IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CORAM: NYALALI, C.J., MAKAME, J.A., AND RAMADHANI, J.A.:

CIVIL APPEAL NO. 39 OF 1995

BETWEEN

S.M. MSISI ..... APPELLANT

AND

TANZANIA RAILWAYS CORPORATION .... RESPONDENT
(Appeal from a Ruling of the High Court
of Tanzania at Dar-es-Salaam)

(Hon. Masanche,J.)

Dated the 6th day of November, 1990

in

Misc. Civil Cause No. 4 of 1989

JUDGEMENT OF THE COURT

NYALALI, C.J.:

This is an appeal by one S.M. MSISI, hereinafter called the appellant, against the ruling and order of the High Court in proceedings for orders of CERTIORARI and MANDAMUS. The appellant asked the High Court to grant orders of certiorari and mandamus in respect of a decision made by the Minister responsible for Labour upon a report submitted to him by the Industrial Court of Tanzania under the provisions of sections 9A and 9B of the Industrial Court of Tanzania Act, 1967 (Act No. 41 of 1967) as amended by Acts Nos. 18 of 1977, 3 of 1990 and 2 of 1993. The High Court, Masanche, J. in dismissing the application stated inter alia:

> "Mr. Kashumbugu, I think, complains about the final decision of the Minister, namely, that he should not have pegged out those days between termination and his own (Minister) decision. If that is what he is doing,

> then it seems to me quite clear he is infact appealing against the decision of the Minister which in terms of section 9 of the Tribunal Act, he may not do.
>
> Even assuming that Mr. Kashumbugu's complaint is one against jurisdiction, it is my considered opinion that by ordering to peg out those days, the Minister did not act out of jurisdiction, there is no provision of law which prevents him from doing so.
>
> And actually, Mr. Kashumbugu cannot complain that the decision was against weight of the evidence because to do that would mean to ask the court to review the evidence, a thing which the court may not do.
>
> I am afraid the application by the applicant Msisi is illconceived. It is rejected and dismissed."

The appellant was aggrieved by that decision of the High Court. He sought and obtained leave to appeal to this Court as required by the provisions of section 5(1)(c) of the Appellate Jurisdiction Act, 1979. The Memorandum of Appeal contains two grounds of appeal which read as follows:

1. His Lordship erred in law in holding that "by ordering to peg out" the days between termination of employment of the appellant and the decision of the Minister, "the Minister did not act out of jurisdiction" while such decision is contrary to established legal definition of reinstatement.

2. In the alternative but without prejudice to the first ground, His Lordship erred in law in not finding out that the conclusion arrived at by the Minister was so unreasonable that no reasonable authority could have ever come to such conclusion.

It is common ground between the parties to this case that the appellant was employed by the Tanzania Railway Corporation until 5th May 1981 when he was dismissed from employment for being absent from duty without permission. The appellant contested his dismissal with the result that the matter was referred to the Industrial Court of Tanzania for inquiry and report to the Minister responsible for Labour. In due course the

Minister made his decision. The relevant and concluding part of the Minister's decision states in Kiswahili:

> "Mlalamikaji arudishwe kazini kwa cheo alichokuwa nacho alipoachishwa kazi na apewe nyongeza za mshahara ili afikie cheo ambacho angekuwa amefikia kama asingefukuzwa alipoachishwa kazi lakini ichukuliwe aliendelea kuwa kwenye likizo isiyo malipo mpaka siku ya uamuzi huu kwa kuwa kuna kasoro kwa jinsi alivyotekeleza taratibu zinazohusiana na taratibu za hospitali hasa pamoja na kwenda kwa mganga wa kienyeji na kuleta hati ya ugonjwa (sick-sheet) kutoka huko.."

A free English translation of this statement would read as follows:

> The complainant should be reinstated in the post which he held at the time of his dismissal and he should be awarded increments of salary so as to put him in the post which he would have attained if he had not been dismissed from employment, but he should be treated as being on leave without pay until the date of this decision because of the irregularities in the procedure concerning attendance at hospital, particularly inrespect of his going to see a local medicineman and obtaining a sick-sheet from him...

