AN ASSESSMENT OF THE COMMISSION FOR MEDIATION AND ARBITRATION'S JURISDICTION OVER PUBLIC SERVANTS

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Abstract

The Commission for Mediation and Arbitration (CMA) has mandate, under the law, to deal with both, private sector and public sector labour disputes, setting up two dispute resolution processes. This article examines the conflict brought about by this arrangement and makes a case for the need for the Court of Appeal of Tanzania to intervene and issue guidance. The critical role of the government in entangling this quagmire by directing on which disputes should be settled through the general legal labour regime and which ones be settled through the public dispute settlement machinery is also underscored.

Key words: *Dispute settlement machinery, mediation, High Court Labour Division, Commission for Mediation and Arbitration, Public Service Commission and Tanzania.*

1.0. INTRODUCTION

Disputes are inevitable in any work place, thus presence of an effective means of settling such disputes is crucial. This article makes a critique on the amendment that was made in the Public Service Act[1] by introducing

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[1] Cap 298 [R.E 2019].

section 32A which essentially ousts workers in the public service from accessing the general labour regime, unless and until they exhaust all remedies available under the Public Service Act. This arrangement is unfair and a clear contravention of the Constitution of the United Republic of Tanzania[2] as it bars workers in the public service from accessing the general labour law that is considered to be more effective and realistic compared to the mechanism available under the Public Service Act. The article provides recommendations that in an attempt to rescue the existing situation.

2.0. AN OVERVIEW OF DISPUTE SETTLEMENT FRAMEWORK IN TANZANIA

In Tanzania today, there are several institutions which have been established to deal with labour disputes. These include the Commission for Mediation and Arbitration (CMA)[3] and the Labour Court (High Court Labour Division).[4] However, these institutions seem to concentrate on labour disputes involving workers in the private sector. This is not only according to the dictates of the law,[5] but by the prevailing practice. The Employment and Labour Relations Act (ELRA)[6] states clearly that it shall apply to all employees including those in the public service of the Government of Tanzania in Tanzania Mainland.[7] However, the ELRA does not apply to all government employees. Some of them are exempted from its application, including those from the Tanzania Peoples Defence Force, the Police Force, the Prisons Service

[2] Article 13 (6) (a).
[3] Section 12 of the Labour Institutions Act, Cap 300 [R.E 2019].
[4] Id., Section 50.
[5] See section 32A of the Public Service Act, Cap 298 [R.E 2019].
[6] Cap 366 [R.E 2019].
[7] Id., Section 2(1).

and the National Service.[8] It goes without saying that, all other government employees are covered by the ELRA.

As stated above, the ELRA is a general labour legislation as it covers employees in both, private and public sector. On the side of public servants there is a specific legislation that governs public service employees only. The Public Service Act.[9] Thus, despite the fact that the ELRA applies to both, public and private employees, since the Public Service Act is the specific law in this regard, it shall prevail over the ELRA as per the dictates of the law.[10] This is cemented by the legal principle '*lex specialis derogat legi generali'* which essentially means that, more specific rules will prevail over more general rules.

As is the case with the ELRA, the Public Service Act[11] establishes some institutions to deal with labour matters pertaining to public servants, these include; the Permanent Secretary (PS), Chief Secretary, the Public Service Commission (PSC),[12] Minister responsible for Local Government, Heads of Independent Departments, Regional Administrative Secretaries, the Director of Local Government Authorities, the Teachers' Service Department of the Public Service Commission and lastly, the President of the United Republic of Tanzania.[13] These are termed as disciplinary authorities, with mandate to discipline various categories of public servants.

Dispute settlement framework with regard to public service employees is a bit complex, with several disciplinary authorities and procedures.

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[8] Ibid.,
[9] Cap 298 [R.E 2019].
[10] See section 34A of the Public Service Act, Cap 298 [R.E 2019].
[11] Together with the Regulations made under it, the Standing Order for the Public Service of 2009 and the Public Service Regulations, 2003.
[12] Section 9 of Cap 298 note 9 above.
[13] See Order F.29 (1) (c) of the Standing Orders for the Public Service above.

This has been problematic to employees at times of termination, among other employment squabbles, as employees may not be aware of the proper disciplinary authority(s) to resort to and the procedures or steps to follow in that regard. As a result, they may be deprived of some remedies which they might be entitled to under the law.

It is from this background, the question as to whether or not the CMA has any feasible jurisdiction over public servants becomes relevant.

