IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: LILA, J.A., KITUSI, J.A, And FIKIRINI, J.A.)

CIVIL APPEAL NO. 73 OF 2022

JAMES G. KUSAGA.....APPELLANT

VERSUS

SEBASTIAN KOLOWA MEMORIAL UNIVERSITY (SEKOMU)... RESPONDENT

(Appeal from the Ruling and Drawn Order of the High Court of Tanzania, Tanga District Registry at Tanga)

(Agatho, J.)

dated the 13th day of September, 2021

in

Civil Application No. 56 of 2020

.....

JUDGMENT OF THE COURT

2nd May & 15th June, 2023

FIKIRINI, J.A.:

The appellant's dream to attain a Bachelor of Education Special Needs (BEdSN) degree was cut short after his discontinuation from his studies. He unsuccessfully pursued the respondent, Sebastian Kolowa Memorial University (SEKOMU) administration, the Tanzania Commission for Universities (TCU) and the Ministry of Education. This prompted the appellant to seek recourse by approaching the High Court of Tanzania at

Tanga. First, by filing Miscellaneous Civil Application No. 41 of 2020, seeking leave to apply for Judicial Review, which was granted. Second, by filing Civil Application No. 56 of 2020. In the application, the appellant intended to ask the court to overturn, the SEKOMU Senate decision to discontinue him from his studies and compel the respondent to reinstate and allow him to continue with his studies.

The factual background giving rise to the present appeal, as gathered from the record, is that the appellant was admitted to study at SEKOMU in 2014 under Registration No. SEK/BEDSN/241/2014. His 1st year was without complications as he sailed through to 2nd year. It was in his 2nd year when things went sour when his 1st semester examination results seemed to have not meet the standards. The appellant was officially informed of his discontinuation from studies through a letter dated 24th June, 2016 for failing to attain the required examination standard. As indicated in the letter, instead of scoring a minimum GPA of 2.0, he scored 0.6. The appellant raised concern and complained that the registration number reflected in the letter was not his. This did not change the outcome, as on 29th June, 2016, he was issued with another

letter confirming his discontinuation. This was the start of all that followed up to the filing of this appeal.

Upset with the discontinuation, the appellant unsuccessfully appealed to the Senate. He later referred his discontent to TCU. The TCU investigated the complaint and noted errors in the marking of the examinations. After concluding that the marking was unfair and led to the discontinuation of the appellant from studies, the respondent was advised and urged to allow the appellant to continue with his studies. The respondent was obliged to report to TCU how the directives were dealt with. Even though the record did not reveal if the respondent reported back to TCU on how the issue was dealt with, the discontinuation was vacated. The appellant was allowed to proceed with 3rd year under the condition that, he was at the same time to sit for the 2nd year's 2nd semester examinations.

During his 3rd year, the appellant sat for his 1st semester examinations and simultaneously repeated the 2nd year 2nd semester courses. His results were withheld and upon inquiry, he was on 31st July, 2017 served with a letter dated 19th June, 2017 informing him that

he had been discontinued for failing four (4) courses out of five (5) repeated courses.

Disappointed, the appellant complained to the Chairman of the Senate contesting the discontinuation in a letter dated 7th August, 2017. He also wrote the TCU on 2nd August, 2017 complaining about the discontinuation and the respondent's act of not responding to his letters. The respondent in its two letters dated 14th and another 17th August, 2017 indicated receipt of the appellant's letter dated 7th August, 2017 and that it was his appeal. In the same letter, the appellant was informed that the University Appeals and Irregularities Committee (UAIC) determined the appellant's appeal on 12th August, 2017 in his absence contending that the Committee informed him through its letter dated 9th August, 2017 to appear on the hearing date, which he could not.

Closely scrutinized the letters dated 14th and 17th August, 2017 which did not disclose how they were communicated to the appellant. They appear to contradict each other on when the appellant was summoned to appear before the UAIC for the hearing of his appeal. The

letter dated 9th August, 2017, indicated the appellant was summoned to appear before the Senate for the meeting held on 12th August, 2017 while the letter dated 14th August, 2017 indicated that the appellant was summoned on 17th August, 2017 but did not appear, resulting in his discontinuation as per the letter dated 4th September, 2017. This means the hearing was conducted five (5) days right after the appellant lodged his complaint challenging the discontinuation, but before he was summoned to appear for the hearing.

