

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAM

(CORAM: SAMATTA, C.J., MAKAME, J.A., RAMADHANI, J.A., LUBUVA, J.A.,  
And LUGAKINGIRA, J.A.)

CIVIL APPEAL NO. 72 OF 1998

BETWEEN

ALI VUAI ALI . . . . . APPELLANT

AND

SUWEDI MZEE SUWEDI . . . . . RESPONDENT

(Appeal from the decision of the  
High Court of Zanzibar at Vuga)

(Dourado, J.)

dated the 25th day of March, 1997

in

Civil Appeal No. 38 of 1996

R U L I N G

LUGAKINGIRA, J.A.:

This appeal arose from proceedings commenced in a district court in Zanzibar. Leave to appeal was duly granted in accordance with s. 5 (1) (c) of the Appellate Jurisdiction Act, No. 15 of 1979, but it was contended for the appellant that the appeal did not require a certificate of the High Court on a point of law in terms of s. 5 (2) (c) of the said Act. The respondent's side takes a different view. In order for the appeal to proceed to hearing, a Full Bench of the Court was therefore convened to decide whether appeals in matters originating in the district courts of Zanzibar require certification on points of law.

The basis of the dispute is to be found in the conflicting decisions of the Court on the subject. In Mohamed Idrissa Mohamed v. Hashim Ayoub Jaku /1993/ TLR 280, decided on November 25, 1993, the Court stated that those appeals did not require the High Court's

certificate on a point of law because they ~~do~~ not fall under Part II of the Zanzibar Magistrates' Courts Act, 1985." That Part provides for the establishment, setup, jurisdiction and powers of primary courts in Zanzibar. However, six years later on December 3, 1999, the Court, without reference to the above decision, refused to entertain an appeal in Fatuma Idha Salim v. Khalifa Khamis Said, Civil Appeal No. 71 of 1998, for lack of a certificate. The Court said:

Rule 89 (2) of the Court of Appeal Rules clearly makes it necessary for a third appeal to be accompanied by a certificate of the High Court, whether of Zanzibar or the Mainland, that a point of law exists for the determination of the Court of Appeal.

This divergence of positions, we think, may be explained on historical reasons but it seems difficult to justify on the present state of the law.

At its enactment, Act No. 15 of 1979 did not extend to Zanzibar and its creature, the Court of Appeal, did not exercise jurisdiction in Zanzibar. Section 5 (2) (c) of the Act provides thus:

(2) Notwithstanding the provisions of sub-section (1) -

... ..

(c) no appeal shall lie against any decision or order of the High Court in any proceedings

.../3

under Head (c) of Part III of the  
Magistrates' Courts Act, 1963,  
unless the High Court certifies  
that a point of law is involved  
in the decision or order.

At that time and until 1984, the term "High Court" meant "the High Court of the United Republic," and reference to the Magistrates' Courts Act, 1963 (repealed and replaced by the Magistrates' Courts Act, 1984), was reference to the Magistrates' Courts Act of Mainland Tanzania. Head (c) of Part III of the Magistrates' Courts Act provides for the appellate and revisional jurisdiction of the High Court in relation to matters originating in primary courts in the Mainland. Accordingly, it is common ground that according to s. 5 (2) (c), a certificate on a point of law is required in matters originating in primary courts in the Mainland.

The Mainland Magistrate's Courts Act also set up a three-tier system of courts. At the bottom is the primary court, established in every district and exercising jurisdiction in the district in which it is established. Appeals therefrom lie to the District Court, thence directly to the High Court. Alongside district courts are courts of resident magistrate from which appeals similarly lie to the High Court. The effect of this system is that an appeal to this Court in a matter originating in a primary court on the Mainland is a third appeal. It is for this reason that Rule 89 (2) of the Court of Appeal Rules, 1979 (compare also Rule 64 (4) in criminal matters), in providing for the documents to be included in the record of appeal, adds:

.../4

and in the case of a third appeal,  
/the record/ shall contain also  
corresponding documents in relation  
to the second appeal and the  
certificate of the High Court that  
a point of law is involved.

Rule 89 (2), therefore, not only echoes the requirement of s. 5 (2) (c), but also has in contemplation the system of courts on the Mainland. Hence, in so far as the Mainland is concerned, there is nothing ambiguous about the expression "third appeal," but it is a correct description of an appeal in a matter originating in a primary court.

Act No. 15 of 1979 was extended to Zanzibar vide the Constitution (Consequential, Transitional and Temporary Provisions) Act, No. 16 of 1984, with effect from March 1, 1985. With this enactment, the Court of Appeal gained jurisdiction in Zanzibar, the assumption of jurisdiction being facilitated by amendments to Act No. 15 of 1979. The term "High Court" was redefined in a reconstituted s. 3 (1) to mean "the High Court of the United of Tanzania or the High Court of Zanzibar, as the case may be." This is to say where reference is made in Act No. 15 of 1979 to the High Court, it means the High Court of Zanzibar in relation to matters from Zanzibar. Therefore, the certificate required under s. 5 (2) (c) is, in the case of Zanzibar, to be issued by the High Court of Zanzibar. The problem is which appeals from Zanzibar require that certificate.