The Minister's order was made under the provisions of section 9B of the Industrial Court of Tanzania Act, 1967, as amended. That section states:

> "(1) Upon receipt of a report made by the Tribunal inrespect of any matter referred to it under section 9A, the Minister shall make a decision in relation to the matters contained in the report, and that decision shall be final.
>
> (2) The Minister shall submit to the Tribunal his decision made under sub-section (1); and upon that receipt of the decision, the Tribunal shall register it as an award regarding the matters to which the decision relates.
>
> (3) A decision made by the Minister and registered by the Tribunal under this section shall be deemed to be an award made by the Tribunal inrespect of the matters to which the decision relates".

Mr. Mwakajinga, learned advocate for the appellant, has submitted to the effect that the Minister contravened the law in qualifying the order of reinstatement by directing the appellant to be treated as being on leave without pay from the date of dismissal to the date ofthe Minister's decision. It is part of Mr. Mwakajinga's submission that once the Minister decided to reinstate the appellant, then in law the appellant had to be treated not only as having been in continuous employment but also as being entitled to full benefits throughout the relevant period. Mr. Mselem, learned advocate for the respondent, has counter-submitted to the effect that the Minister was in law empowered to make a qualified order of reinstatement. It is part of Mr. Mselem's submission to the effect that the appellant seeks to be done what the law does not allow, that is, a review of the decision of the Minister, which is final under the relevant law.

The crucial issue in this case is whether the relevant law precludes the Minister from making a qualified order of reinstatement. Mr. Mwakajinga has cited **STROUDS JUDICIAL DICTIONARY** in support of his contention. STROUDS JUDICIAL DICTIONARY, 5TH EDITION defines the term **'reinstatement'** as regards to employment as follows:

> "Reinstatement "(Essential Work (General Provisions) Order 1942): the natural and primary meaning of "to reinstate", as applied to a man who had been dismissed, was to replace him in the position from which he was dismissed and so restore the status quo ante the dismissal (Dixon v Patterson, 1943 S.C(J)78,83 and see Barr & Stroud v. Adair, 1945 S.C.(J)34,39). It was not sufficient merely to pay the man wages without providing him with work (Jackson v. Fisher's Foils [1944] K.B.316), unless there was in fact no work for him to do (Hodge v. Ultra Electric [1943] K.B.462). He had to be reinstated at the same

place of work (Powell Duffryn Ltd v. Rhodes [1946]IALL E.R.666)."

It is Mr. Mwakajinga's contention that the law in Tanzania concerning reinstatement is as stated in STROUDS JUDICIAL DICTIONARY. With due respect, we are unable to agree for the following reasons. First, the term "reinstatement" or "to reinstate" as contained in STROUDS JUDICIAL DICTIONARY is defined in respect to a specific statute wherein it is used, that is, the Essential Work (General Provisions) Order 1942. That term is not used anywhere under the Industrial Court of Tanzania Act, 1967, under which the Minister made his decision. The term is of course used under the Security of Employment Act, 1964, Cap574, specifically under sections 24 to 27, but the decision of the Minister was not made under the Security of Employment Act. Second, the term 'reinstatement' or to be precise, its Kiswahili equivalent, is not used as a term of art but as ordinary language in the Minister's decision. Its true meaning is thus to be ascertained by applying the normal rules of grammar, and not the rules of law. That being the position, we find nothing in the ordinary meaning or usage of the term 'reinstatement' to preclude the Minister from qualifying that term in the manner he did. Third and last, it is apparent that the decision-making powers conferred upon the Minister under section 9B are sufficiently wide to allow the Minister to decide as he did, so long as such decision was "... in relation to the matters contained in the report" submitted to him by the Tribunal. There is no suggestion made to us that the decision of the Minister was on matters not contained in the Tribunal's report.

With regard to the issue of reasonableness raised in the second ground of appeal, it is apparent that the Minister qualified the appellant's reinstatement "... because of the irregularities in the procedure concerning attendance at hospital, particularly inrespect of his going to see a local medicineman and obtaining a sick-sheet from him ...".

We do not think that the ground used by the Minister in qualifying his decision to reinstate the appellant in the manner he did can be said to be unreasonable, since appellant's absence from duty was indeed irregular. In the final analysis therefore, this appeal cannot succeed, and we hereby dismiss it in its entirely. Since there is no suggestion that this is Legal Aid case, we order the appellant to pay the costs of this appeal.

Dated at DAR-ES-SALAAM this..23rd..day of..September.....1996.

F. L. Nyalali
CHIEF JUSTICE

L. M. Makame
JUSTICE OF APPEAL

A.S.L. Ramadhani
JUSTICE OF APPEAL