaid holding in both cases was not based upon any statutory provision like ours, but it dispels any lingering qualms that parallel disciplinary proceedings and criminal investigations are necessarily an irrationality.

We hinted earlier, that the High Court justified its departure from the literal rule of construction in **Stella Manyahi** (*supra*), **Chai Bora Limited** (*supra*) and **Security Group Tanzania Ltd.** (*supra*) on the ground that, the interplay of parallel criminal investigations and disciplinary proceedings would result in the employee being subjected to double jeopardy. With

respect, this reasoning is faulty primarily because the double jeopardy rule applies to criminal offences only but not to disciplinary proceedings or administrative processes. In general, this rule, encapsulated in section 21 of the Penal Code, Cap. 16, provides that a person cannot be tried twice for the same crime based on the same conduct. At any rate, internal disciplinary proceedings and criminal investigation processes are independent processes that can coincide without one barring the other from proceeding – see, for example, **Godwin Barasa Barechi** (*supra*); and **Gladys J. Cherono** (*supra*).

Based on the foregoing discussion, it is our conclusion that the High Court wrongly applied the purposive approach to construe the provision in issue, which is clear and its meaning devoid of any apparent absurdity or injustice. The court ought to have given effect to the plain meaning instead of defeating it by reading words into the provision. With respect, the court drove a coach and horses through that provision by expanding its horizon to police investigations. In the premises, we find merit in the first and second grounds of appeal.

The above outcome is sufficient to dispose of this appeal. Consequently, the remaining grounds of appeal are no longer dispositive of the matter. We shall not consider and determine them.

In consequence, we allow the appeal. We, therefore, quash the High Court's judgment and restore the CMA's award dismissing the respondent's claim. In consonance with the usual practice that labour matters ordinarily do not attract awards of costs, we make no order as to costs.

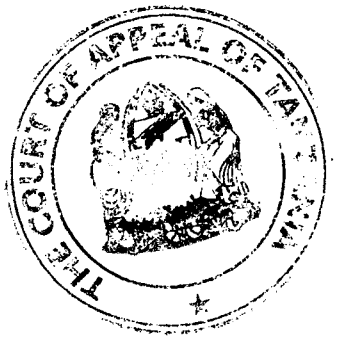
DATED at **DAR ES SALAAM** this 4th day of September, 2023.

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

A. S. KHAMIS
JUSTICE OF APPEAL

The Judgment delivered this 6th day of September, 2023 in the presence of Mr. Kyariga N. Kyariga, counsel for the Appellant and Respondent in person is hereby certified as a true copy of the original.



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