

A measuring the extent of the injury inflicted on the husband.

I find no conflict between these principles and the provisions of s. 74 of the Law of Marriage Act, 1971. Applying those principles to the

B present case, can it rightly be said that the assessment made by the primary court is unsupportable in law or in fact? Sitting as an appellate court, this court is entitled to interfere with a trial court's assessment of damages only if one or more of the conditions stated by LORD

C WRIGHT in *Davies v. Powell Duffryn Associated Collieries (2)*, at p. 617, exist:

D In effect the court, before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down

E heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.

F Even with the best will in the world, I cannot see how I can rightly fault the primary court's assessment of damages in this case. According to the evidence on record, the appellant stayed with the respondent's wife at his (the appellant's) home for a fairly long time. Leaving pecuniary loss aside, it must be true to say that the injury to the respondent's

G feelings inflicted by the appellant must have been fairly considerable. The assessment of damages by the primary court was, on the whole, fair and just.

**ALLY LINUS AND ELEVEN OTHERS v. TANZANIA
HARBOURS AUTHORITY & THE LABOUR
CONCILIATION BOARD OF TEMEKE DISTRICT**

COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(Nyalali, C.J., Mwakasendo and Kisanga, JJ.A.)

CIVIL APPEAL No. 2 OF 1983

(From the decision of the High Court of Tanzania at Dar es Salaam,
N.S. Mnzavas, J.K., dated 9th September 1982,
in Civil Cause No. 5 of 1981)

Administrative Law – Prerogative Remedies – Certiorari – Grounds for granting certiorari – Whether absence or lack of jurisdiction are the only grounds for granting certiorari

Administrative Law – Natural Justice – Duty to act judicially – Failure by the Labour Conciliation Board to allow party to proceedings to call material witnesses – A breach of natural justice

Precedent – Judicial precedent and duty to act judicially – High Court judge dissenting from decision of another High Court judge – Duty to act judicially requires judges not to lightly dissent from considered opinions of their brethren

Administrative Law – Certiorari – Grounds for award of certiorari – Error of Law as a ground for awarding certiorari

Administrative Law – Error of Law – Administrative Tribunal equating acceptance of terminal benefits with consent to the termination of employment – An error of law

High Court – Jurisdiction – Supervisory jurisdiction of the High Court – Whether granting certiorari on grounds of error of law amounts to hearing an appeal

A *from an administrative tribunal – Appeal and judicial review distinguished*

The appellants were aggrieved by the 1st Respondent's decision to terminate their employment. They accepted payment of their terminal benefits but at the same time referred their grievances to the Labour Conciliation Board, the 2nd Respondent. The Board decided against them and they applied to the High Court for orders of certiorari and mandamus. The High Court dismissed their application on grounds, *inter alia*, that the High Court could not grant certiorari upon any grounds other than absence or excess of jurisdiction, and that granting certiorari in the matter would amount to hearing an appeal from the Labour Conciliation Board. On appeal to the Court of Appeal:

D Held:

(i) Certiorari should have been granted by the High Court on the grounds of breach of natural justice by the Labour Conciliation Board; as a quasi-judicial body, the Board was duty bound to call those officials of the 1st Respondent whom the appellants wanted to give evidence before it;

E

(ii) It is not a matter of courtesy but a matter of duty to act judicially that requires a judge not lightly to dissent from the considered opinions of his brethren;

F

(iii) Certiorari should have been granted also upon the finding that the Board had erred in law to equate payment of terminal benefits to the appellants with consent by them to the termination of their employment;

G

(iv) Granting an order of certiorari in this case would not amount to hearing an appeal from the Board; while an appeal requires the appellate court to re-hear the case decided by the Board either generally or on particular issues, in an application for certiorari the High Court merely exercises its supervisory function to ensure that the Board acts in accordance with the law;

H

(v) The function of interpreting the law is a judicial function and the judiciary has the final word about the meaning of the laws.

I

Appeal allowed

Cases referred to:

(1) *Amri Juma and 15 Others v. Tanzania Harbours Authority and Another*, High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Cause No.37/1980 (unreported).

(2) *R v. Northumberland Compensation Appeals Tribunal*, [1952] 1 All E.R. 122

Professor Shivji, for the Appellants

Mr. Rweyemamu of the Tanzania Legal Corporation, for the 1st Respondent

JUDGMENT OF THE COURT

(Delivered on 13 May 1983)

Nyalali, C.J.: According to the proceedings in this court and the court below, it is indisputable that the appellants, that is Ally Linus and eleven others, applied in the High Court at Dar es Salaam for orders of *Certiorari* and *Mandamus* in respect of proceedings conducted before the Labour Conciliation Board at Temeke. The grounds upon which the application is based can be summarized as being firstly, the failure of the Board to observe principles of natural justice, secondly, the failure to act judicially and thirdly, the failure to act according to law.

