IN THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM

CRIMINAL REV.CASE NO. 8 OF 2000
CR. CASE NO. 849/99 AT KISUTU

JOHN MWANSASU .. .. .. APPLICANT

VERSUS

THE REPUBLIC .. .. .. RESPONDENT

J U D G E M E N T

BEFORE: A. R. MANENTO: J;

The applicant was charged and convicted of obtaining money by false pretences c/s 302 of the penal code, Cap. 16 of the Laws. He was sentenced to one year imprisonment suspended sentence in that he should keep dean record during all that period. Besides that, it was inter alia that:

(1) Accused to vacate from the house No. 597, Block 44 in Kijitonyama immediately in favour of PW3 one Valence Matunda.

That was on 27/3/2000. The applicant did not vacate from the suit premises as immediately as ordered by the court 27/3/2000 as certified by a court bailiff by his affidavit deponed and filed by him on 6/4/2000. That was nine days after the judgement and order. On the same day the court beiliff filed

an affidavit the applicant filed a chamber summons in accordance to Section 368(1)(b) of the Criminal Procedure Act, 1985 for the following orders:

(a) That the honourable court be pleased its suspend execution of an order that direct the applicant to vacate the house No. 397 Block 44 in Kijitonyama pending the hearing of an appeal.

(b) That the court be pleased to suspend all other orders therein, pending hearing of the appeal.

(c) That any other relief(s) as the court may deem fit and just to grant.

The application was scheduled to be heard on 12/4/2000 and it was further rescheduled for hearing on 14/4/2000. on that day, before the commencement of the hearing of the application, the prosecutor of the hearing of the application, the prosecutor requested the court to require the applicant first to show cause why he disobeyed the count`s order for immediate vacant possession. Then the court ordered that it would hear the application by the applicant to have the order suspended as well as that of disobedience of courts order for vacant possession of the Kijitonyama House No. 397 Block 44 which amounts into contempt of court c/s 114(1) (h) of Cap. 16.

The learned counsel for the applicant replied in the following words:-

> "Mr. Kadogo: In view of the application and requirement on accused to show cause, I have the following to say:
>
> My client is praying on this magistrate to disqualify himself from presiding over this case because he has no confidence in you." He Stated some unfounded reasons as to why his client had no confidence to the trial magistrate and finally submitted that his client (the applicant) "prayed for the magistrate to disqualify himself from the hearing of the matter."

The court overruled the learned counsel and still, the learned counsel want on to submit. That his client was not ready to proceed with the hearing of his application by the trial learned Principal Resident Magistrate. The Court accepted and adjourned the hearing of the accuseds application sine die, yet, it went on the require that accused/applicant to show cause as to why he should not be delt with for contempt of courts. In short, Mr. Kadogo, learned counsel for the applicant submitted that the accused was looking for another alternative

accommodation within which he would vacate from the house with a period of 14 days. secondly that the accused was intending to lodge and appeal against the decision of the court.

In reply to that short submissions, the Public prosecutor submitted that it appeared that the accused was trying to delay the implementation of the courts order taking into consideration that the order was supposed to be obeyed immediately because it was in course of Criminal matter.

After hearing the submissions, the Court ruled that the accused had disobeyed the court order since 27/3/2000 and he had failed to show sufficient cause and so he was convicted of contempt of court c/s 114(1) (h) of Cap. 16 of the Laws.

He was sentenced as follows:-

(1) For the offence of contempt of the court`s order, he is sentenced to six months imprisonment.

(2) For the suspended sentence, he is after today`s conviction ordered to serve it in a custodian form from today.

The sentences were ordered to run consecutively so that the accused served a total of one and a half years imprisonment. It is from that background that the accused wrote a letter to this

court requiring the court to revise the lower courts decision for contempt of court.

There are three reasons which are to be considered leading to the revision of the contempt proceedings namely:-

(1) That despite being asked to withdraw himself from the conduct of the case he refused and proceeded to hear the application for the Public Prosecutor.

