The offence was committed before Act Number 10 of 1989 came into effect. In addition at the time of the commission of the offence, the prescribed minimum sentence for the offence was seven year's imprisonment under section 5(b) of the Minimum Sentences Act 1972. And we would add at that time in terms of section 170(1) of the Criminal Procedure Act 1985 the power of a Subordinate Court in sentencing was limited to an award of a term not exceeding eight years imprisonment.

In the event, the sentence of thirty (30) years' imprisonment imposed upon the appellant was undoubtedly illegal and cannot be allowed to stand. (See: *Christopher Mwakabura v. Republic* (1); *Abdul Abdallah v. Republic* (2) The sentence is therefore rectified by substituting a term of imprisonment for seven (7) years' on the first count. However taking into account the fact that the appellant has been serving his term in prison since the 10 February 1992, we ordered on the 30 September 2004 that the appellant be released from prison immediately unless otherwise lawfully held for some other cause.

PERMANENT SECRETARY (ESTABLISHMENTS) AND ANOTHER *v.* HILAL HAMED RASHID AND FOUR OTHERS

COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM

(Ramadhani, Mroso and Nsekela, JJ.A.)

CIVIL APPEAL No. 66 OF 2002

(From the decision of the High Court of Tanzania at Dar es Salaam, Kyando, J., dated 21 March 2002, in Civil Case No. 481 of 1999)

Police Officers – Termination of Service – Termination of Service in the Public interest – Services of Senior Police Officers abruptly terminated by the President by retirement in the Public interest – Whether the termination was lawful – Article 36(2) of the Constitution of the United Republic of Tanzania 1977 (1995 Edition) and section 3(2) of the Police Force and Prisons Services Commission Act 1990.

President – Powers of the President – Constitutional Powers of the President to remove a person from office – Whether the President may use those Powers to terminate service of Police officers – Article 36(2) of the Constitution (1995 Edition), and section 3(3) of the Police Force and Prisons Services Commission Act 1990.

Damages – Damages for unlawful termination of employment – Terminated officers claiming to be paid statutory salaries up to the date of compulsory retirement – Whether the claim is awardable.

The respondents were very Senior Police Officers. Their services were abruptly terminated on the grounds that the President had retired them in the public interest. They challenged their termination in the High Court, which held that they were unlawfully terminated. On appeal, the appellants defended the terminations and the respondents argued, *inter alia*, that they should be awarded damages in amounts equal to their statutory salaries up to their respective dates of compulsory retirement if they had remained in employment.

Held:(i) Being "retired in the public interest" is possible and lawful under the Civil Service Act 1989 which, however, was not applicable to the respondents because it categorically stated that it was not applicable to members of the Police Force;

(ii) Under article 36(2) of the Constitution the President is empowered to remove any officer from office and when the President retires any officer in the public interest he may be acting within his powers under the provisions of that article to remove that officer;

(iii) Although article 36(2) of the Constitution empowers the President to remove an officer from office, the application of the article is subject to other relevant law which, in this case is the Police Force and Prisons Services Commission Act 1990 whose section 3(2) vests the power to terminate Senior Police Officers in the President, but it has no provision for retirement in the public interest;

(iv) As the powers of the President to remove from office are subject to the provisions of the Police Force and Prisons Services Commission Act 1990, and the Act does not recognize retirement in the public interest, the respondents were wrongfully retired;

(v) It is baseless speculation to expect that once employed on permanent and pensionable terms, a person shall remain in that employment for life or up to the age of retirement; the claim for salaries up to the respondents' respective ages of compulsory retirement was, therefore, correctly refused by the trial court.

Appeal dismissed

Cases referred to:

(1) *McClelland v. Northern Ireland General Health Service Board* [1957] 2 All ER129

(2) *Attorney General v. Said Juma Shekimweri*, Civil Appeal Number 11 of 1998 (unreported)

(3) *Keke v. Chief Secretary and Clodumar v. Chief Secretary* [1987] LRC (const) 979

(4) *Jones v. Solomon* [1991] LRC 646

(5) *Twikasyege Mwaigombe v. Mbeya Regional Trading Co Ltd* [1988] T.L.R. 237

Statutory provisions referred to:

(1) Constitution of the United Republic of Tanzania 1977, article 36(2)

(2) Civil Service Act 1989 Number 16 of 1989, sections 2 and 19(3)

(3) Police Force and Prisons Services Commission Act 1990 Number 8 of 1990, sections 3(2) and 3(3)

Mr Chidowu, State Attorney, for the Appellants

Dr Twaib, for the Respondents

Editorial Note: Article 36 of the Constitution was amended in 2000 but the court made no reference to the amended version which came after the events leading to this case; the amendment, however, had no effect on the powers of the President considered in this judgment.