.../5

Until 1985 the judicial set up in Zanzibar was dominated by a system of popular justice founded in the People's Courts Decree, No. 6 of 1969. People's Courts had full and exclusive jurisdiction in all criminal cases (except for the offences of murder, attempted murder and manslaughter which were triable by the High Court) and civil matters. Appeals therefrom lay to the High Court. The Decree was repealed by the Magistrates' Courts Act, 1985, enacted by the Zanzibar House of Representatives. The Act set up a four-tier hierarchy of courts with primary courts at the bottom, then district courts, and regional courts from which appeals lie to the High Court. While on the Mainland district courts and resident magistrates' courts are parallel, in Zanzibar appeals lie from district courts to regional courts. The effect of this is that an appeal to this Court in a matter originating in a primary court in Zanzibar is a fourth appeal and an appeal in a matter originating in a district court is a third appeal. It is apparently due to a religious commitment to numbers, an aspect of the Rules but not the principal legislation, that Fatuma's case was rejected because it was a third appeal without a certificate on a point of law.

Mr. Mbwezeleni who appeared for the respondent supported the decision in Fatuma's case and argued that the appeal was rightly rejected for non compliance with Rule 89 (2). He sought to buttress his argument with reference to ss. 76 and 77 of Zanzibar's Civil Procedure Decree (Cap. 8) and the decision of the High Court of Zanzibar in Yussuf Suleiman Taibu v. Juma Abdulla Juma, Civil Appeal No. 15 of 1987. We will revert to these provisions and this decision later. It is only necessary to state here that counsel for the appellant, Dr. Lamwai, disagreed and submitted that going by the amendments to Act No. 15 of 1979, a third appeal on the Mainland corresponds to a fourth appeal from Zanzibar, that district courts

in Zanzibar were for the purpose of the Act on the ~~same~~ level as regional courts, and that s. 5 (2) (c) targets appeals in primary court proceedings only. If Rule 89 (2) were construed to apply to appeals in district court proceedings on the Isles, that would result in a subsidiary legislation overriding the principal legislation.

There is merit in Dr. Lamwai's arguments. It is at once clear that the position taken in Fatuma's case and the position taken by Mr. Mbwezeleni, overlook the extent and effect of the amendments to Act No. 15 of 1979. In fact Mr. Mbwezeleni confessed to being unaware of Act No. 16 of 1984 which introduced these amendments. Apart from redefining certain terms, there was added to s. 3 a subsection (2) in these terms:

(2) For the purposes of this Act, reference to any provision of any procedural or substantive enactment applicable to Mainland Tanzania shall be construed to include reference to a like or similar provision of a corresponding procedural or substantive enactment of the House of Representatives applicable to Zanzibar in relation to the matter to which the former enactment relates.

Section 5 (2) (c) of the Act makes reference to the provisions of the Mainland Magistrates' Courts Act, that is, Head (c) of Part III thereof which provide for the appellate and revisional jurisdiction of the High Court in relation to matters originating in primary courts. The provision says that an appeal against the decision or order of the

High Court in those matters would not lie unless the High Court certifies that a point of law is involved in the decision or order. The corresponding enactment of the House of Representatives applicable to Zanzibar is the Magistrates' Courts Act, 1985. Admittedly there is no part or head of a part in that Act that comprehensively deal with the appellate and revisional jurisdiction of the High Court of Zanzibar in relation to matters originating in primary courts. A few provisions similar to those in Head (c), Part III of the Mainland Act, show up here and there in the Zanzibar Act. However, provision is made for matters originating in primary courts in Part II thereof. We are of the view that in view of the provisions of s. 3 (2) cited above, reference in s. 5 (2) (c) to Head (c) of Part III of the Mainland Act is to be construed to include reference to Part II of the Zanzibar Act as held in Mohamed Idrissa (above).

As pointed out earlier the decision in Fatuma's case was reached on the basis of numbers and without reference to Mohamed Idrissa. The argument went like this: Rule 89 (2) requires a third appeal to be accompanied with a certificate on a point of law; an appeal from district court proceedings in Zanzibar is a third appeal; therefore, an appeal from district court proceedings in Zanzibar requires a certificate on a point of law. It is not a question of numbers, though, and Act No. 15 of 1979 does not refer to first, second or third appeal. The "third appeal" phenomenon is a creation of the Rules in relation to the system of courts in the Mainland and made sense only before Zanzibar's four-tier system was brought on board. Were the Rules to be written today, Rule 89 (2) would appear in different terms. It is therefore immaterial that an appeal from district court proceedings in Zanzibar is a third appeal; the truth of the matter is that it does not correspond to an appeal from primary court proceedings in the Mainland. As counsel for the

appellant also pointed out, were the "third appeal" rule to apply to the system in Zanzibar, Rule 89 (2) would override s. 5 (2) (c), but Mr. Mbwezeleni was quick to concede that that would be wrong. In these circumstances, we see no difficulty in stating that for the purpose of Act No. 15 of 1979, what is a third appeal on the Mainland is a fourth appeal in Zanzibar.

