

Citation	Parties	Legal Principles Discussed
CIVIL APPEAL NO. 29 OF 2001- COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM- MROSO, J.A., MUNUO, J.A., And KAJI, J.A.)-	JOHN BOSCO KAZINDUKI Vs. 1. THE MINISTER FOR LABOUR, 2. THE ATTORNEY GENERAL- (Appeal from the ruling and order of the High Court of Tanzania at Dar es Salaam- <u>Manento, J.</u>)	Whether High Court should have granted the order of certiorari because the person who decided a reference against a decision of a Conciliation Board was not the Minister for Labour as he should have been.

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MROSO, J.A., MUNUO, J.A., And KAJI, J.A.)

CIVIL APPEAL NO. 29 OF 2001

**JOHN BOSCO KAZINDUKI APPELLANT
VERSUS
1. THE MINISTER FOR LABOUR]
2. THE ATTORNEY GENERAL] RESPONDENTS**

**(Appeal from the ruling and order of the High Court
of Tanzania at Dar es Salaam)**

(Manento, J.)

**dated the 16th day of March, 2000
in**

Miscellaneous Civil Cause No. 45 of 1999

JUDGMENT OF THE COURT

25 April & 10 May 2007

MROSO, J.A.:

This is an appeal against a decision of the High Court, Manento, J. as he then was, dismissing with costs an application for the order of **certiorari** which was made to the High Court by the appellant.

Following from the decision of the High Court the appellant sought to challenge it in this Court. He, therefore, filed three substantive grounds of appeal. In the first ground of appeal it is contended that the High Court should have granted the order of **certiorari** because the person who decided a reference against a decision of a Conciliation Board was not the Minister for Labour as he should have been. In the second ground of appeal the complaint is that the High Court in refusing to issue the order of **certiorari** had failed to exercise its discretion judiciously. Finally, in the third ground of appeal the grievance is that the High Court judge in deciding against the application for issuance of the order of **certiorari** departed from the grounds advanced by the appellant in his statement to court and, instead, "invented his own grounds" to which the appellant was not given opportunity to be heard. For a better

appreciation of the general tenor of the appeal we intend to give a background to it.

The appellant was in 1996 employed as a teller at the Kichwele Branch of the National Bank of Commerce in Dar es Salaam. A person from Sonia Industries Limited brought to the bank Tshs. 1,435,100/= to be deposited into a company account. That amount of money was shown on a deposit slip. The appellant attended the customer and after being satisfied that the amount to be deposited was correct ticked on the deposit slip and took the money into his custody. Subsequently, the appellant prepared another deposit slip relating to the money but this later slip showed that the total amount received from the customer and banked was Tshs. 1,335,100/=. He then destroyed the original deposit slip. It is obvious that the pay-in-slip prepared by the appellant showed an amount which was Tshs. 100,000/= less than the amount the customer had deposited. A few days later the customer somehow got to know of what the appellant had done and lodged a complaint to the bank management.

The bank management not only made the appellant refund the amount of Tshs. 100,000/= but they also took disciplinary action under the Security of Employment Act, 1964 by dismissing him summarily. The applicant did not accept the dismissal from employment and challenged it by making a reference to the Conciliation Board which ordered that he be re-instated in his employment.

With the quashing of the employer's decision by the Conciliation Board, the Bank made a reference to the Minister for Labour and Youth Development.

On 23rd May, 1998 a decision which appeared to have been made by the Minister for Labour, was given by one Mohamed Seif Khatibu (MB) in a document with reference number KZ/U.10/RF/7451/4. He reversed the decision of the Conciliation Board and ordered that the appellant be dismissed because he had failed to report that there was short remittance of cash from a customer and that there was need for high integrity in a Bank.

Following from the order of dismissal the appellant applied to the High Court for the order of **certiorari** as already mentioned in this judgment. One of the complaints in the appellant's affidavit to the High Court in support of the application was that Mohamed Seif Khatibu who purported to decide on the respondent's reference to the Minister for Labour against the decision of the Conciliation Board was not then the Minister for Labour and was not, therefore, competent to order for the appellant's dismissal.