The said letters also revealed that UAIC made its recommendation to Deputy Vice Chancellor for Academics, Research & Consultancy (DVC-ARC) for tabling the recommendation before the Senate for its final decision. The Senate through its letter dated 4th September, 2017 confirmed the UAIC recommendation on the appellant's discontinuation, after allegedly failing to appear at the hearing conducted on 12th August, 2017. However, the record revealed that there was no hearing conducted on 12th August, 2017 instead the hearing was deferred to 24th August, 2021 due to the appellant's absence after being summoned to appear on 9th August, 2017, as per the letters referred to above.

On its part, after consultation and upon being shown documents by the respondent, the TCU in its letter dated 15th September, 2017, responded to the appellant's letter dated 2nd August, 2017 advising him to seek other legal remedies.

Dissatisfied with the TCU's response and recommendation, the appellant through a letter dated 16th January, 2019 referred his grievance to the Ministry of Education, Science and Technology "*Wizara ya Elimu, Sayansi na Teknoiojia.*" The Ministry through its letter dated 26th February, 2019 echoed the advice given by TCU, that the appellant should pursue other legal remedies.

Accepting the advice, the appellant sought and was granted an extension of time from the Minister to apply for a Judicial Review hence Civil Application No. 41 of 2020 before the High Court of Tanzania at Tanga seeking leave to do so, which was granted on 22nd October, 2020. This was followed by filing Civil Application No. 56 of 2020 for Judicial Review:

> "*That the Hlgh Court to order Certiorari to call into the court and quash the decision of the respondent to discontinue the appiicant from*

studies and to grant the prerogative order of Mandamus to compel the respondent to reinstate the applicant's studies and allow him to sit for all 2nd year 2nd semester and 3rd year 2nd semester and do a final exam and the respondent to release the applicant's 2nd semester final exam results on 1st semester of 3rd year and he be allowed to make his research presentation."

In its determination, the High Court framed three issues:-

"1. *Rights to be heard: Whether the TCU cancellation was written to vary the respondent's decision due to failure to give the applicant an opportunity to be heard.*

2. *Right of Appeal: Whether the applicant had a right of appeal which he did not exercise after TCU canceled the respondent University's decision to discontinue the applicant.*

3. *Whether the applicant had exhausted all remedies.*

The application was heard by way of written submissions and after considering the submissions by parties, the High Court dismissed the applicant's application and prayer that the decision to discontinue him be vacated. The trial judge relied on a number of letters that the appellant was afforded the right to be heard, followed by a letter

confirming his discontinuation. The judge equally reasoned that both the TCU and the Ministry could not see the problem with the decision of the Senate and that is why they advised him to seek other legal remedies.

The decision dismissing the application with costs is what irked the appellant to prefer this appeal containing six (6) grounds, which are paraphrased as follows: ***one,*** the appellant was not afforded the right to be heard before the Senate contrary to rules of natural justice, **two,** that the judge misconstrued the TCU and Ministry of Education, Science and Technology's decision and advise to the appellant regardless of the fact that there were serious irregularities, ***three,*** the judge erred by concluding otherwise despite the respondent's admission on own mistakes in marking the appellant's examinations, ***four,*** that appellant discontinuation was composed of unqualified and incompetent members of the Senate, ***five,*** that the respondent without diligence wrongly marked the appellant's exam the fact observed by TCU and no measure was taken such as appointing the 3rd independent marker, and ***six,*** judge wrongly condemned the appellant to pay costs.

Counsel for the parties filed written submissions pursuant to rules 106 (1), (3) and (8) of the Court of Appeal Rules, 2009 (the Rules). On the date scheduled for the hearing, Mr. Philemon Raulencio learned advocate appeared fending for the appellant. The respondent enjoyed the services of Mr. Henry Simon Njowoka learned advocate. Both counsel for the parties prefaced their submissions by adopting their written submissions to form part of the oral submissions.