3.0. DISCIPLINARY AUTHORITIES IN THE PUBLIC SERVICE

As noted above, there are numerous bodies or institutions with mandate to deal with labour disputes in the public service. All of these are statutory creatures. These include; the Chief Secretary, Permanent Secretary, Public Service Commission (Commission) and lastly the President of the United Republic of Tanzania.[14] However, it should be noted at this juncture that the above-mentioned authorities do not have concurrent jurisdiction but each one is an appellate body to the other depending on the decision-making authority. That is to say, if an employee is aggrieved by the decision of the Chief Secretary, the appeal lies with the President of the United Republic of Tanzania.[15] Likewise, where the impugned decision is made by the Permanent Secretary, the appeal should go to the Public Service Commission, where a public servant or a disciplinary authority is aggrieved by the decision made by the Chief Secretary, Permanent Secretary or the Commission, the appeal lies directly with the President, whose decision shall be final.[16]

[14] See Section 25 (1) of the Public Service Act, Cap 298 [R.E 2019].
[15] Id., S. 25 (1) (a).
[16] Id., S. 25 (1) (c), see also Order F.29 (1) of the Standing Orders, 2009, see also Regulation 35 (2) of the Public Service Regulations, 2003.

According to the dictates of the law, if a matter reaches the President as the final appellate body, that is the end of the matter in question. One would wonder, where is the role of the Employment and Labour Relations Act (ELRA)[17] and the Labour Institutions Act (LIA)[18] as stated under section 2 (1) of the ELRA? This goes hand in hand with the question as to whether or not the CMA has jurisdiction over civil servants, this is so because the CMA is a creature of the Labour Institutions Act.[19]

In 2016 a relatively confusing amendment was made to the Public Service Act vide the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016.[20] Among other things, the amendment added a new section to the Public Service Act, section 32A. This section stated:

A public servant shall, prior to seeking remedies provided for in labour laws, exhaust all remedies as provided for under this law.

A simple interpretation of the above amendment is that, when public servants have any labour-related grievances they should directly access remedies available under public labour regime before they can access remedies available under labour laws, meaning, the Employment and Labour Relations Act and the Labour Institutions Act. Thus, resort to the labour laws should be a matter of last resort. This raises a question as to why was such amendment introduced? Or what was the mischief behind its enactment? This is answered below.

[17] Cap 366 [R.E 2019].
[18] Cap 300 [R.E 2019].
[19] Section 12 of Cap 300 [R.E 2019].
[20] See Section 26.

4.0. BACKGROUND INFORMATION ON THE IMPUGNED AMENDMENT

Generally, as a matter of practice, law does not operate in a vacuum, and its enactment is always dictated by a particular underlying situation or condition. The Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016 is never an exception. The rationale for its enactment can easily be grasped through the parliamentary discussions on the proposed Bill.[21] Specific discussions on the proposed Bill took place on 8th November 2016 in the fifth Parliamentary session, seventh meeting. The then Attorney General (AG) while citing sections 10 (1) (e) and 25 of the Public Service Act[22] informed the National Assembly through the Speaker that the current situation in as far as dispute settlement in public service is concerned is not clear, in that, it only states that a public servant who is not satisfied with the decision of a disciplinary authority has the right to appeal to the Public Service Commission (Commission), and that an appeal therefrom lies with the President who shall be the final appellate body. The Attorney General stated further that the law does not require public servants to exhaust such remedies before utilizing the labour laws and other bodies such as the CMA where it may take a long time for a dispute to be concluded.[23]

The focus of the amendment, according to the Attorney General, was on employees working in operational service, which according to the law, means the cadre of supporting staff not employed in the executive or officer grades.[24] From the foregoing it suggests that, the AG wanted to make sure that disputes involving public servants take short time and this

[21] Which are documented in the Hansard for the 5th Meeting, 8th Session which took place on 8th November 2016.
[22] Cap 298 [R.E 2019].
[23] Pp. 87-88 of the Hansard for the 5th Meeting, 8th Session which took place on 8th November 2016.
[24] Section 3 of the Public Service Act, Cap 298 [R.E 2019].

would only be achieved if the same are determined through the public service dispute settlement machinery. When the Parliamentary Standing Committee on Constitutional and Legal Affairs was invited to comment on the proposed amendment (through its chairperson), it was of the view that, the new section 32A should be used in disciplinary matters only and in case of other labour issues employees should be at liberty to utilize other labour laws. This, according to the Committee, would avoid bureaucracies which would affect employees.

It added further that, a clause "any other written law" be added at the end of the proposed new section. The basis for the addition was to ensure that the Public Service Act is not the only labour law dealing with labour matters involving public servants and that, should a public servant decide to go to court they should be at liberty to do so.[25] The Chief Opposition Whip when invited to comment on the proposed amendment was of the view that, what the AG said in support of the amendment that it will shorten the time in settling labour disputes involving public servants, was not true. He was of the view that, to the contrary, it will elongate the procedure and add more costs on the employee.[26] He added further that, the aim of the proposed amendment is to bar public servants from accessing justice in the labour courts which are relatively more independent and speedier in disposing of cases. Based on that, he concluded that, the opposition does not condone to the proposed amendment.