(2) That in the conviction of contempt of court, the Hon. trial magistrate convicted the accused while there was no formal charge which was read to the accused nor fact;

(3) That the Hon. trial magistrate, erred in law and infact in refusing to withdraw himself while there was sufficient reasons.

During the hearing of these revisional proceedings, the applicant was no longer represented by Mr. Kadago, learned counsel. He was represented by Mr. Mwaikusya, learned counsel. During the submissions and reply to the submissions, neither Mr. Mwakyusa nor Mr. Mdemu, learned State Attorney did submit on ground number one of the revision, that is to say that the learned Resident Magistrate was requested to withdraw from the conduct of the whole proceedings. The proceedings show a kind of mix up in that they relate to both the offence of contempt of

court as well as the application to suspend the eviction order. The trial learned Resident Magistrate did stay the hearing of the application by the applicant sine die while he relied that he would proceed with the issue of contempt of court`s order as he believed that the was not bias in any way. So he proceeded. As to haw the learned trial magistrate was bias is not shown in the submissios of either the learned counsel for the applicant or the learned state attorney. What is transpired is only that just after the prosecution had alerted the court that its order for immediate vacation of the suit premises had not been complied with, so the accused had to show cause as to why he should not be delt with for the offence of courts order, then the accused/applicant who had not complied with that order was of the fear fear that a penal action would be taken against him immediately. So the quickest solution was to make the court in action by asking the trial learned Resident Magistrate to disqualify himself, that request was not conceded by the learned Resident Magistrate. The request to have the trial learned

Resident Magistrate to disqualify himself from seing to it that his order for immediate vacation from the suit premises is complied with, is on my opinion an act of delaying the execution of courts orders and not an act of bias in the pact of the learned Resident Magistrate. A courts Order is lawful unless it is invalidated by another superior order, and therefore it must be obeyed. A contrary view will have the undesired effect of creating an impasse in the conduct of the trials. The cardinal aim of reacting the offence of contempt of court is to arrest

all conducts which are aimed at or reasonably feared to be aimed at interfering with proper administration of justice. Justice H. Msumi in the case of Yasini Mikwanga Vs R (1984) TLR 10 at page 12 insisted on this point by quoting and approving a quotation in an English decided case in A.G. V Butterworth (1963)1 G.B. 696 where Lord Donavan had this to say:

> "The question to be decided..
> in all cases of alleged contoupt of
> court, is whether the action complained
> of is calculated to interfere with the
> proper administration of justice.
> There is more than one of so interfe
> ring."

From the quotation above, I would then ask myself if the action of the accused of non compliance of the courts offer for immediate vacation from the suit premises can be interpreted to amount into interfering with proper administration of the justice. Court had made an order which order is within its powers to make. Then the accused resisted to obey that offer and when the court is to ask the accused as to why he did not obey

its order, the accused replied that the magistrate should disqualify himself from the conduct of the case. That behavior of the accused is noting but an act calculated to interfere with the proper administration of justice. The court is obliged to supervise the execution of its orders otherwise, the court would

be equated to a toothless bull dog which could buck without biting. The learned Resident acted properly to see to it that the there is proper administration of courts orders. Now whether the conduct of the accused in not vacating from the suit premises immediately amounted into disobeying the courts order is subjective issue. What is immediately vacation of a suit premises under the circumstances for a person who had been living in the said house for years without prior arrangement for an alternative accommodation. That was what the learned Resident Magistrate was to decide judiciously-having been given the reasons for non-compliance with the order immediately, which, by the understanding of the Public Prosecutor ment immediately after the delivering of the judgement and the pronouncement of the order. That is the same day the order was made. If that is what the public prosecution and the learned Resident Magistrate ment, I beg to differ, each order must be taken in accordance to its circumstances.

The learned counsel for the accused submitted in detail on the second ground of revision, that is to say "the conviction of contempt of court - the learned Resident Magistrate convicted the accused while there was no formal charge which was read to the accused nor facts. in the first place, I have to look at the proceedings which are Self explanatory to this issue. The learned Resident Magistral said:

" Accused/Applicant to show cause why he should not be dealt with for contempt

of this court's order of 27/03/2000 to vacate the House No. 397, Block 44 in Kijitonyama. This is c/s 114(1)(h) Cap. 16."

Mr. Mwaikusya, learned counsel submitted that the procedure in framing the formal Charge was seriously flouted. He found support in the High Court case of Masumbuko Rashidi Vs R (1986)TLR 212. In that case the accused persons had wanted to engage an advocate and on the day in issue, the alleged advocate had not yet received any instruction from the accused persons. The accused person insisted that they wanted their advocate and when the charge was read over to them, the 4th accused walked out of the dock, and the trial magistrate, peremptorily convicted him of contempt of court c/s 114(1) of the Penal Code and sentenced him to twelve months imprisonment. Following the decision in the them East African Court of Appeal in Joseph Odhengo s/o Ogongo V.R 21 EACA 302, the court held that

"when a court takes cognisance of an offence of contoupt of court, it is essential that the court should frame and record the substance of the charge, read such charge to the accused who should then be called upon to show cause why he should not be convicted on the charge; and the accused should be given a fair opportunity to reply. Besides, the record of the court should contain an adequate note of the accused person's reply, if any, as

well as the courts decision.

Earlier before the decision of Chipeta J in Masumbuko Rashidis' case (supra) hon. Msumi J. as he then was in the case of Yasini Mikwanga V R (1984) TLR 10, again following the same case of Joseph Odhengo c/s Ogongo (Supra) and AG.V. Butterworth (1963) 1. G.B696 held that

> "unlike in formal criminal charge there are no set if rules which a magistrate is required to comply with in drafting a charge of contempt of court under summary proceedings; it is enough for him to explain to the accused the gist of his offensive conduct, the particular provision of the law which contravenes it and give him an opportunity to make a reply.

When this court was confronted again in this issue of the procedure in cases of contempt of court, Plat J. as he then was in the case of Sebastian Lothi and Others VR (1969) HCD 184, he considered the Court of Appeal for Easten Africa decision in Joseph Othengo (Supra) in which Simon J. as he then was differentiated the case of Othengo and that of Hamisi s/o Muruiro V R. Cr. App No. 141 of 1968 (unreported) whereby the observation of the Court of Appeal (EA) in Odhengo's case were considered Obiter and therefore not binding, while it was said that the actual contempt might allow for a different procedure. For

example the contempt in Odhingo's case was refusing without lawful excuse to answer a question. Simon J. was prepared to concede that in the case of that kind of contempt it might well be contrary to natural justice not to give the contemnor an opportunity of advancing a lawful excuse if he had one. The

court of Appeal for East Africa Judge, Simmons, went on to distinguish the Odhengo's case and that of Hamisi. In the Hami's case, the contempt consisted of insults heard by the court, which demanded no proof and admitted of no explanation. Then it was ruled that under the circumstances in the facts found in Hami's case, the court was entitled to punish brevi manu. On the strength of the authorities cited above. I am inclined to follow the decision of Msumi J. in Yasimi Mikwanga (supra) together with that of Platt. J. in Sebastian Lothel Another (supra) and hold that is no formal procedure stated in formulating and dealing with offences of contempt of the court, provided that the accused is informed of the particulars of the offence and the offence itself. He may be required to show cause as to why he should not be punished for contempt of the court or he could just be punished brevi manu.