Addressing us on the first ground of appeal whether the appellant was afforded the right to be heard by the SEKOMU Senate, Mr. Raulencio vehemently contested that the appellant was afforded the right to be heard. His reason for submitting so was that the appellant had never been availed with his examination results yet he was discontinued from studies as per the termination letter that reached the appellant on 31st July, 2017 as reflected on page 119 of the record of appeal, without his appeal being heard. Despite admitting receipt of the appellant's letter turned into an appeal, there was no proof that the appellant was afforded such an opportunity. The letters relied on by the respondent that the hearing was conducted in the appellant's absence had contradictory information. For instance, it was impossible to have

been summoned to appear for a hearing on 14th August, 2017 while in the same letter, it indicated that hearing was conducted on 12th August, 2017. This means the appeal was heard before the appellant was summoned. This was followed by a discontinuation letter dated 14th August, 2017, in which it condemned the appellant for failure to attend the hearing of his appeal on 9th August, 2017.

He went on to submit that from the contradicting contents of the letters, he wondered if the appellant was ever summoned as alleged since there was no proof to that effect. The dispatch book relied on by the respondent did not indicate any dispatch of the letter to the appellant on 9th August, 2017, instead, the date shown was that of 17th August, 2017, which did not specify it was for which letter. More so, in the discontinuation letter, the hearing date indicated was the 24th August, 2021 at 9.00 a.m, meaning the appellant was summoned after four (4) years, whereas by then even the case before the High Court had already been filed and he would have graduated already from the course he was taking.

Dismissing the respondent's argument that the contradictory dates were just a slip of a pen, Mr. Raulencio maintained that the respondent discontinued the appellant without being heard as there was no proof that he was served with a letter for him to appear before the respective body. The counsel thus, prayed for the appeal on this ground to be allowed with costs.

In his brief reply submission, Mr. Njowoka discounted all the submissions by Mr. Raulencio and contended that the appellant was duly served with a summons to appear as per the dispatch book, so the right to be heard was afforded to him but he did not appear before the UAIC hence failed to exercise his right to be heard.

In his brief rejoinder, Mr. Raulencio insisted that the appellant was never afforded the right to be heard, attaching his reasoning to the fact that the confusing dates in the letters relied on by the respondent proved that the appellant was not summoned or heard, hence denied to exercise his right to be heard.

In determining whether the respondent had established on the balance of probability that the appellant was accorded the right to be

heard but slept on his right, we wish to start by stating two legal principles. One, in terms of section 3 (2) (b) of the TEA, the standard is on the balance of probabilities. We have in a number of our decisions restated that position, See, **Attorney General & Others v. Eligi Edward Massawe & Others**, Civil Appeal No. 86 of 2002; **Anthony M. Masanga v. Penina (Mama Mgesi) and Another**, Civil Appeal No. 118 of 2014; **Paulina Samson Ndawavya v. Theresia Madaha**, Civil Appeal No. 45 of 2017 and **Mary Agnes Mpelumbe v. Shekha Nasser Hamud**, Civil Appeal No. 136 of 2021 (all unreported). In the **Mary Agnes Mpelumbe** the Court stated:-

> *"We are also guided by the basic rule that he who alleges has the burden of proof as per section 110 of the Evidence Act, Cap. 6 R. E. 2019 as well as the position that standard of proof in a civil case is on a preponderance of probabilities, meaning that the Court will sustain such evidence that is more credible than the other on a particular fact to be proved."*

We had also expressed ourselves on the shifting of the burden of proof in the case of **Paulina Samson Ndawavya** (supra) when we said:-

> *"It is again trite that the burden of proof never shifts to the adverse party until the party on whom onus lies discharges his and that the burden of proof is not disputed on account of the weakness of the opposite party's case."*