Commenting on the proposed amendment, a Member of Parliament from the opposition, one Kasuku S. Bilago was of the view that, the proposed amendment which aims at forcing a public servant to first exhaust remedies under the Public Service Act before resorting to other

[25] P. 144, 160 and 161 of the Hansard for the 5th Meeting, 8th Session which took place on 8th November 2016.
[26] Id., pp. 168-170.

labour laws is very dangerous. It aims at burying workers' rights to access justice, because according to him, the Labour Court and the CMA are very active and quick in dispensing justice. The workers will be losing their rights simply because, after exhausting the remedies under the Public Service Act, they will not be able to go back to the Employment and Labour Relations Act and the Labour Institutions Act because of time limitation in such laws. That is to say, if the law states that a grievance should be referred to CMA within thirty days, after exhausting the remedies under the Public Service Act, the 30 days will have passed and the amendment does not state that time will start running after one resorts to the labour regime.[27]

On his side, the Minister in the President's Office, Public Service and Good Governance supported the amendment on the ground that, exhaustion of remedies under the Public Service Act is an administrative procedure which aims at achieving consistency. He added further that, a servant who is dissatisfied by the decision of the Commission may appeal therefrom to the President and that President's decision can be challenged in courts through judicial review.[28]

Looking at the above analysis, one will quickly note that, it is only the AG and the Minister responsible for public service who supported the proposed amendment, all others opposed it. Notwithstanding this reality, the amendment was passed, suggesting that the Government had a motive to achieve. That is, to set known procedures especially to those who work in the operational service and to achieve consistency together with shortening the time in solving labour matters involving public servants. The question is, have all these been achieved through the amendment? The answer is no. As shall be discussed ater in this article,

[27] P. 196 of the Hansard for the 5th meeting, 8th session which took place on 8th November 2016.
[28] Id., p. 213.

procedures for resolving a labour related dispute through the Public Service Act are too complicated and it takes too long to finalize such dispute considering the various stages involved, which are scattered as well in various labour laws.

5.0. THE LEGAL IMPLICATION OF THE STATED AMENDMENT

A literal interpretation of the amendment stated above suggests that, by making reference to labour laws, it refers to the Employment and Labour Relations Act, the Labour Institutions Act together with the regulations made under them. It further suggests, which was actually the situation on the ground that, an employee, whether in the public or private sector, once aggrieved by a decision-making authority, would, in the case of private sector, go directly to the Commission for Mediation and Arbitration (CMA). In the case of public service, the employee would be in a position to decide whether to go to the CMA or pursue their rights through the Permanent Secretary, Chief Secretary or the Commission and lastly to the President, as the case may be.

The above explanation indicates that, once upon a time, the CMA was at per with the Permanent or Chief Secretary. The legal implication of the stated amendment is relevant with regard to the public service in that, once a public servant is aggrieved by a decision of any relevant disciplinary authority, is barred from resorting to remedies available under the ELRA and the LIA. Suggestively, they have to resort to the remedies available under the public service legal regime. The only avenue for such employee to access the CMA is after exhausting all the remedies

under public service;[29] when the matter has finally been dealt with by the President of the United Republic of Tanzania.[30]

However, looking at Order F.29 (4)[31] it is crystal clear that the Standing Orders recognize applicability of the Employment and Labour Relations Act to public servants. The Order reads,' *Notwithstanding the terms of paragraph (1), the Employment and Labour Relations Act shall be binding on every disciplinary authority having powers of dismissal, termination of appointment or discipline in respect of those public servants of the* ***Operational Service*** *who are subject to the provisions of the said Act.'*

The Standing Orders[32] define operational service to mean the cadre of supporting staff not employed in the executive or officer grade. Literally it means that, in handling disciplinary issues involving supporting staff the Employment and Labour Relations Act has to apply. This brings a confusion or contradiction rather, between the Standing Orders and the impugned amendment. Legally speaking, in such a situation, the amendment should prevail since it is an Act of Parliament while Standing Orders are a subsidiary legislation.[33]

6.0. JUDICIAL INTERPRETATION OF THE STATED AMENDMENT

The controversial provision (Section 32A) in the Public Service Act has attracted the attention, not only of the Courts (the High Court and the Court of Appeal of Tanzania) but also of the CMA. At different times the courts have been holding different on its interpretation. While others

[29] See the Public Service Act, Cap 298 [R.E 2019] Together with the Regulations made under it, the Standing Order for the Public Service of 2009 and the Public Service Regulations, 2003.
[30] See section 25 (1) (c) of the Public Service Act, Cap 298 [R.E 2019].
[31] Public Service Standing Orders of 2009.
[32] Order A.1 (44) of the Standing Orders, 2009.
[33] See Section 36 (1) of the Interpretation of Laws Act, Cap 1 [R.E 2019].