The High Court, Mnzavas, J.K., dismissed the application but made no order as to costs. The appellants were aggrieved by the decision hence this appeal to this court. Professor Shivji, of the Legal Aid Committee of the Faculty of Law of the University of Dar es Salaam appeared for the appellants, while Mr. Rweyemamu from the Tanzania Legal Corporation, represented the first Respondent. The second Respondent, that is, the Labour Conciliation Board, has apparently been unwilling to be made a party to the proceedings ever since they commenced in the High Court.

It is indisputable that on the 5th April, 1980, sixteen employees of the

A First Respondent (the Tanzania Harbours Authority) had their employment terminated. There followed a general stoppage of work about four days later, that is, on the 8th and 9th of April, 1983. Next day, on the 10th of April, identical letters were written to the appellants by the First Respondent, terminating their employment. It is common ground that the First Respondent, offered to pay terminal benefits to the Appellants. There is no dispute that the appellants complained to the local branch of their workers' organization, that is, JUWATA. They were advised to accept the payment but press on with their complaints to higher authorities. Furthermore, it is common ground that the appellants accepted payment of terminal benefits and referred their grievances to the Labour Conciliation Board under the Security of Employment Act, Cap. 574. The Board made its decision against the appellants. That decision gave rise to the proceedings in the High Court.

E For reasons which will be apparent later on in this judgment, it is relevant to mention here that similar action was taken by the other sixteen employees whose employment had been terminated by the First Respondent earlier, on the 5th of April, 1980. In their case, the High Court, Mapigano J., decided the application in their favour. This was the case of *Amri Juma and 15 Others v. Tanzania Harbours Authority and Another (1)*.

F In the case now before us, the learned Jaji Kiongozi stated the general question and guiding principle as follows:

G Now the question this court is required to decide is whether this is a fit case for the issue of a writ of certiorari. In law I can only do so if the court is satisfied that the Conciliation Board acted without or in excess of jurisdiction.

H With regard to the specific points raised in the application the learned Jaji Kiongozi stated:

I There can be no argument that two of the workers were not present when the Tribunal heard and determined their petition. But with due respect to the learned counsel for the applicants such irregularity by the tribunal

did not deprive it of its jurisdiction to hear the dispute. Nor can it, by any stretch of imagination, be said that by hearing the petition in the absence of the two workers the tribunal exceeded its jurisdiction. By doing so the Labour Conciliation Board clearly acted contrary to principles of natural justice but that is far from saying that the Board had no jurisdiction to entertain the matter. That being the position I fail to understand how I can grant the application for a writ of certiorari. To do so would amount to hearing an appeal from the decision of the Labour Conciliation Board, which power, as the law amply shows, this court does not possess.

There were, I agree other procedural irregularities such as the tribunal not allowing some of the workers to call their witnesses but, as the learned counsel will no doubt agree with me, a writ of certiorari will only lie where an error of law is revealed on the face of an order or decision or absence of or excess of jurisdiction is shown.

Furthermore, the learned Jaji Kiongozi stated:

The Board's remark that the taking of terminal benefits by the workers prejudiced their appeal may have been wrong and entitled the applicants to appeal to the Minister against the decision of the Board. But that is far from saying that such error entitles this court to interfere with the decision of the Board by way of granting the writ of certiorari.

The appellants are challenging these views and findings of the learned Jaji Kiongozi. In their first ground of appeal, they challenge the view that certiorari lies only where there is absence or lack of jurisdiction. We are satisfied that such a view is wrong. There is plenty of authority to show that the absence or lack of jurisdiction are not the only grounds for certiorari to issue. Paragraph 147 of *Halsbury's Laws of England* states that certiorari:

... will issue to quash a determination for excess or lack of jurisdiction or error of law on the face of the record or breach of the rules of natural justice, or where the determination was procured by fraud, collusion or perjury.

A The appellants contend that Certiorari ought to have been issued by the High Court upon the finding by the learned Jaji Kiongozi that there was a breach of the principles of natural justice in deciding the case against Salum Madundo and Mustafa Juma who did not appear. We are satisfied
 B that the appellants' contention is correct. For the future guidance of the Labour Conciliation Board we have to point out that the rules of natural justice would not have been violated if the Board had dismissed the reference of the two persons on the ground of their failure to appear
 C instead of deciding their case on merits.

In another ground of appeal and through the submissions made before this court by Professor Shivji, the appellants argue that certiorari should have been issued upon the finding of the learned Jaji Kiongozi that the
 D Board failed to allow some of the workers to call witnesses. We agree that the appellants' argument is correct. We concur with the views of Mapigano, J., in the earlier mentioned case of *Amri Juma and 15 Others* (1) where he stated:

E It is beyond question that the discharge by a Board of its functions under the provisions of the Security of Employment Act, 1964, as amended by Act No. 1 of 1975, constitutes an activity of a quasi-judicial character

F We are satisfied that the Board as a quasi-judicial body has a duty to act judicially. This judicial duty includes the duty to make reasonable inquiries. From the testimony given and the questions raised by the
 G appellants in the course of the proceedings before the Board, it was apparent that the appellants wished the Board to hear relevant evidence from certain officials employed by the 1st Respondent, such as the doctor who examined those employees who claim to have been sick on the material
 H day, and the supervisors who were in-charge of some of the appellants who claim to have been on duty at the material time. The Board was duty bound to call those officials to give evidence on the issues before it, unless there was good reason shown for not doing so.

