IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MASSATI, J.A., MANDIA,J.A. And KAIJAGE, J.A.)

CRIMINAL APPEAL NO. 250 OF 2012

1. **HSU CHIN TAI**
2. **ZHAO HANQUING.....APPELLANTS**

VERSUS

THE REPUBLIC.....RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Mwarija, J.)

Dated the 23rd day of February,2012
in
Criminal Session No. 38 of 2009

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JUDGMENT OF THE COURT

4th February & 28th March, 2014

MASSATI, J.A:

The appellants, who are Chinese citizens, were convicted by the High Court of Tanzania sitting at Dar es Salaam, for the offences of carrying out fishing activities in the Exclusive Economic Zone (EEZ) of the United Republic of Tanzania, contrary to section 18(1) of the Deep Sea Fishing Authority Act (Cap 388 RE 2002) as amended by Act No. 4 of 2007, read together with regulation 67 of the Deep Sea Fishing Authority Regulations 2009, GN 48 of 2009; and causing water pollution and degradation of marine environment contrary to regulations 25(1) and (2) and (70) of the

Regulations. They were each sentenced to pay a fine of Tanzania Shillings one billion or suffer 20 years imprisonment. The first appellant was further sentenced to pay a fine of twenty (20 billion) Tanzania Shillings or suffer 10 years imprisonment. Aggrieved, they have now appealed to this Court.

In this Court and in the court below, the 1st appellant was represented by Captain Ibrahim Bendera, learned counsel, and the 2nd appellant was represented by Mr. John Mapinduzi, learned counsel. Mr. Biswalo Mganga, learned Principal State Attorney and also Assistant Director of Public Prosecutions, appeared for the respondent/Republic, assisted by Dr. Deo Nangola, learned Principal State Attorney, Mr. Prosper Mwangalila, learned Senior State Attorney, and Mr. Hamid Mwanga, learned State Attorney.

In this Court, and in the trial court, several questions including that of the jurisdiction of the trial court and the propriety of the trial, were raised. The High Court rejected some as premature and overruled them. Since the question of jurisdiction of any court is basic, we think it is imperative for us to ascertain it before turning to the merits of the appeal. (See **AMANI MALEWO v DIOCESE OF MBEYA (R.C)** Civil Appeal No. 22

of 2013 **RICHARD JULIUS RUKAMBURA v ISSACK N. MWAKAJILA AND ANOTHER** Civil Appeal No. 3 of 2004 (both unreported).

In order to appreciate the point we are about to make, we shall revisit part of the proceedings of the trial court.

From the available records, the Director of Public Prosecutions (the DPP) filed the information in the High Court, against 37 accused persons including the appellants on 4/8/2009. A copy of the information is reproduced below;

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM DISTRICT REGISTRY

AT DAR ES SALAAM

CRIMINAL SESSIONS CASE NO. 38 OF 2009

THE REPUBLIC

VERSUS

1. *HSU CHIN TAI*
2. *ZHAO JIA YIN*
3. *ZHAO GE XI*
4. *MA ZONG MIN*
5. *LIU DONG*
6. *FANG YANGTAO*
7. *ZHAO HANQUING*
8. *ZHANG HON WEN*
9. *HSU SHENG PAO*
10. *ZHANG LI JUN*
11. *MUHAMMAD KIKI*
12. *ANURAHAMAN KOSID*
13. *JEJEN PRIYANA*

14. KUNTORO SURATNO
15. TUSIAM SANWIARJI NARMIN
16. IFAN HERNOPAND
17. ALI MKOTA
18. JUMA JUMA KUMBU
19. JACKSON SIRYA TOYA
20. GUYEN TUAN
21. TRAN VAN PHUONG
22. PHAM DINH SUONG
23. TRAN VAN THANH
24. CAO VUONG
25. KRISTHOFER PADILLA
26. SILVINO GAVANES
27. BENJAMIN BAOALAN J.R
28. BENJIE ROSANO
29. IGNACIO DACUMOS
30. MARLON MARANON
31. JHOAN BELANGO
32. ROLANDO NACIS
33. CAI DONG LI
34. CHEN RUI HAI
35. LIU XIS DONG
36. ZHAO JIONG
37. GONG ZHAN HUI

At the sessions to be held at .....the court is informed that HSU CHIN TAI, ZHAO JIA YIN, ZHAO GE XI, MA ZONG MIN, LIU DONG, FANG YANGTAO, ZHAO HAQUING, ZHANG HONG WEN, HSU SHENG PAO, ZHANG LI JUN, MUHAMMAD KIKI, ANURAHAMAN KOSID, JEJEN PRIYANA, KUNTORO SURATNO, TUSIAM SANWIARJI NARMIN, IFAN HERNOPAND, ALI MKOTA, JUMA JUMA KUMBU, JACKSON SIRYA TOYA, GUYEN TUAN, TRAN VAN PHUONG, PHAM DINH SUONG, TRAN VAN THANH, CAO VUONG, KRISTHOFER PADILLA, SILVINO GAVANES, BENJAMIN BAOALAN J.R, ENJIE ROSANO, IGNACIO DACUMOS, MARLON MARANON, JHOAN BELANGO, ROLANDO NACIS, CAI DONG LI, CHEN RUI HAI, LIU XIS DONG, ZHAO JIONG and GONG ZHAN HUI are charged with the offences namely:-

FIRST COUNT

STATEMENT OF OFFENCE

UNLAWFUL CARRYING OUT OF FISHING ACTIVITIES IN THE EXCLUSIVE ECONOMIC ZONE OF THE UNITED REPUBLIC OF TANZANIA contrary to section 18(1) of the Deep Sea Fishing Authority Act [Cap 388 R.E 2002] as amended by the Deep Sea Fishing Authority (amendment) Act No. 4 of 2007.

PARTICULARS OF OFFENCE

HSU CHIN TAI, ZHAO JIA YIN, ZHAO GE XI, MA ZONG MIN, LIU DONG, FANG YANGTAO, ZHAOHAQUING, ZHANG HONG WEN, HSU SHENG PAO, ZHANG LI JUN, MUHAMMAD KIKI,ANURAHAMAN KOSID, JEJEN PRIYANA, KUNTORO SURATNO, TUSIAM SANWIARJI NARMIN,IFAN HERNOPAND, ALI MKOTA, JUMA JUMA KUMBU, JACKSON SIRYA TOYA, GUYEN TUAN,TRAN VAN PHUONG, PHAM DINH SUONG, TRAN VAN THANH, CAO VUONG, KRISTHOFER PADILLA, SILVINO GAVANES, BENJAMIN BAOALAN J.R, ENJIE ROSANO, IGNACIO DACUMOS, MARLON MARANON, JHOAN BELANGO, ROLANDO NACIS, CAI DONG LI, CHEN RUI HAI, LIU XIS DONG, ZHAO JIONG and GONG ZHAN HUI, on divers dates between 10th January 2009 and 8th March 2009, while aboard a vessel named No. 68 BU YOUNG @ TAWARIQ 2, jointly and together, carried out fishing activities in the Exclusive Economic Zone of the United Republic of Tanzania without a license.

SECOND COUNT

STATEMENT OF OFFENCE

WATER POLLUTION AND DEGRADATION OF MARINE ENVIRONMENT Contrary to Regulations 25(1) and (2) and 70 of the Deep Sea fishing Authority Regulations, 2009, G.N. No. 48 of 2009.

PARTICULARS OF OFFENCE

HSU CHIN TAI, ZHAO JIA YIN, ZHAO GE XI, MA ZONG MIN, LIU DONG, FANG YANGTAO, ZHAOHAQUING, ZHANG HONG WEN, HSU SHENG PAO, ZHANG LI JUN, MUHAMMAD KIKI,ANURAHAMAN KOSID, JEJEN PRIYANA, KUNTORO SURATNO, TUSIAM SANWIARJI NARMIN,IFAN HERNOPAND, ALI MKOTA, JUMA JUMA KUMBU, JACKSON SIRYA TOYA,

GUYEN TUAN,TRAN VAN PHUONG, PHAM DINH SUONG, TRAN VAN THANH, CAO VUONG, KRISTHOFER PADILLA, SILVINO GAVANES, BENJAMIN BAOALAN J.R, ENJIE ROSANO, IGNACIO DACUMOS, MARLON MARANON, JHOAN BELANGO, ROLANDO NACIS, CAI DONG LI, CHEN RUI HAI, LIU XIS DONG, ZHAO JIONG and GONG ZHAN HUI, between 10th January, 2009 and 8th March 2009, while aboard a vessel named No. 68 BU YOUNG@ TAWARIQ 1 @ TAWARIQ 2, jointly and together polluted the waters and degraded the Marine environment of the Exclusive economic Zone of the United Republic of Tanzania by flowing oil and throwing offal and other fish wastes in the water.

THIRD COUNT FOR 7TH AND 9TH ACCUSED

STATEMENT OF OFFENCE

ACCESSORY AFTER THE FACT: contrary to sections 378(1) and 388 of the Penal Code [Cap. 16 R.E. 2002]

PARTICULARS OF OFFENCE

HSU CHIN TAI, ZHAO JIA YIN, ZHAO GE XI, MA ZONG MIN, LIU DONG, FANG YANGTAO, ZHAOHAQUING, ZHANG HONG WEN, HSU SHENG PAO, ZHANG LI JUN, MUHAMMAD KIKI,ANURAHAMAN KOSID, JEJEN PRIYANA, KUNTORO SURATNO, TUSIAM SANWIARJI NARMIN,IFAN HERNOPAND, ALI MKOTA, JUMA JUMA KUMBU, JACKSON SIRYA TOYA, GUYEN TUAN,TRAN VAN PHUONG, PHAM DINH SUONG, TRAN VAN THANH, CAO VUONG, KRISTHOFER PADILLA, SILVINO GAVANES, BENJAMIN BAOALAN J.R, ENJIE ROSANO, IGNACIO DACUMOS, MARLON MARANON, JHOAN BELANGO, ROLANDO NACIS, CAI DONG LI, CHEN RUI HAI, LIU XIS DONG, ZHAO JIONG and GONG ZHAN HUI, on divers dates between 10th January 2009 and 8th March 2009, jointly and together, carried out fishing activities in the Exclusive Economic Zone of the United Republic of Tanzania without license; between 8th and 11th March 2009, at various places in Mombasa Kenya and at Dar es Salaam port in Temeke District within Dar es Salaam Region, did assist the said HSU CHIN TAI, ZHAO JIA YIN, ZHAO GE XI, MA ZONG MIN, LIU DONG, FANG YANGTAO, ZHAOHAQUING, ZHANG HONG WEN, HSU SHENG PAO, ZHANG LI JUN, MUHAMMAD KIKI,ANURAHAMAN KOSID, JEJEN PRIYANA, KUNTORO SURATNO, TUSIAM SANWIARJI NARMIN,IFAN HERNOPAND, ALI MKOTA, JUMA JUMA KUMBU, JACKSON SIRYA TOYA,

GUYEN TUAN,TRAN VAN PHUONG, PHAM DINH SUONG, TRAN VAN THANH, CAO VUONG, KRISTHOFER PADILLA, SILVINO GAVANES, BENJAMIN BAOALAN J.R, ENJIE ROSANO, IGNACIO DACUMOS, MARLON MARANON, JHOAN BELANGO, ROLANDO NACIS, CAI DONG LI, CHEN RUI HAI, LIU XIS DONG, ZHAO JIONG and GONG ZHAN HUI in order to enable them to escape prosecution and punishment.

Dated at Dar es Salaam this 4th day of August, 2009

Sgd:

.....

BISWALO MGANGA

STATE ATTORNEY

This was the basis of their committal for trial.

On 16/9/2009 the accused persons appeared before Sheikh J. for the purposes of plea taking. But no pleas were taken because counsel for some of the accused persons Capt. Bendera, had filed a notice of preliminary objections. The trial judge heard the objections relating to the territorial jurisdiction of the trial court to try the offences, but on the 17/9/2009, she ruled that, they were premature and the same were struck out. The case was adjourned to 24/9/2009 for plea taking.

When the court resumed on 24/9/2009, the court could not take the pleas again because one of the interpreters chosen and sworn on the first day of appearance (i.e. 16/9/2009) did not attend. However, Mr. Mganga, the lead prosecution counsel, informed the court that the prosecution had, earlier that morning, filed the consent of the DPP as required under section

94 (1) of the Criminal Procedure Act (the CPA). Whereupon, Mr. Mapinduzi and Capt. Bendera submitted that the proceedings could not have been commenced prior to obtaining the consent. The trial court had to make a ruling after hearing the parties. The decision was to the effect that the objection was not only premature, but also lacked substance because under the law, the consent could be produced at any time even at the trial stage. The case was thereafter adjourned to 29/9/2009 when the accused persons' pleas were taken and the preliminary hearing conducted and several exhibits admitted. It must be noted at this juncture that the interpreters were only "reminded" that they were still under oath, presumably, the one they took on 16/9/2009.