JUDGMENT OF THE COURT

(Dated 04 October 2004)

Ramadhani, J.A.: This is a consolidation of two appeals with respect to the judgment and decree of Kyando, J., in Civil Case Number 481 of 1999 in which Hilal Hamed and four others were the plaintiffs, and the Permanent Secretary (Establishments) and the Attorney General were the defendants. In Civil Appeal Number 64 of 2002 the plaintiffs are appealing against certain orders only while in Civil Appeal Number 66 of 2002 the defendants are contesting the whole judgment and denying any liability to the plaintiffs. So, we have taken the defendants to be the appellants and the plaintiffs to be the respondents with a cross appeal.

The respondents were very Senior Police Officers whose services were terminated abruptly by identical letters, dated 6 May 1996, from the first appellant to every one of them informing them that the President has terminated their services, albeit retroactively from 4 May 1996. The letters, which the learned judge collectively referred to as "the letters of retirement", reached the respondents after the news of their termination had hit the headlines of some local newspapers, notably, *Daily News, Nipashe* and *Mtanzania.*

The respondents claimed that their premature retirement was illegal and invalid. Consequently, the respondents claimed payment of salaries and all dues owing to them from the date of premature retirement to the time of compulsory retirement age of each one of them, general damages to the tune of TZS. 300 000 000 for each, and interest from the date of judgment to the date of full payment.

Kyando, J., found from the letters of retirement that the respondents were "retired in the public interest", a phraseology obtained in the Civil Service Act 1989, which does not apply to the members of the Police Force by virtue of section 2 which defines a civil servant as 'a public officer holding or acting in a civil service office". Then the definition of a "civil service office" categorically excludes "the office of a member of the Police Force".

Members of Police Force are governed by the Police Force and Prisons Services Commission Act 1990, (Act Number 8 of 1990) (hereinafter referred to as the PFPSC Act). As the PFPSC Act does not contain the phrase "retirement in the public interest", Kyando, J., held that the respondents could not be retired in the public interest and that the premature retirement was illegal and void. He awarded damages of TZS. 70 000 000 to each of them for wrongful termination of employment with interest at court rate from the date of judgment to that of full payment.

However, the learned judge held that the respondents were not entitled to any payment from the date of illegal retirement to their respective dates of compulsory retirement. We better let the learned judge speak for himself:

> In the present case, too, the claims to payment from the date of the "premature" retirements to the dates of compulsory retirement are based on the assumption that the plaintiffs had to work up to the dates of their compulsory retirements. This assumption in view of the authority above [*McClelland B. Northern Ireland General Health Service Board* (1)] is wrong and it is also founded on speculations. This is because no one can know what the future holds for him. One can die before reaching the age of compulsory retirement or he can be dismissed from employment or he can even resign. I reject, therefore, in this case the claims in para (b) which are for payments up to the ages of compulsory retirement of the plaintiffs

The learned judge also dismissed another claim based on the Police Force Regulations, 1995, (GN 193/95) for respondents 1 and 2, Hilal Hemed Rashid and Edwin Abraham Man, for additional superannuating benefits due to officers of the rank of Commissioner of Police and above.

Mr Chidowu, learned State Attorney, appeared for the appellants and submitted that the letters of retirement cited section 36(2) of the Constitution of the United Republic, 1977, which in Kiswahili uses the phrase "kuwaondoa katika madaraka" and argued that this is correctly translated as "removal from office". He went further to submit that a couple of decisions in the Commonwealth have taken the word "removal" and the word "retire"to mean the same thing and pointed out that those decisions have been followed by this court in *Attorney General v. Said Juma Shekimweri* (2). It was submitted that the President had the power to do what he did with respect to the respondents, and so their termination was not illegal.

On behalf of the respondents was Dr Twaib, learned advocate, who submitted that the words "remove" and "retire" are not always synonymous. He submitted that the decision in *Shekimweri* (2) is confined to the facts of the case. He also pointed out that the powers of the President under article 36(2) of the Constitution are subject to other written laws, which include the PFPSC Act, and that the provisions of this Act were violated in the present case. He contended that the retirement of the respondents was unlawful.

We find it as a fact that the President terminated the services of the respondents by "retirement in the public interest". We cannot fault the learned judge's finding that the letters of retirement say so. We also agree with Mr Twaib that the appellants in their amended written statement of defence pleaded so. The only issue is whether the President erred.

Article 36(2) of the Constitution was one of the laws cited in the letters of retirement and it provides, according to the edition of 1 July 1995, which was the one in force then, as follows:

> Bila ya kuathiri masharti mengineyo yaliyomo katika Katiba hii na masharti ya sheria yoyote inayohusika, mamlaka ya kuwateua watu kushika nafasi za madaraka katika utumishi wa Serikali ya Muungano, na pia madaraka ya kuwapandisha vyeo watu hao, kuwaondoa katika madaraka, kuwafukuza kazi na mamlaka ya kuthibiti nidhamu ya watu waliokabidhiwa madaraka, yatakuwa mikononi mwa Rais, Tume za Utumishi na mamlaka mengineyo yaliyotajwa na kupewa madaraka kuhusu nafasi yoyote au aina ya nafasi za madaraka kwa mujibu wa Katiba hii au kwa mujibu wa sheria yoyote inayohusika.

That can be translated:

> Subject to other provisions contained in this Constitution and to any other relevant law, the authority to appoint persons to offices in the service of the Government of the United Republic, and also the authority to promote such persons, to remove such persons from authority, to dismiss them from employment and the authority to discipline such persons, shall be vested in the President, the Service Commissions and any other authorities specified and empowered in respect of any office or category of office in accordance with this Constitution or in accordance with any relevant law.

Thus *"kuwandoa katika madaraka"* translates as "to remove such persons from authority" and so, the sub-article empowers the President to "remove" an officer from office. But, as already pointed out, the respondents were "retired in public interest". So, was this done under the provisions of article 36(2)?

Mr Chidowu referred us to *Shekimweri* where this court said:

> Going by the persuasive authorities in other Commonwealth countries, we hold that "remove" and "retire" mean one and the same thing.

Mr Twaib cautioned that the holding in *Shekimweri* should be confined to the facts of that case. However, that decision determined the meaning of two words used in two different legislation and that cannot be subject to the facts of a case.

Mr Twaib further argued that there are certain circumstances where the two words: "retire" and "remove" cannot be synonymous. Again that cannot be. In *Shekimweri* we followed the holding in *Keke v. Chief Secretary and Clodumar v. Chief Secretary* (3), one of the persuasive authorities, where it was said:

> The term "remove" means not only to dismiss but also to transfer or remove by retirement or change the situation of any person see **Shorter Oxford Dictionary**, (3 ed) Volume 2.

It suffices here to say that when the President "retire[s] in the public interest" any officer, he is acting within the provisions of article 36(2), that is to "remove" that officer. That is what was held in another persuasive authority relied upon in *Shekimweri* (2), *Jones v. Solomon* (4), at 662:

> In my judgment, the Commission acted within its jurisdiction in *removing* the respondent from public service on *retirement in the public interest...* [emphasis supplied]

However, the powers of the President under the provisions of article 36(2) are subject to other provisions of the Constitution and any other relevant law. In the present case the relevant law is the PFPSC Act, which provides in section 3(2) as follows:

> The power of appointment, promotions, confirmation and termination of appointment of Police and Prisons Officers above the rank of Assistant Commissioner is vested in the President of the United Republic.

The Act gives the President the power of "termination of appointment of a Police Officer above the rank of Assistant Commissioner". For the avoidance of doubt we have to state that according to *Shekimweri* (2) "termination" is also covered by the wider term "remove" obtained in article 36(2). However, as already said, that article is subject to the provisions of section 3(2) of the PFPSC Act which specifically deals with the termination of (or the removal from) the appointment of Police Officers above the rank of Assistant Commissioner like the respondents.

In *Shekimweri's* Case (2) article 32(2), like in this case, was cited and the relevant law for the appellant in that case was the Civil Service Act, which provides for "retirement in the public interest" in section 19(3). However, the Civil Service Act categorically excludes police officers. In the case of the respondents, the relevant law, the PFPSC Act, does not contain the phrase "retired in the public interest".

There is no flicker of doubt in our minds that the Constitution overrides all other legislation, the PFPSC Act included. Admittedly, also article 36(2) of the Constitution empowers the President to "remove" from office any officer he has appointed. However, the same article subjects itself to any other relevant law, in this case, the PFPSC Act. It is a principle of interpretation that *generalia specialibus non derogant,* that is, general things do not derogate from special things. So, the controlling provision in the case of the respondents is the PFPSC Act, which does not recognize retirement in the public interest. Therefore, we agree with the learned judge that the respondents were wrongfully retired.

Having come to that finding, we now consider the alternative ground of appeal, that is, whether the award of damages of TZS. 70 million to each respondent is on the high side. We shall consider this side by side with the cross-appeal of the respondents that the learned judge erred in law in assessing damages.

Mr Chidowu submitted that the learned judge had wrong considerations in assessing damages. Then Mr Chidowu argued that the retirement dates of the respondents are not the same so, the quantum should not also be the same. Mr Twaib, on the other hand, contended that retirement in the public interest causes stigma and that the public take it as an indication of misconduct on the part of the individual

concerned. He pointed out that the first and predominant principle in damages is *restitutio in integrum,* that is, the restoration to the original position of the claimant.