I Finally, the appellants contend that certiorari ought to have been issued

by the High Court upon the finding of the learned Jaji Kiongozi that the Board erred in equating payment of terminal benefits with consent by the appellants to their termination of employment. It is important to note here that in the earlier case of *Amri Juma and 15 Others*, the High Court, Mapigano, J., ordered certiorari and Mandamus to issue upon the finding that the Board had, *inter alia*, made "an error of law when it held that the taking of the terminal benefits by the applicants fatally prejudiced their case."

The learned Jaji Kiongozi in considering the decision by Mapigano, J. stated:

I have carefully read the decision by my brother Mapigano, J., (quoted above) and I agree that where all things are equal, judicial courtesy requires that Judges should not lightly dissent from the considered opinions of their brethren but I would also like to mention to the learned counsel for the applicants that individual judges are not bound by each other's decisions. On the facts of this case, as I see them, this was a proper case for the applicants to refer their grievances to the Minister as provided under Section 26 of the Security of Employment Act.

With due respect to the learned Jaji Kiongozi, it is not a matter of judicial courtesy but a matter of duty to act judicially which requires a judge not lightly to dissent from the considered opinions of his brethren.

The learned Jaji Kiongozi appears to hold the view that to allow the application in the present case would amount to usurping the powers of hearing an appeal by the Minister responsible for labour affairs. Since the same court, presided over by Mapigano, J., in the earlier case originating from the same place and involving the same Respondents had granted a similar application, one expects sufficient reasons to be given for the results in the present case being different from those in the earlier case. This is necessary to avoid giving the parties and the general public a false impression that results of cases in courts of law perhaps depend more on the personalities of judges than on the law of this Land.

A We are satisfied on our part that the High Court should also have granted an order of certiorari in this case upon the finding that the Board had erred to equate payment of terminal benefits with consent by the appellants to termination of their employment. We accept the appellants' **B** contention that under the circumstances of this case, as in Amri Juma's case, which show that the workers had complained to their local branch of their Union about their termination and had been advised by the branch to accept payment and pursue their complaint, there can be no reasonable **C** inference that the workers in question had consented to termination of their employment.

Furthermore, it is a misdirection in law to hold the view that granting the order of certiorari in the a present case amounts to hearing an appeal **D** from the Board. The proceedings for certiorari are quite different from proceedings by way of appeal. In the latter instance, that is in an appeal, the appellate court or tribunal is required to re-hear the case either generally or on particular issues raised in the appeal. The High Court has no **E** jurisdiction to do so in matters originating from Labour Conciliation Boards. Only the Minister responsible for labour affairs is vested with such appellate jurisdiction.

F The position is different in proceedings for certiorari where the High Court is required to exercise its supervisory function to ensure that a tribunal or such body below acts in accordance with the Rule of Law. Apart from the historical origin of certiorari, which we need not go into in this case, it is clear that the basic structure of the Constitution of this **G** country vests the judicial power of the state in the Judicature, that is, the judicial arm of the Government. The function of interpreting the laws of the state is a judicial function and for that reason the judicial arm of the **H** Government has the final word about the meaning of the laws of this country. That is the objective basis of the supervisory function of the High Court, which it exercises by certiorari, mandamus and the like.

One last point before we conclude. We are informed by Professor **I** Shivji from the Bar that the Labour Conciliation Board has been unwilling to be associated with these proceedings ever since they started in the

High Court. We do not know the reasons for that behaviour. However, **A** we need to point out that since the Labour Conciliation Board is an Organ of the Government, the proper procedure should have been for the court to notify the Attorney General to appear in the High Court on behalf of the Board as it was done in England in the case of *R. v. Northumberland Compensation Appeals Tribunal* (2). This procedure should be followed **B** in the future in similar cases.

In the final analysis, therefore, we allow the appeal with costs, set aside the ruling of the Court below and grant the application for orders of certiorari and Mandamus whereby we quash the proceedings before the Labour Conciliation Board and direct the reference of the appellants to be heard in accordance with the laws of this country by the Board which, **C** for this purpose, should be differently constituted. **D**

ARUSHA MUNICIPAL COUNCIL
v.
LYAMUYA CONSTRUCTION COMPANY LTD

COURT OF APPEAL OF TANZANIA
AT ARUSHA

(Nyalali, C.J., Kisanga and Ramadhani, JJ.A.)

CIVIL APPEAL No. 25 OF 1989

(From the decision of the High Court of Tanzania at Arusha
(Mwakibete, J.), dated 29th March 1988, in Civil Cases
No. 23 and 46 of 1986)

Civil Practice and Procedure - Jurisdiction of the Courts - Civil proceedings in respect of immovable property held under customary law - Whether High Court has jurisdiction - Section 2(1) of the Judicature and Application of Laws Ordinance and s. 63(1) of the Magistrates' Courts Act 1984 **I**