There are a few related matters which may be disposed of at this stage. First, when counsel for the respondent became aware of Act No. 14 of 1984, he argued that since Act No. 15 of 1979 was extended to Zanzibar at a time the latter was still under the people's courts system, the Act has no relevance to the system instituted subsequently by the Magistrates' Courts Act, 1985. We are unable to agree and we think that is a strange way of interpreting statutes. The extension of Act No. 15 of 1979 to Zanzibar did not cease with the repeal of the People's Courts Decree but continued with the law that replaced it. The question to be asked consequent to the repeal of the Decree is whether there is now in Zanzibar a corresponding enactment for the purpose of s. 3 (2) and we say it is the Magistrates' Courts Act, 1985.

Mr. Mbwezeleni also referred to ss. 76 and 77 of the Civil Procedure Decree for yet another argument that appeals from Zanzibar have to be on points of law even without s. 5 (2) (c) and cited Yussuf Suleiman Taib (above) as confirmation of that argument. Indeed ss. 76 and 77 provide that a "second appeal" to the Court has to be on a point of law. This reference to "second appeal" calls to mind yet an earlier period in Zanzibar's legal history when it had a two-tier system of courts. That was a time it



boasted of an array of subordinate courts from all of which appeals lay to the High Court and on to the Court of Appeal for East Africa. It is a matter for concern that the Decree does not appear to have been revisited for quite some time and as ss. 76 and 77 testify, it is unaware of the present four-tier system. Granted, however, that appeals from Zanzibar have by virtue of these provisions to be on matters of law, that does not answer the present problem. These provisions do not require the points of law to be certified by the High Court. We think on the other hand that the decision in Yussuf Suleiman Taib had nothing to do with ss. 76 and 77. That was an appeal in a matter originating in a primary court. Ramadhani, CJ (as he then was) remarked that in a second and a third appeal to the High Court, the regional court should certify a point of law. That was an appeal to the High Court, not to this Court, and ss. 76 and 77 which relate to appeals to this Court do not provide for a certificate. Moreover, whether certification is required or not for certain appeals to the High Court of Zanzibar is not relevant to the problem at hand. A certificate of the regional court to that end has no relevance to the requirements of s. 5 (2) (c).

There was, finally, a general question raised by the Court as to the mischief the requirement of certification was intended to combat. Dr. Lamwai responded, and correctly, that the purpose of a certificate for the class of appeals in matters originating in primary courts was to ensure that deserving cases only reached the Court of Appeal. The exercise is therefore a screening process which would leave for the attention of the Court only those matters of legal significance and public importance. Would this objective be defeated by absence of certification in appeals from district court proceedings

in Zanzibar. We do not think so, but, ironically, the Zanzibar court system is better equipped to attain that objective. There is that extra appeal to the regional court which does not obtain on the Mainland.

For the reasons we have set out, we hold that an appeal in proceedings originating in a district court in Zanzibar does not require a certificate on a point of law; it only requires leave of the High Court in accordance with s. 5 (1) (c). As with the Mainland, a certificate on a point of law is required only in a matter originating in a primary court. We note that a panel of the Court came to the same conclusion in the later case of Harban Haji Mosi & Another v. Omar Hilal Seif & Another, Civil Reference No. 19 of 1991, also from Zanzibar, and we agree with the decision therein. Perhaps it might be desirable, in order to put the position beyond doubt, for the Legislature to recast s. 5 (2) (c) and for the learned Chief Justice to revisit Rule 89 (2) in order to reflect the court system in Zanzibar. As leave to appeal was granted in this case, the appeal will proceed to hearing without more.

DATED at DAR ES SALAAM this 31st day of May, 2002.

B.A. SAMETTA  
CHIEF JUSTICE

L.M. MAKAME  
JUSTICE OF APPEAL

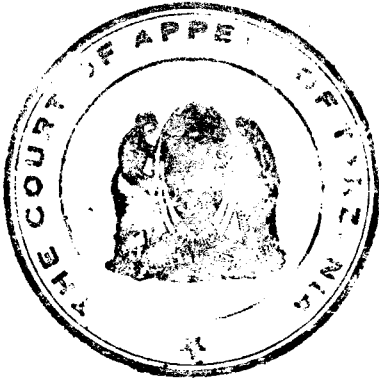
A.S.L. RAMADHANI  
JUSTICE OF APPEAL

D.Z. LUBUVA  
JUSTICE OF APPEAL

K.S.K. LUGAKINGIRA  
JUSTICE OF APPEAL



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



( F.I.R. WAMBALI )  
DEPUTY REGISTRAR