Two, the right to be heard (*audi alteram partem*) is a fundamental principle the courts of law guard against jealously. In this country, natural justice is not merely a principle of common law; it has become a fundamental constitutional right protected under (Article 13 (6)(a) of the Constitution of the United Republic, 1977, as amended from time to time. The position has been restated in our decisions, such as **D.P.P. v. S. I. Tesha** [1992] T. L. R. 237, **Mbeya-Rukwa Auto Parts & Transport Limited v. Jestina George Mwakyoma,** [2003] T. L. R 251 and **Abbas Sherally & Another v. Abdul S.H.M. Fazalboy** Civil Application No. 33 of 2002 and **Yazidi Khassim Mbakileki v. CRDB 1996 Ltd & Another**, Civil Reference No. 14 of 2018 (both unreported) and **Ausdriil Tanzania Limited v. Mussa Joseph Kumili & Another,** Civil Appeal No. 78 of 2014 (unreported) cited in the appellant's written submissions by Mr. Raulencio, to mention a few. In all these decisions, the stance has been that once it is established that a

right to be heard has been flouted, the Court usually will not hesitate to invoke its revisionary power and nullify the proceedings, decision and order retrial.

In the present appeal, there is no proof that the appellant was summoned to appear for the hearing either on 12th August, 2017 or 24th August, 2017 or 24th August, 2021 the dates mentioned in the letters referred to above. From the evidence on record, the respondent has not indicated whether the communication allegedly made by way of letters reached the appellant and on time for him to attend the hearing of his appeal. The dispatch book relied on, as submitted by Mr. Raulencio, the observation we share, was of no assistance. Our review of the dispatch book showed entry made on 17th August, 2017 without pointing out which letter was being referred to. Without specifically illustrating the reference of the letter mere entry in the dispatch book had no meaning. This is more so in the circumstances of the present appeal as the dispatch did not prove that the appellant was summoned to appear for the hearing of his appeal as alluded to by the respondent.

The record further revealed that the respondent's evidence was contradictory regarding when the UAIC sat for the hearing of the appellant's appeal. Despite this, the respondent did not disown any of the two letters, instead, on the one hand, while admitting the dates to be confusing blessing them as a slip of a pen, on the other, wanted the High Court to take dates as correct that the appellant was summoned on 17th August, 2017 to appear on 24th August, 2021 for hearing of his appeal. In short, the respondent wanted the court to take both versions of the account given as correct, which we find absurd.

Furthermore, the date of hearing, 12th August, 2017 mentioned in the letter dated 17th August, 2017 shown on page 189 of the record of appeal and the minutes of the University Senate held on 26th August, 2017, both indicate the hearing was adjourned on 12th August, 2017, after the appellant had failed to show up, the hearing was then held on 24th August, 2021. However, the date change is not reflected in the Senate letter dated 4th September, 2017, when discontinuing the appellant. Certainly, there is a contradiction as to the date when the appellant was summoned and when exactly the hearing of the appellant's appeal was conducted. We thus can conclusively and safely

say the appellant was never summoned nor heard, as there was no cogent proof to that effect.

Comparing the appellant's version that he was not summoned to appear before the UAIC for the hearing of his appeal outweighs the respondent's account that the appellant was summoned vide letters as shown in the record of appeal. In the case of **Hemed Said v. Mohamed Mbilu** [1984] T. L. R. 113, the Court reaffirmed the principle that the person whose weight of evidence is heavier must win. In this appeal likewise, we find the appellant's story on how things unfolded regarding the letters allegedly sent summoning him to appear before the respondent's Senate and that he had not sat in any hearing, was more credible than that of the respondent that the appellant was summoned but absented himself and thus the UAIC proceeded to hear his appeal in absentia, ultimately discontinuing him from his studies.

In the upshot, we find this ground of appeal sufficiently disposes of the appeal, hence no need to embark on an academic exercise of determining the remaining grounds of appeal. Accordingly, we allow the appeal and hereby quash and set aside the respondent's order

discontinuing the appellant's studies. Likewise, we quash all the proceedings and rulings of the High Court in Miscellaneous Civil Application No. 41 of 2020 and Civil Application No. 56 of 2020. The respondent is ordered through its body the University Appeals and Irregularities Committee (UAIC) to afford the appellant a right to be heard before any decision is reached. The appeal is allowed with costs.

DATED at **DAR ES SALAAM** this 15th day of June, 2023.

S. A. LILA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 15th day of June, 2023 in the presence of Mr. Thomas Kitundu, learned counsel for the Appellant and also holding brief for Mr. Henry Njowoka, learned counsel for the Respondent, via Video Link from Tanga, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL