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IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

COURT MARTIAL CRIMINAL APPEAL NO.2 OF 1990

P.2669 MAJ. SY SULEIMAN
Y. SULEIMAN APPELLANT

Versus

JUDGE ADVOCATE GENERAL... RESPONDENT

J U D G M E N T

MAPIGANO, J. KYANDO, J. MACKANJA, J.

Two preliminary points were taken on behalf of the appellant, and we dismissed the same and reserved the reasons. The first point is about the legality of the order which convened the trial court, and the second is about the competence of the Judge-Advocate who officiated at the trial proceedings, one Colonel Mkindi, and the part played by him.

It was submitted that the Chief of Staff who made the convening order did not have authority under the law to do so. As indicated, we were unable to sustain this submission. Under the provisions of the statute which was cited by counsel for the appellant, the power to convene a General Court Martial is conferred upon the President, the Chief of Defence Forces and "any other officer specifically assigned by the Defence Forces Committee". An instrument was produced and displayed by counsel for the respondent which explicitly showed that the Defence Forces Committee had actually exercised its discretion by appointing the Chief of Staff as the convener of all General Courts Martial.

It was pointed out, in fine, in relation with the second point, that the office of Colonel Mkindi was the one which initiated the trial, and it was argued that in principle and justice Colonel Mkindi should not have taken part "in the determination of the case". We consider that there is no factual basis for this contention. We totally agree that it is not the duty of a Judge-Advocate to participate in the determination of a case before such court. In our view the role of a Judge-Advocate is, broadly, one which is confined to superintending the trial, advising the court on points of law and procedure, and assisting the parties to elicit a

full statement of facts material to their respective cases. It is not his business to participate in the decision of the case, and, we repeat, there is nothing on the record to show or suggest that Colonel Mkindi did so.

These were the reasons which led us to overrule the preliminary points.

We now turn to consider the main part of the appeal. It is the contention of the appellant that the General Court-Martial which tried him failed to comply with statutory procedures at the time of his arraignment. In particular, he argued that contrary to laid down procedure, the President of the General Court-Martial did not take the oath as required by Regulation 112 of the Defence Forces Regulations. These Regulations, made under section 66 of the National Defence Act, No.24 of 1967, are read as one with the Code of Service Discipline made under sections 53 and 85 of the said Act. Section C.112(1) of the Code of Service Discipline makes it a mandatory condition precedent that:

"C.112(1) At every court-martial an oath shall be administered to each of the following persons:-

- (a) the President and other members of the court-martial,
- (b) the Judge-Advocate,
- (c) court reporters,
- (d) interpreters, and
- (e) witnesses,

in the manner and in the forms prescribed in Defence Forces Regulations".

Regulation 112.05 makes provision for a mandatory procedure which must be followed before the oaths are administered in the prescribed form. When the court has been opened and all have taken their places, the convening order, including the names of the officers appointed to try the accused, must be read in the hearing of the accused. The accused, or each of them separately, must be given an opportunity to object to any of those officers by being asked whether he does so object. The objections will have to be determined in advance of any other step in the proceedings. Then every member of the court-martial and every person in attendance on a court-martial as Judge-Advocate, the President and each officer who is named in section C.112(1) of

the Code of Service Discipline, must take an oath if they are Christians or be affirmed if they are Moslems. The oath shall be in the prescribed form as provided for in Regulations 112.05.

Our examination of page 2 of the record of proceedings before the General Court-Martial shows that after the court had assembled and objections from the appellant having been overruled, the President swore all members of the court and the Judge Advocate. The Judge-Advocate swore the court reporter. The record of the proceedings does not show that the President was himself sworn by the Judge-Advocate, or by any other member of the General Court-Martial.

Ms. Kiwanga, learned State Attorney, concedes that the General Court-Martial included the President. It is her view that although page 2 of the record of proceedings does not show that he was sworn, he was in fact sworn and that the omission is probably a clerical error. That is an attractive point. We are, however, after a careful scrutiny of the record, not persuaded that that was a clerical omission. We are satisfied that the exclusion of the President of the Court from those who took the oath portrays the true position of what happened. We would thus call in aid the maxim that expressio unius personae vel rei, est exclusio alterius.

We consider that the oath to be taken by the President of a General Court-Martial is a necessary prerequisite to the jurisdiction of that court. It will therefore act without jurisdiction, as it is the case before us, where it fails to comply with formalities which are conditions precedent to the commencement of a trial. In these circumstances we hold that the General Court-Martial acted without jurisdiction. Consequently the proceedings before it have been rendered a nullity: Anismic Ltd. v. Foreign Compensation Commission and Another, [1968] 2 WLR 196 which was cited with approval by the Court of Appeal of Tanzania in Management of Hotel Africana v. Jumuiya ya Wafanyakazi Tanzania (JUWATA), Civil Appeal No. 30 of 1988.

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In the result we declare the proceedings a nullity. There will be no retrial, inasuch as the appellant has fully served the sentence passed by the Court-Martial.

D.P. MAPIGANO
JUDGE

L.A. KYANDO
JUDGE

J.M. MACKANJA
JUDGE

8/2/95

Coram: Mapigano, J.

Appellant in person

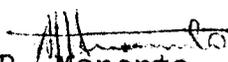
Mr. Naali for the Respondent.

Court: Judgment delivered.

D.P. MAPIGANO
JUDGE

8.2.1995

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


A.R. Manante
SENIOR DEPUTY REGISTRAR