The learned state attorney though admitted that the accused had disobeyed the lawful order of the court, yet he briefly said that for that reason alone, he could not support the conviction. Going by the records of the lower court, following the decision of Yasini Mikangwa (supra), I am of the opinion that the trial learned Magistrate followed the procedure. The learned Resident

magistrate asked the accused/Applicant to show cause why he should not be dealt with for contempt of the courts order of 27/3/2000 to vacate the House No. 397 Block 44, Kijitonyama. That was c/s 114(1)(h), Cap. 16. Both the section of the relevant offence was cited by the court, the particulars of the offence were given to accused by the court, that is failure to vacate from the house as per order of the court made on 27/3/2000. This also surfaces the requirements stated in Masumbuko Rashidi (Supra) unfortunately, instead of the accused showing cause as to

why he should not be convicted of contempt of court, the learned counsel for the accused spoken behalf of the accused. he first demanded that the trial learned Resident Magistrate should disqualify himself from the conduct of the case. That was not the reply needed by the court. However, Mr. Kadago, learned advocate after the court had refused to disqualify itself from the conduct of the contempt of courts proceedings, he want to show cause, on behalf of his client and for certainty, I beg to quote him as follows:

> "Mr. Kadago: The Republic through the prosecutor has applied for Accused to show cause why he should not be convicted of contempt of court. The accused has not infact contempted the court. He is aware of a notice to vacate the house on 6/4/2000.

"Therefore the accused was supposed to vacate the house on 6/4/2000. Therefore the accused was supposed to vacate said house after 14 days. The accused is therefore looking for an alternative accommodation pending the outcome of this matter...the accused is intending to lodge an appeal... The accused is residing in that house. It is quite difficulty for him to vacate the house in a short time. The accused therefore is not willing to disobey the courts order. We pray on court to take all that into account. That is all your honour."!

Following what I had already said above at length, I don't agree with both the defence counsel Mr.Mwakyusa and the learned State Attorney Mr. Mdemu for the Republic that the procedures for the offence of contempt of court was flouted. It was not and the accused was given an opportunity to show cause and he actually should cause only that the trial Residant Magistrate on his subjective test did not believe the explanations given so he convicted the accused and sentenced him.

Secondly, Mr. Mwakyusa,learned counsel stated that the alleged order which is said to have been disobeyed was issued on 4/4/2000 after the application of one Matunda dated 3/4/2000, an application made under order 21 rule 11 of the Civil Procedure Code, 1966. If the order took a form of a Civil nature, then it

need 14 days from the date it was issued. The accused was not served with the order. order and was not aware of it.
Thus the conviction of the accused for contempt was illegal. The courts order was not made on 4/4/2000. The learned trial Resident Magistrate was very clear on what order he talked about when he called upon the accused to show cause. That was the order of the court made on 27/3/2000 when the accused was found guilty and convicted of the offence of obtaining money by false pretences c/s 302 of the Penal Code Cap 16 of the Laws. That order was made in the presence of the accused and was heard by him. He was not convicted of contempt of courts order issued under order 21 rule 11 of the Civil Procedure Code, 1966, and to say that the accused was not aware of the courts order to vacate from the suit premises, an order made in the presence and hearing of the accused on 27/3/2000 is nothing but a misleading of the counsels himself and the court. This ground is dismissed as lacking truth or substance worth of acting upon.

Lastly, the learned counsel for the accused submitted that he complaint that the trial magistrate was bias so as to disqualify himself was not given serious consideration. he went on saying that in the circumstances where were charges of the applicant being contemptuous of the same magistrate, one would expat more serious consideration as the magistrate would be sitting on a matter of which he himself is a complainant. This view was supported by Mr. Mdemu, learned State attorney by saying that hon. Ihema when requested by one Mtilala to disqualify himself from the case and how Ramadhani, J.A when asked by Lyatonga Mrema to disqualify himself from the conduct of the

case, did disqualify. Unfortunately, the learned state attorney did not elaborate under what circumstances in which those judges agreed to disqualify themself what were the reasons advanced by the complainants which made the judges accept the request. That was an empty handed submission.