are of the view that the CMA has jurisdiction to deal with public servants, others maintain that it does not have such powers vide section 32A. There are a number of theories advanced regarding whether or not employees in the public service could knock the doors of the CMA before exhausting remedies available in the public service dispute settlement machinery. The *first* one was non-restrictive theory, which maintains that, employees in the public service and those in the private sector have the right and may enjoy the remedies available under the Employment and Labour Relations Act,[34] the Labour Institutions Act[35] and the Regulations made under them without exhausting the remedies available under the public service dispute settlement machinery. This was noted in the case of *James Leonidas Ngonge v. Dawasco*,[36] and in consolidated Labour revisions of *Attorney General vs. Maria Mselemu*[37] and *Attorney General vs. Allan Mulla*[38] where it was held that" the CMA has jurisdiction in all labour disputes irrespective of whether or not the government is a party.

The *second* theory was named restrictive theory, this maintained that, employees in the public sector may not access remedies outside the public service dispute settlement framework without first exhausting the remedies available under public service legal regime. However, this theory seems to accept some exceptions. Employees of the public parastatal organizations, public corporations and other autonomous public institutions are excluded from the definition of a public servant by section 3 of the Public Service Act. The other exception is that,

[34] Cap 366 [R.E 2019].
[35] Cap 300 [R.E 2019].
[36] Labour Revision No.382 of 2013, High Court of Tanzania Labour Division at Dar es Salaam (Unreported).
[37] Labour Revision No.270 of 2008, High Court of Tanzania Labour Division at Dar es Salaam (Unreported).
[38] Revision No. 271 of 2008, High Court of Tanzania Labour Division at Dar es Salaam (Unreported).

employees whose disputes arose before coming into force of the 2016 amendment to the Public Service Act (vide Written Laws Miscellaneous Amendments) Act, No. 3 of 2016) are not caught by the net and thus need not exhaust the remedies under the public service legal regime. Lastly, categories of employees who are excluded from the definition of a public servant need not exhaust the remedies under the Public Service Act. These include, those working in a parliamentary office; an office of a member of a council, board, panel, committee or other similar body whether or not corporate, established by or under any written law; an office the emoluments of which are payable at an hourly rate, daily rate or term contract; an office of a judge or other judicial office; and lastly an office in the police force or prisons service.[39]

A number of judicial decisions support the restrictive theory, these include; *Dar es Salaam City Council v. Generose Gaspar Chambi*[40]. In this case the respondent was employed by the applicant as a Personal secretary on 1st September, 2003. She worked with the applicant until 20th July, 2011, where she was terminated on absenteeism. Aggrieved with termination, the respondent filed a dispute before CMA claiming to have been unfairly terminated. CMA found that she was unfairly terminated. This dissatisfied the applicant who decided to lodge an application for revision before the High Court Labour Division. Submitting on the grounds for revision, the applicant's counsel started with ground three, that, CMA had no jurisdiction to entertain the dispute on the reason that, the respondent was a public servant thus she had to appeal to the Public Service Commission instead of CMA. He referred to section 25(1) (b) of the Public Service Act[41] read together with Rule 61(1) of the Public Service Regulations of 2003 and Section 32A of the Public Service Act

[39] Section 3 (a) of the Public Service Act, Cap 298 [R.E 2019].
[40] Labour Revision No. 584 of 2018, High Court Labour Division, at Dar es Salaam (Unreported).
[41] No. 8 of 2002.

as amended by the Written Laws (Miscellaneous Amendments) Act No.3 of 2016 which provided for exhaustion of the remedies provided under the Public Service Act prior to seeking available remedies under the labour laws. The court ruled in the favour of the Applicant that, CMA lacked jurisdiction to entertain the matter because the respondent had to exhaust remedies under the public service legal regime.

The same view as above was also maintained in the case of *Salehe Komba and Revocatus Rukonge v. Tanzania Posts Corporation,*[42] *Jeremiah Mwandi v. Tanzania Posts Corporation,*[43] Deogratius John Lyakuipa and Another v. Tanzania Zambia Railway Authority[44] to mention just a few.

The picture captured from the above explanation is the absence of consensus at the level of the High Court regarding the correct position of the law, which is a result of divergent views over interpretation of section 32A of the Public Service Act. In a situation like this, in a Common Law jurisdiction like Tanzania, it is the role of the Court of Appeal to make a determination over the controversy and set a rule that will be reflecting the correct position of the law now and then.