One Paul Joel Ngwembe, a State Attorney in The Attorney General's Chambers, swore an affidavit on behalf of the respondent in the application before the High Court. In paragraph 7 of his affidavit he purported to reply to the claim by the appellant that the said Mohamed Seif Khatibu was not the Minister for Labour on 23/05/1998 when he decided on the reference against the decision of the Conciliation Board. The learned State Attorney said:-

“7. That the contents of paragraph 10 of the affidavit (appellant’s) is partly admitted to the extent that the decision of Minister for Labour to reverse the decision of Conciliation board was signed by the Minister Mohamed Seif Khatibu (MB) after being appointed acting Minister for Labour. The date appearing on the decision i.e. 23/5/1998 was the date when the document was typed waiting for the signature of (sic) the then Minister for Labour Hon. Kinyondo though was still in office but he was in Mwanza attending the election petition, which finally unseated him from the Member of Parliament. Otherwise the applicant is put to strict proof thereof”.

It would appear, therefore, that on 23/05/1998 when Mohamed Seif Khatibu signed the decision in the reference as Minister for Labour and ordered that the appellant be dismissed, late Kinyondo, (MB) was still Minister for Labour although he was attending an election petition hearing.

According to a copy of the judgment of the High Court in the election petition which is in the record of appeal, late Kinyondo was unseated as a Member of Parliament on 27th May, 1998 and consequently ceased to be Minister for Labour and Youth Development.

Mr. Mgare, learned advocate for the appellant, argued forcefully that Mr. Khatibu could not therefore have been an acting Minister for Labour on 23/05/1998. If it was true, as Mr. Ngwembe deponed in his affidavit, that on 23/05/98 Mr. Khatibu was acting Minister for Labour, evidence of such appointment could have been annexed to his affidavit. Mr. Mgare also wondered why Mr. Khatibu would not sign the document embodying his decision as acting Minister for Labour if in fact it was in that capacity that he decided the reference to the Minister for Labour. Mr. Mgare submitted that Mr. Khatibu was not the Minister for Labour or his delegate as provided for under section 4 of the Security of Employment Act, 1964. Under that section of that Act the term "Minister" is defined to mean the Minister responsible for labour matters and, to the extent

that any function imposed or power conferred on the Minister is delegated to the Labour Commissioner under the Act, includes the delegate of the Minister. The High Court should, therefore, have issued the order of **certiorari** to quash what passed as a decision of the Minister but was not.

Ms Otaru, learned State Attorney who appeared for the respondents, put up resistance to Mr. Mgare's submission by trying to argue that Mr. Khatibu did not really sign the decision of the Minister on 23/05/1998 but on a later date and that the date shown was the date the document was typed. But she could not carry that argument to a logical conclusion because if 23/05/1998 was merely the date the document was typed, then how could it contain a decision which had not been taken by that date? It was clear Ms Otaru was fighting a losing battle.

We think that Mr. Mgare's arguments and submission have weighty substance. The reference to the Minister responsible for labour matters could only be decided either by the Minister himself or

by his delegate who would be the Labour Commissioner, if the Minister delegated that particular function to the Labour Commissioner. Since the then minister responsible for Labour, late Kinyondo, was such Minister until on 27th May, 1998, it is highly unlikely that there could have been an acting Minister for Labour four days earlier while the substantive holder of that office still existed and was in the country. If such an unlikely thing was the case, it was incumbent on the respondent to produce clear evidence before the High Court. That was not done.

It is noted that although the issue about Mr. Khatibu not being Minister for Labour on 23/05/1998 had been raised by the appellant both in his statement and affidavit before the High Court, the learned judge before whom the application for **Certiorari** was being heard conveniently omitted to discuss it. We think that issue was critical and decisive in the application before the High Court.

If, as now appears to be the case, the person who decided the reference to the Minister was not the Minister responsible for Labour matters or his delegate, then the purported decision was not the

decision of the Minister. It was no decision at all on the reference. It was null and void.

Once it is accepted that the purported decision was no decision at all in law, it would follow that the High Court should have issued the order of **certiorari** to quash and set aside that purported decision which had no effect of reversing the decision of the Conciliation Board. It also means, of course, that the employer's reference to the Minister is yet to be decided by the Minister responsible for Labour matters.

The High Court decision was given on the basis that the Minister for Labour had decided the reference and that on the merits as the learned judge saw them, there were no grounds for issuing the order sought by the appellant. Since the judge erred in believing that the Minister had decided the reference, the appropriate step to be taken by this Court is to quash and set aside both purported Minister's decision on the reference and the High Court ruling. We so order. The other grounds of appeal depend on the finding on the

first ground of appeal which we have just disposed of, it is now idle to discuss them. The appellant to have his costs.

GIVEN at DAR ES SALAAM this 10th day of May, 2007.

J.A. MROSO
JUSTICE OF APPEAL

E.N. MUNUO
JUSTICE OF APPEAL

S.N. KAJI
JUSTICE OF APPEAL

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

(S.M. RUMANYIKA)
DEPUTY REGISTRAR