Unfortunately, the submissions by the learned counsel cannot be said to have a support of any authority. It was not be differentiated from a laymans submission. I say so because even a lay man could just submit as did the learned state attorney this matter. I don't subscribe to that kind of submissions made by a learned state attorney appearing for the Republic. I would therefore say that none of the learned counsels did cited any authority to establish the biasness of the trial Resident magistrate when calling upon the accused to show cause why he should not be convicted of defaulting his order made on 27/3/2000 for the accused to vacate the suit promises immediately. Immediately as I had said earlier could mean just on the very day the order was made or any other near date and that is why the learned Resident Magistrate wanted to hear the accused person

before convicting him and sentencing him. Contempt of courts ordered are offences which a court takes cognizance, it is in effect assuming and exercising a jurisdiction to deal summarily with the offence and it is essentially not calling for further evidence to prove it. The offence is already committed in the eyes of the court soit doesn't need another magistrate who doesn't know anything about its commission to deal with the

learned trial Resident Magistrate stayed sine die the hearing of the application by the accused for staying the execution of its order, but rightly, on my opinion continued to deal with the offence of contempt of court.

Mr. Mwakyusa learned counsel had submitted on the point of bias that the learned magistrate was interested in the case, as did the prosecutor. So his continuing with the case even after a request to disqualify himself violated the principal of matural justice. The learned Resident Magistrate had no interest in the case nor is there any evidence to that effect, bit his interest was to see to it that the courts orders are obeyed. If a magistrate makes an order which is not obeyed then the motion of the rule of law will not be in existence. Courts orders must be obeyed and the courts should see to it that such orders and or decisions are obeyed for proper administration of justice.

After my lengthy elaboration as to the law in regard to contempt of court I now proceed to, on my own motion to make a ruling whether the trial learned Resident Magistrate was right or not in combining the hearing o the application by the applicant already filed to suspend the execution of an order that directed the applicant to vacate the house No. 397 Block 44 in Kijitonyama pending the hearing of an appeal and the Verbal request by the

public prosecutor for accused to show cause why he should not be convicted of contempt of court. This application was set for hearing on 12/4/2000. On that day the accused's advocate was

absent and the hearing was set for hearing on 14/4/2000. It was on that day when the trial magistrate decided to hear the two applications simultaneously. The accused felt bias on the part of the learned Resident Magistrate as there was no justification as to why his application should not be heard, an application which requested the court to stay its order for the accused to vacate from the suit premises.

I am of the considered opinion that the learned Resident magistrate might not have been bias on the face of it, he believed that his order had not been complied with, and therefore he failed to control his patience so that he could first hear the applicant/accused as he might have good and reasonable reasons why he should not vacate immediately. Such reasons as availability of an immediate alternative accommodation. The non patience of the learned Resident Magistrate to ear first the applicant/accused made the accused to think that the trial magistrate was bias, even if he is not. That the best test is not whether the magistrate's acts in a prejudicial manner, but whether there exists in the mind of the accused a reasonable apprehension that he will not have a fair and unprejudiced trial before the magistrate in question. Borrowing the words of Lord Denying in Metropolitan Properties Co (F.G.C) Ltd. V London (1969) IQB577 at p. 599 quoted by Kazimoto J. as he then was in Republic Vs Athuman Rajabu & others (1989) TLR 44, his lordship said:

"The reason is plain enough Justice
must be rooted in confidence, and
confidence is destroyed when right
- minded people go away thinking
The judge was biased."

Now on the case before me, the conduct of the learned Resident Magistrate in accepting to hear the application for contempt of court before hearing the application for stay of execution by the applicant really eroded the confidence of the accused person thinking that the magistrate was biased and demanded him ~~is~~ to disqualify himself. Only on that part of the the revision, I am inclined to say that the trial learned Resident Magistrate should not have combined the hearing of the two applications and his acts of so combining the hearing of the two applications made the right thinking people think that he was bias and for that reason, I revise the conviction for contempt of court c/s 114(1)(h) of the Penal Code and quash the order for conviction and set the accused free.

A. R. MANENTO

JUDGE

17/7/2000

Coram: A. R. Manento, J,

Mr. Msuya - for Applicant,

Miss Maganga - for respondent.

C.C.: Aza