7.0. COURT OF APPEAL'S RULE SETTING POWERS ON CMA'S JURISDICTION OVER PUBLIC SERVANTS

The Court of Appeal of Tanzania has had the opportunity to test the applicability of the impugned section 32A of the Public Service Act in a number of cases. In the Case of *Joseph Khenan v. Nkasi District Council*[45] the appellant Joseph Khenan was employed by the respondent Nkasi District Council as a Watchman on 01.07.1996 and later; on 01.04.1999,

[42] Labour Revision No. 12 of 2018, High Court of Tanzania at Mwanza (Unreported).
[43] Labour Revision No. 6 of 2019, High Court of Tanzania at Kigoma (Unreported).
[44] Revision Application No. 68 of 2019, High Court of Tanzania at Dar es Salaam Labour Division (Unreported).
[45] Civil Appeal No. 126 of 2019, Court of Appeal of Tanzania at Mbeya (Unreported).

he was promoted to the position of a Ward Executive Officer, a position he held until 15.09.2008 when he was terminated at his instance. His termination was confirmed by the President on 16.04.2015 who ordered that the respondent should pay the appellant terminal benefits, if any. Following the President's order, the appellant claimed from the respondent terminal benefits to the tune of Tshs. 57,654,107/=. On 09.09.2016 the respondent communicated to the appellant in writing telling him that his entitlements were calculated basing on Regulation 40 (1) of the Public Service Regulations, 2003 read together with Regulation 49 (1- 5) of the Public Service Regulations, 2009. Based on those calculations, the appellant was told that he was entitled to be paid a total of Tshs. 4,943,056/= only. Dissatisfied with that order the Appellant preferred the matter before the CMA and later to the High Court Labour Division and lastly to the Court of Appeal of Tanzania.

At the hearing, among other concerns, there arose the issue concerning jurisdiction of the CMA considering that the Appellant herein was a public servant. The court was to answer the question whether CMA was seized with jurisdiction to entertain the matter when the same already went up to the President of the United Republic of Tanzania as an appellate body. After a thorough analysis of the law, the Court ruled that the CMA had such jurisdiction because, not withstand the provisions of section 32A of the Public Service Act, the matter before the CMA was filed a bit earlier before the Written Laws (Miscellaneous Amendments) Act, No. 3 of 2016 came into force.

It goes without saying that, had Act No. 3 of 2016 come into force, it is obvious that the CMA would be adjudged to lack the requisite jurisdiction to entertain the matter.

In the latest Court of Appeal's Decision pertaining to the matter under discussion, *Tanzania Posts Corporation v. Dominic A. Kalangi*[46] the respondent Dominic A. Kalangi was a former employee of the appellant Tanzania Posts Corporation. Until the termination of his employment contract, he was working as a Regional Manager. However, his services were terminated on 10th July 2017 following allegations of gross misconduct and dishonesty. Aggrieved by the termination of his employment contract, the respondent referred his grievances to the Commission for Mediation and Arbitration for Lindi (the CMA), which, after hearing the parties, ruled against him holding that his contract of employment was both procedurally and substantially terminated fairly. Undaunted, he applied to the High Court seeking revision of the decision of the CMA but all to no avail.

However, it is worth noting that, having found no merit in the application for revision and subsequently dismissed it, the learned High Court Judge (Ngwembe,J) went on and held in conclusion that, the Appellant was to pay the Respondent compensation equal to six months' salaries. This aggrieved the appellant hence he lodged an appeal to the Court of Appeal of Tanzania. During hearing, an issue arose as to whether the CMA was seized with jurisdiction to entertain the matter considering that the Respondent was a public servant. The Court held that CMA had no jurisdiction to entertain the matter.

From the above discussion, the Court of Appeal of Tanzania sides with the restrictive theory in that, once a public servant is aggrieved by a decision of a public authority pertaining to employment matters, he/she has to exhaust all available remedies under the public service dispute settlement machinery before resorting to the labour laws, to mean, the ELRA and the LIA. Thus, this is the position of the law as it stands today in Tanzania. Looking at the decision of the CAT one will quickly

[46] Civil Appeal No. 12 of 2022, Court of Appeal of Tanzania, at Mtwara (Unreported).

note that, the Court only confined itself on the provisions of the law and decided accordingly, it never bothered to settle the matter once and for all. On the face of it one may say that the Court was right based on the fact that, it strictly followed the dictates of the law.[47] The CAT was very much aware of the existence of the contradicting decisions of the High Court, this was an opportunity for it to conclude the debate and probably by saying something on the impugned amendment. With this decision of the CAT in place, it means that, the High Court Labour Division is bound by that decision and it has to follow it as a matter of law. This suggests that, section 32A of the Public Service Act is safe and shall remain operational until the same is amended by the Parliament *suo motu* or the same is challenged in court.