The first issue for determination is, whether the proceedings for the institution of the trial of the appellants was properly consented to by the DPP in terms of section 94(1) of the CPA.

That section provides:-

> *" 94(1) Proceedings for the trial of any person who is not a citizen of the United Republic, for an offence committed on the open sea within two hundred nautical miles of the coast of the United Republic measured from the low-water*

mark, ***shall not be instituted*** *in any court except with the leave of the Director of Public Prosecutions and upon his certificate that it is expedient that such proceedings should be instituted."* (emphasis supplied)

(2)Proceedings before a subordinate court previous to the committal of an accused person for trial or to the determination of the court that the offender is to be put up on his trial shall not be deemed proceedings for the trial of the offence committed by such offender for the purposes of the said consent and certificate under this section;

(3)It shall not be necessary to aver in any charge or information that the consent or certificate of the Director of Public Prosecutions required by this section has been given; and that fact of the same having been given shall be presumed unless disputed by the accused person at the trial. The production of a document purporting to be signed by the Director of Public Prosecutions and containing such consent and certificate shall be sufficient evidence for all purposes of this section of the consent and certificate required by this section;

(4) (not relevant)

Although this was not a ground of appeal, we nevertheless asked the learned counsel to address us on the proprierty of these proceedings. Both Mr. Mapinduzi and Captain Bendera insisted that it was wrong for the proceedings to have commenced prior to obtaining the consent of the DPP. On his part, Mr. Mganga, was of the firm view that, in terms of section 94(1) (3) and (4) of the CPA, the consent could have been produced at any time even after the commencement of the trial. He also went on to argue that on the authority of the decision of **DPP v. ALLY NUR DIRIE AND ANOTHER** (1988) TLR 252, a trial begins when an accused person appears before a competent court and pleads to the charge or information. Since the consent was filed on 24/9/2009 before the accused persons' pleas were taken on 29/9/2009, the consent was produced well in time. In any case, he went on to argue, if there was any irregularity, it was curable under section 388 of the CPA. The prosecution argument impressed the trial court, and formed the basis of its decision on this point, as indicated hereinabove.

We shall first begin by examining the purpose of giving consent to prosecutions. Consent to prosecutions is a creature of statute. Many

countries in the commonwealth have such statutes. Even in this country, there are several statutes which create the requirement for consent prior to prosecution of certain offences. There are several reasons why certain offences require consent but chief among those is, in order to prevent certain offences being prosecuted in inappropriate circumstances ***(See Memorandum of the 1972 Franks Committee of the Home Office of the United Kingdom. "Consents to Prosecute: Legal Guidance". The Crown Prosecution Service (http.wwwcps.gov.uk/legal/a.toc/ consent to prosecute).*** Consents are therefore intended to prevent mischiefs and, not to cure them. They cannot therefore be given after the intended event. Although not necessary for the determination of the matter, we may perhaps pose here and reflect on the rationale behind the requirement of consent in section 94(1) of the CPA. We think that this is so as to enable the DPP take into account important considerations of public policy or the obligations of the state and the principles of international law; particularly that rule of statutory interpretation that, a local statute is not intended to apply to persons outside the territories of the state enacting it and that the legislature is presumed to respect the

rules of international law. (See **PRINCIPLES OF STATUTORY INTERPRETATION** - 9th ed. By Justice G.P. Singh- p 525).

Next, there is no dispute that the consent of the DPP in this case was given and filed in court on 24/9/2009, while the information was filed on 4/8/2009. We reproduce below a copy of the consent in question.