Admittedly, the learned judge in assessing damages considered four matters: One, he considered the publicity which surrounded the retirement of the respondents. Two, he observed that "retirement in the public interest in this country carries a very bad stigma on the part of the retiree". Three, he accepted the evidence of the respondents that their families received the news "with shock and consternation and anguish". Lastly, he considered that the respondents lost their jobs.

We entirely agree with the last two considerations but we are rather uneasy with the first two. It is a fact that the news of the retirement of the respondents was splashed on three different newspapers. However, there was no evidence that the appellants were responsible for the publications. The respondents may consider suing the papers, subject to other relevant laws.

However, we are of the considered opinion that the last two considerations: the effect of the retirement on the members of the family, and the loss of employment, are weighty enough to dissuade us from interfering with the award. On the other hand, Mr Chidowu did not elaborate as to how to grade the damages on the basis of the differing compulsory retirement dates of the respondents. However, we are of the opinion that Kyando, J., ought to have taken into account that the first and the second respondents, who were Commissioners of Police, ought to have got slightly more. So, we grant TZS. 80 million to each and uphold the damages for the rest.

Then there was a cross-appeal that the learned judge erred in refusing to award statutory salaries to the respondents to the date of compulsory retirement of each. This need not detain us. We are in full agreement with the learned judge that the claim should fail. We endorse the observation by Mroso, J. (as he then was), in *Twikasyege Mwaigombe v. Mbeya Regional Trading Co Ltd* (5), at 241, that:

> There is sometimes a misconception that where a person is offered employment on permanent and pensionable terms, then that he must be employed for life and must be paid a pension.

Mroso, J, went on to list down a number of things that can prevent one from remaining in employment and so be eligible for a pension. For the same reasons a person may not be eligible to get salaries and other benefits for the period up to the compulsory retirement age. So, we dismiss this ground of cross-appeal.

Another ground of cross-appeal was raised by first and second respondents that they are entitled to further superannuating benefits under the Police Force Service Regulations 1995 (G.N. 193/95). Kyando, J. said:

> The plaintiffs called no evidence on this point and I hold that the regulations relied on by the first and second plaintiffs, though they exist, are not operative and they do not confer on these plaintiffs the benefits which they claim under them, i.e. the regulations. I reject, therefore, these claims here.

We cannot fault the learned judge. It was up to the respondents to beef up their case and to show that the regulations are operative. That, they did not do. On the contrary, the appellants produced Mrs Hawa Mmanga, who was the Director of Pensions in the Ministry of Finance, and the Deputy Commissioner of Police, Abbas Hamis Awamasoli, who was the Chief of Administration in the Police Force. Both said that the regulations are not in force. We dismiss this ground, too.

Before we conclude, there are two matters we wish to comment on. First, we are disturbed by the disability of some of the members of staff of the first appellant who violate left, right and centre the principle of confidentiality in State matters. In this appeal the letters of retirement were written on 6 May 1996, and on the next day the news were splashed on three dailies and the radio while four respondents received their letters on 13 May 1996, and the first respondent got his on 10 May 1996. It is obvious that some one spread the news on

the same day the letters were written. A similar thing happened in the case of *Shekimweri* who was officially informed of his retirement on 4 August 1995, while the news that twenty eight Immigration Officers, including Shekimweri, had been sacked by the Minister of Home Affairs appeared in the *Daily News* on 2 June 1995, two months earlier. This state of affairs is most unfortunate and intolerable.

The second matter is that the appellants, who are advisers of the President, mishandled the whole affair and led the President into this deplorable situation. As already said, the respondents were all very senior officers with distinguished service. They could have been consulted and the issue of their premature retirement could have been settled in a way more satisfactory than the course that was taken. We concede that almost all very senior appointments are subject to utmost confidence and trust of the statutory appointing authority on the appointee. This is particularly so with the disciplined forces. If confidence and trust vanishes, then the authority has either to talk to the officer into premature retirement or to take disciplinary measures, which might not be an easy thing to do especially if the record of the officer is clean.

In the final analysis the appeal is dismissed with costs. The cross-appeal is partly allowed but on a matter which was raised by the appellants. For the avoidance of doubt the respondents were unlawfully retired and consequently they are entitled to damages of TZS. 80 million for the first and second respondents, and for the remaining three respondents, TZS. 70 million each. Interest shall be charged at court rate up to the date of full payment from the time of the judgment of the High Court in the case of TZS. 70 million and from the date of this judgment with respect to TZS. 80 million.