8.0. THE REMEDIES AVAILABLE TO THE AGGRIEVED PERSON

The above discussion which is based on the discussed judicial precedents suggests that, once a public servant exhausts all available remedies under the Public service legal regime that is when they can resort to remedies available in the ELRA and the LIA. According to the labour laws, the remedies so available include approaching the CMA either for mediation or arbitration and lastly to the High Court Labour Division by way of revision.[48] The law dictates that at CMA, the matter has first to be mediated.[49] It follows therefore that, after the matter concerning a public servant goes up to the President of the United Republic of Tanzania, and a decision is made thereon, then the dissatisfied person should resort to the CMA. The question would be, how would that referral be made to the CMA? The law is very clear that, the decision of the President shall

[47] Sections 32A and 34A of the Public Service Act, Cap 298 [R.E 2019].
[48] See sections 86, 88 and 91 of the Employment and Labour Relations Act, Cap 366 [R.E 2019].
[49] Id., Section 86.

be final.[50] Another question arises, how will such final decision be challenged?

There are two theories concerning what should follow next; the extra-labour regime theory and the finality theory. The extra-labour regime maintains that, once a public servant exhausts all remedies available under public service legal regime up to the last ladder of appeal, he cannot resort to remedies available under general labour laws by seeking remedies at the CMA and the High Court Labour Division, save that, he may resort to extra-labour regime remedies available under judicial review framework by seeking for prerogative orders against the President of the United Republic of Tanzania. It means that, the provisions of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act[51] come into play.

Mkasimongwa J. in the case of *Asseli Shewally v. Muheza District Council*[52] held to the effect that, when a public servant exhausts all internal remedies available under the public service legal regime up to the highest ladder, the President, he cannot later go to the CMA, the only available remedy is for him to challenge that decision through judicial review. The same view was held in the case of *Benezer David Mwang'ombe v. Board of Trustees of Marine Parks and Reserves Unit*[53] and that of *Martin Mtui v. Municipal Executive Director*[54] to mention but a few.

[50] Section 25 (1) (c) of the Public Service Act, Cap 298 [R.E 2019].
[51] Cap 310 [R.E 2019].
[52] Labour Revision No. 6 of 2018, High Court of Tanzania at Tanga (Unreported).
[53] Miscellaneous Labour Application No. 380 of 2018, High Court Labour division at Dar es Salaam.
[54] Miscellaneous Application No. 8 of 2020 High Court Tabora District Registry.

According to this theory, the aggrieved person may not and should not think of resorting to appeal. The only available remedy is judicial review, the effectiveness or otherwise of it is discussed below under this part.

The Finality theory on the other hand maintains that, public servants must exhaust all remedies available under the public service legal regime and once these are exhausted, the public servant cannot resort to remedies available under general labour law by seeking remedies at the CMA or High Court Labour Division as the decision of the President as an appellate authority of last resort in public service is final and conclusive. Hence it cannot be challenged at the CMA or before the High Court Labour Division. This was so said by Rumanyika J. in the case of *Mkurugenzi Halmashauri ya Sengerema v. Masumbuko Alphonce Mathias.*[55] The legal effect of this judgment is that, when the President of the United Republic of Tanzania makes a decision, such decision is final and conclusive and not subject to be challenged in any court of law. In other words, the President has the final say with regard to people's rights in as far as public servants' labour rights are concerned.

The finality theory further suggests that, when the President is performing the appellate functions over labour matters, he/she is at liberty to go wrong or right with no possibility of his decision being questioned in any court or tribunal. The assumption under this theory is that, ouster clauses are absolute and they fully cushion the authority concerned. However, this assumption is legally wrong based on the perception the Courts of law in Tanzania and elsewhere have, that, they are always jealous of their jurisdiction and will not remain silent when their jurisdiction is being taken away by legal provisions.[56] This is because, according to the Constitution of the United Republic of

[55] Labour Revision No. 17 of 2020, High Court of Tanzania at Mwanza (Ureported).
[56] *Mtenga v. The University of Dar es Salaam* (1971) HCD 247. See also *Tanzania Air Services Ltd v. Minister for Labour* [1996] TLR 217.

Tanzania the duty to dispense justice is on the courts and not otherwise.[57] Thus it is the court with final say in dispensation of justice and not any other body.

The extra-labour regime on the other hand holds water in as far as the correct position of the law is concerned. However, one question needs attention; how effective is judicial review regarding labour matters? It should be noted that, subjecting an employee to judicial review is to expose him/her to cumbersome and technical procedures which are unhealthy to labour relations. Judicial review is not available as a matter of right but highly depends on the discretion of the Court. This is so because, before a person applies for judicial review they must first obtain leave of the court. Failure of which application of remedies under judicial review will not be possible.[58] The stage involves complex issues including several documents to be drafted for accompanying the application, such as a statement providing for the name and description of the applicant, the relief sought, the grounds on which the relief is sought and affidavits verifying the facts. [59]It is also noteworthy that, the application for leave involves hearing and, in some cases, in granting leave the judge in question may impose terms as to costs.[60]