CONSENT OF THE DIRECTOR OF PUBLIC PROSECUTIONS

I, ELIEZER MBUKI FELESHI, *The Director of Public Prosecutions in the United Republic of Tanzania in terms of Section 94(1) of the Criminal Procedure Act [CAP. 20 R.E. 2002]* ***DO HEREBY CONSENT*** *to the prosecution of* ***HSU CHIN TAI, ZHAO JIA YIN, ZHAO GE XI, MA ZONG MIN, LIU DONG, FANG YANGTAO, ZHAOHAQUING, ZHANG HONG WEN, HSU SHENG PAO, ZHANG LI JUN, MUHAMMAD KIKI,ANURAHAMAN KOSID, JEJEN PRIYANA, KUNTORO SURATNO, TUSIAM SANWIARJI NARMIN,IFAN HERNOPAND, ALI MKOTA, JUMA JUMA KUMBU, JACKSON SIRYA TOYA, GUYEN TUAN,TRAN VAN PHUONG, PHAM DINH SUONG, TRAN VAN THANH, CAO VUONG, KRISTHOFER PADILLA, SILVINO GAVANES, BENJAMIN BAOALAN J.R, ENJIE ROSANO, IGNACIO DACUMOS, MARLON MARANON, JHOAN BELANGO, ROLANDO NACIS, CAI DONG LI, CHEN RUI HAI, LIU XIS DONG, ZHAO JIONG*** *and* ***GONG ZHANHUI****, for contravening the provisions of Section 18(1) of the Deep Sea Fishing Authority Act [CAP. 388 R.E. 2002] as amended by Deep Sea Fishing Authority Act [Amendment Act No 4 of 2007 and Regulations 25(1)(2) and 70 of the Deep Sea Fishing*

Authority Regulations, 2009, G.N. NO. 48 of 2009 the particulars of which are stated in the charge sheet.

Signed at Dar es Salaam this 24th day of September 2009

Signed
Eliezer Mbuki Feleshi
DIRECTOR OF PUBLIC PROSECUTIONS

This means, that the consent was obtained 50 days after the filing of the information. The trial court found this to be in order, because on that date the trial of the accused persons had not even commenced, and so within the purview of Section 94(1) of the CPA.

With respect, we think the trial court missed the point. We think the commanding words in Section 94(1) of the CPA are **"Proceedings for trial" .....** and **"shall not be instituted in any court except with the leave of the Director of Public Prosecutions and upon his certificate that it is expedient that such proceedings should be instituted".** So, it clearly prohibits the institution of proceedings without the leave of the DPP first had and obtained. In order to appreciate the full impact of section 94(1) the CPA must be read as a whole. Read in its context, one will see that the section is not about "commencement of trials", but about "institution of proceedings for trial." This is so because in the scheme of the CPA, a proceeding is instituted by the making of a

complaint or a charge (in a subordinate court) under sections 128 and 129, and by the filing of information in trials before the High Court under Section 245(6) of the CPA. This information is then transmitted to the committal court for an accused person to be committed for trial under section 246. After a committal order, the prosecution has no room to file any other document relating to the institution of the proceedings, except with the leave of the trial court. Only after instituting the proceedings can a trial commence. In the clear words of section 94(1) of the CPA, therefore, leave or consent of the DPP had to be available before the institution of the proceedings.

We agree with the trial court and Mr. Mganga that, if available, the DPP's consent may be produced at any time and that in terms of section 94(4) of the CPA the court may presume the existence of such consent unless disputed. We also agree with the holding in **DPP V. ALLY NUR DIRIE'S case** (supra) that a trial commences when an accused person appears and pleads before a court of competent jurisdiction. But the issue in **DIRIE'S** case is different from the one in the present case. In the former the issue was "when does a trial commence?" In the present one,

the issue is "when is a proceeding instituted?" The answers to the two issue are also different. As demonstrated above, a proceeding is instituted when a charge or information is filed, but a trial commences when an accused person appears and pleads before a competent court. A trial must be preceded by the institution of the proceedings. To that extent the two cases are different.

Since in this case we have found that the proceedings were instituted on 4/8/2009 and since there is no other evidence to suggest that the DPP's consent/leave was given prior to the institution of the proceedings, except "the (consent")" dated 24/9/2009, which was 50 days later, it is obvious in our view that, the purported consent was given and filed in violation of the law. As this Court said in **PAULO MATHEO V. R,** (1995) TLR 144, if the DPP's consent is given retrospectively, it cannot be said to have been given in accordance with the law. To answer the first issue therefore, it is our considered view that, the institution of the proceedings for the trial of the appellants was not proper, and the irregularity is incurable.

The second issue is, what is the effect of the failure of the trial court to take the pleas of the accused persons on the first day of their appearance in court?

We do not have to waste much time on this issue because, it is not in dispute that in trials before the High Court, sections 275 and 276 of the CPA require that on the first day in court, an accused person must know the charge and be asked to plead, unless, he objects to it on account of not having been served with a copy of the information; and that any other objections can only be taken after the plea has been taken. It is also not in dispute that in the present case, the accused persons first appeared in court on 16th September, 2009 but no pleas were taken and instead, objections were entertained, even if ruled premature the next day. The same mistake was repeated on 24th September, 2009. By so doing the trial court put the horse before the cart. This was a total violation of the law. But Mr. Mganga has prevailed upon us to find that the irregularity was curable under section 388 of the CPA.

We do not agree. It is a fundamental principle of our criminal justice that, at the beginning of a criminal trial, the accused must be arraigned. This means that the court has to put the charge to him and require him to plead thereto. This is not negotiable. (See **NGOCHE OLE MBILE V REPUBLIC (1993) TLR. 253, MUSSA MWAKUNDA VRS REPUBLIC CRIMINAL APPEAL NO. 174 OF 2006** (Unreported). Recently we had

occasion to emphasise this point in **CHEKO YAHAYA V. R.** Criminal appeal No. 179 of 2013 (unreported) where we said:-

> *"Section 275(1) of the Act is not cosmetic or superficial. Parliament intended that the court arraigns the accused person(s) before it proceeds with the trial. As already seen this provision is couched in mandatory terms. Suffice to say that to have not read that charge to the appellant before commencing trial was a fatal error and such omission was not curable under section 388 of the Act".*

Mr. Mganga, also tried to convince this Court to find that by not taking their pleas on 16/9/2009 and 24/9/2009 the appellants were not prejudiced. Again, we are not impressed. Once the trial court omitted to take their pleas, and yet proceeded to hear some preliminary objections on both occasions, the accused persons were effectively excluded from participating in those hearings whatever the outcomes. Since the intention of sections 275(1) and 276 of the CPA (and according to **DIRIE's** case) is that, preliminary objections, be heard after the commencement of the trial

(ie after the pleas) the premature hearing of the preliminary objections without the participation of the appellants was certainly illegal and against the principles of fair trial. By their nature, preliminary objections are intended to avert full-fledged trials or lead to amendment of charges. The appellants were denied that chance. They were therefore certainly prejudiced.

There were also other grounds of preliminary objections such as the one with regard to the territorial jurisdiction of the trial court to try the offences. We did not find it opportune to canvass it in this appeal for one reason. Since it was ruled premature, and was never raised again, it was not decided by the trial court, and so we do not have the benefit of the opinion of the lower court, on that point.

So, for the reasons; first; that the proceedings were instituted prior to the grant of (consent) leave and certificate of the DPP; and second; for failure to take the pleas of the appellants on arraignment, the proceedings and judgment of the High Court were a nullity. As these did not form part of the grounds of appeal filed and argued by the appellants' counsel, we invoke our revisional powers under section 4(2) of the Appellate

Jurisdiction Act (Cap 141 RE 2002), and revise and quash the trial court's proceedings and judgment and set aside the sentences. As to whether or not the appellants should be retried, we leave it to the discretion of the DPP to decide as he deems fit, but should he decide to reinstitute the proceedings, he should do so with all convenient dispatch. Should that be the case, then the trial should be before a different judge and a different set of assessors.

Order accordingly.

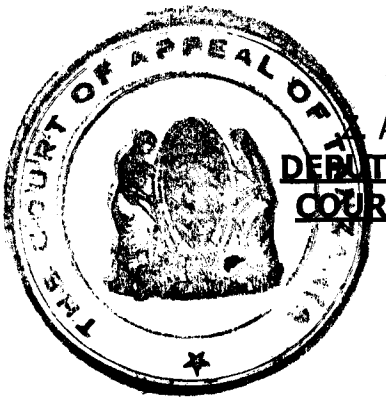
DATED at **DAR ES SALAAM** this 25th day of March, 2014.

S. A. MASSATI
JUSTICE OF APPEAL

W.S. MANDIA
JUSTICE OF APPEAL

S.S. KAIJAGE
JUSTICE OF APPEAL

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



A. MARUMA
DEPUTY REGISTRAR
COURT OF APPEAL