Another hurdle in pursuing labour rights through judicial review is the limited nature of the grounds to be invoked for judicial review remedies to issue. Judicial review is only to be issued on questioning the legality of an action or decision made by a public authority, as opposed to merits of the matter.[61] The common grounds for invocation of judicial review

[57] Article 107A (1) of the Constitution of the United Republic of Tanzania of 1977 as amended.
[58] Rule 5 (1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014.
[59] Id., Rule 5 (2).
[60] Id., Rule 5 (5).
[61] Musa, S., *Public Law in East Africa*, Kampala: Law Africa Publishing (U) Ltd, 2013, at p. 95.

include; acting ultra-vires, error of law on the face of records and failure to observe rules of natural justice. Thus, when the decision made by the President has nothing to do with these three main grounds the employee will have no recourse against the decision made by the President. This is disadvantageous to the employee compared to an appeal since, in appeal matters of evidence may be entertained, this is not the case in judicial review.

On the same line of argument, the remedies available in judicial review are discretionary in nature, thus grantable at the discretion of the court. In *Re Fazal Kassam (Mill) Ltd.*[62] one of the objections raised was that, applicants were precluded from seeking relief by way of mandamus since they had a right of appeal to the Minister, against the respondent's refusal to issue them with a coffee exporter's license. It was stated by Sir Ralph Windham, C.J. at p. 1005 that,

> *"…it is not the law that the court will always refuse mandamus when the applicant could have appealed. The matter is one of discretion, to be carefully and judicially exercised, the position being simply that as stated in Halsbury's Law of England (3rd E.d) Vol 11 at p. 107. The court will, as a general rule, and in the exercise of its discretion, refuse an order of mandamus, when there is an alternative specific remedy at law which is not less convenient, beneficial and effective."*

It goes without saying that, when one applies for the prerogative orders of certiorari, mandamus and prohibition the same will not be issued as a matter of right. The reason for this is as stated above, that these remedies are issued at the discretion of the court. Thus, an employee who resorts to judicial review is likely to face that legal dilemma. It is a trite principle

[62] [1960] E.A 21.

of labour law that labour disputes should be settled as quickly as possible, the aim being to bring about harmony at work places.

Looking keenly at the amendment the subject of this discussion, one will quickly note that, in one way or the other, among other effects, it affects the right to appeal or to enjoy other legal remedies which is constitutionally guaranteed.[63] This is so because, despite the fact that the impugned amendment suggests that a public servant will have the right to resort to labour laws (ELRA and LIA) after exhausting the remedies under the Public Service Act, its practicality is questionable and renders the stated remedy to be illusory. This renders the constitutionality of the amendment questionable. This is a fit case for challenging the said amendment for being unconstitutional. Once this avenue is explored and the court rules out that the amendment is actually unconstitutional, the old ideal atmosphere will come back where public servants will be at liberty to choose a proper avenue for them in settling labour disputes. That is to say, they may decide to access the CMA and the High Court Labour Division or channel their grievance through the Public Service Commission up wards.

9.0. THE ROLE OF CMA IN PUBLIC SERVICE DISPUTE SETTLEMENT

The President being the final decision maker in disciplinary actions involving public servants, and judicial review being the only viable remedy available to a public servant aggrieved by the decision of the President, one has to quickly note that, the only remedy available therefrom is appeal to the Court of Appeal of Tanzania.[64] According to the laws of the Land, the Court of Appeal of Tanzania is the highest

[63] Article 13 (6) (a) of the Constitution of the United Republic of Tanzania of 1977 as amended.
[64] Section 4 (1) of the Appellate Jurisdiction Act, Cap 141 [R.E 2019].

court in the judicial hierarchy. Thus no appeal lies from the Court of Appeal. This marks the end of exhaustion of remedies under the public service dispute settlement machinery, it means that, according to section 32A of the Public Service Act, it is at this point that a dissatisfied servant may resort to general labour laws. It means therefore that, it is now the turn for the ELRA and the LIA together with the CMA and the High Court Labour Division to come in and feature in the dispute settlement regime for public servants.

The challenging questions would be, how would a Court of Appeal's decision be challenged before a CMA? Should the aggrieved servant approach CMA by way of a fresh referral? These two questions do not attract simple answers. Regarding the first question, it is legally inconceivable to appeal the Court of Appeal's decision to CMA, this is because CMA has no such legal mandate to question the Court of Appeal, it being the final appellate court in Tanzania. Regarding the second question, it would be possible to reopen the matter at CMA as a fresh referral but, such proceedings would be caught up by the *res judicata* principle because the matter, among others, was finally determined by a competent court, the Court of Appeal. In such circumstances, it is very hard if not impossible to see the role of CMA at this juncture.

This amounts to a total exclusion of the role of the ELRA and the LIA together with the 2007 regulations made thereunder. As a result, section 2 (1) of the ELRA which states that the Act shall apply to all employees including those in the public service of the Government of Tanzania in Mainland Tanzania to become nugatory. From the foregoing, one may wonder whether it was the real intention of the Parliament of Tanzania to totally exclude applicability of the ELRA and the LIA and to totally oust the jurisdiction of the CMA and High Court Labour Division regarding disputes involving public servants. If this was the real intention of the Parliament, what did the Parliament intend to achieve?

The fact that there are scattered labour laws for public sector on one hand and private sector on the other, contravenes the intention of the government of Tanzania in streamlining the labour regime after noting that the labour laws are scattered.[65] The above uncertainty invites the Court of Appeal of Tanzania to make a correct interpretation by ascertaining the intention of the Parliament by inserting the problematic section 32A in the Public Service Act. This is so because, the CAT has finally ruled out that by inserting section 32A in the Public Service Act, public servants are precluded from seeking refuge in the general labour laws (the ELRA and the LIA) before exhausting the remedies available under the public service legal regime. The CAT has not categorically stated what should follow next after the President of the United Republic of Tanzania makes a final decision is his/her capacity as an appellate body.

10.0. CONCLUSION

The dispute settlement machinery in Tanzania is tainted with uncertainties as to whether the public service settlement machinery and that found under the general labour laws are at the same level and thus either of them can be accessed or it has to be accessed after the other is exhaustively utilized. To a great extent, this has been fueled by the amendment made to the Public Service Act, and specifically on introduction of section 32A. This section has given rise to divergent views in the Judiciary which ended up in confusing the judiciary itself and the general public. Thus, the Court of Appeal of Tanzania has a very big role to play in entangling this puzzle, once and for all. It is unfortunate, as observed above that, the Court of Appeal in several occasions had an opportunity to deal with the impugned amendment but it ended up confining itself on the question as to whether or not the CMA has

[65] See general findings to the Law Reform Commission, Report on the Labour Law, 2001.

jurisdiction to deal with a labour matter involving a public servant. It never bothered to go ahead and determine the legality or otherwise of the amendment. Had it gone ahead and looked at the amendment critically, it would have discovered the legal paradox caused by the amendment.

Looking at the two regimes the subject of this paper, that is, the public service dispute settlement machinery and the private one, it goes without saying that, the public service dispute settlement machinery is never independent. It is so because all disciplinary authorities under it are under one superior, the President who is the final say in such disputes. But also, all disciplinary authorities do relate closely so in some cases faulting a decision of a 'relative' is not that simple. The CMA and the Labour Court on the other hand, are a bit free compared to their counterpart. Prudence would thus point towards an ideal situation where public servants would become free to choose where to go, and if that is demanding too much then the proposal by the Parliamentary Standing Committee on Constitutional and Legal Affairs, that section 32A of the Public Service Act be applied only in respect of disciplinary matters be adopted.

11.0. RECOMMENDATIONS

After a thorough analysis and review of the statutory law and case law, the author is of the view that the situation as discussed above, should not be left unattended, thus some recommendations are made herein below that may be useful in clearing the disharmony.

1. The Public Service Act, and specifically section 32A should be amended to remove the disharmony for the sake of safeguarding the rights of the work force. This is supported by his Lordship, Hon. Mkasimongwa, J. in *Asseli Shewally v. Muheza District Council*[66]

[66] Labour Revision No. 6 of 2018, High Court of Tanzania at Tanga (Unreported).

who advised that the Public Service Act be amended and the finality of the President's decisions as the final appellate body in the public service be removed. He was of the view that, this would give wide chances for the aggrieved servant to seek for remedies. According to him, once this is done, servants will be at liberty to choose the route they would wish to use, whether to pursue their rights through the public service legal regime or through the general labour laws.

The amendment should make it clear that employees in the public service are supposed to utilize the remedies available under the public service dispute settlement machinery and they may not resort to the general labour laws. This is so because the two regimes; the public service dispute settlement regime and the general labour laws are at per and requiring an employee to resort to the other machinery after exhausting remedies available under the other is a duplication of efforts and elongates dispute settlement unduly. This calls for an intervention by a court of law through declaring the unconstitutionality of the amendment. Alternatively, the Attorney General may have to move for an amendment of the law so as to obviate the unwelcome legal paradox.

This necessarily means that, the Employment and Labour Relations Act together with the Labour Institutions Act will be reserved for workers in the private sector. This will necessitate an amendment to section 2 (1) of the ELRA so as to make it clear that these two laws together with the regulations made under them shall only apply to workers under the private sector.

2. In the alternative to the above recommendation, It is suggested that, the impugned section 32A of the Public Service Act be challenged in court for the Court to declare it illegal and thus be amended. This is so because the body (the responsible ministry) that was to initiate the move for amendment seems to be happy

with the provision, this was seen in the parliamentary discussions as quoted from the Hansards and reported in the discussion in this article.