

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA  
(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)**

**AT DAR ES SALAAM**

**PC. CRIMINAL APPEAL NO. 8 OF 2022**

*(Originating from the decision of the District Court of Kibaha at Kibaha in Criminal Appeal No. 3 of 2022, by Hon. Ng'hwelo-RM dated 12<sup>th</sup> day of May, 2022)*

**RAMADHANI MBWANA KILO ..... APPELLANT**

**VERSUS**

**SAMWEL ODAA OTIENO ..... RESPONDENT**

**JUDGMENT**

18<sup>th</sup> July, 2022

**ISMAIL, J.**

The proceedings from which this appeal arises were originally instituted in the Primary Court of Maili Moja at Kibaha. The respondent in the instant proceedings was an accused person who was facing a charge of threatening to kill, contrary to section 89 (2) (a) of the Penal Code, Cap. 16 R.E. 2019. The trial court found him guilty and convicted him of the charged offence. He was sentenced to a 12-month conditional discharge during which he would serve as a community worker.

The sentence aggrieved the appellant. He resorted to an appeal to the District Court of Kibaha at Kibaha (1<sup>st</sup> appellate court), and two grounds of appeal were raised. After the hearing, the court retired to compose a decision. While composing the judgment, it crossed to the court's mind that the respondent had raised two preliminary grounds of objection on which the parties were not availed with an opportunity to address. Nevertheless, the court went ahead and determined the appeal on the basis of the raised objections. In the end, the court upheld the objections and dismissed the appeal.

This decision has raised the appellant's discontentment, hence the institution of the instant appeal. The Petition of Appeal has four grounds of appeal, but given the decisive importance of ground four of the appeal, the parties were invited to address the Court on that ground alone. This ground touches on failure by the 1<sup>st</sup> appellate court to afford the parties a right to a fair hearing on the preliminary objections raised by the respondent.

In his brief submission, Mr. Selemani Matauka, learned counsel for the appellant, argued that the decision by the 1<sup>st</sup> appellate court to determine the preliminary objections without affording the parties the right to be heard was a violation of the constitutional right to a fair hearing, as enshrined in Article 13 (6) (a) of the Constitution of the United Republic of Tanzania.

Learned counsel argued that, even the court itself realized that it had flouted this requirement, and acknowledged it at pages 2 and 3 of the impugned judgment.

Mr. Matauka took the view that this violation was fatal and he invited the Court to be inspired by the decisions of the Court of Appeal of Tanzania, and quash and set aside the decision. These are: ***Charles Christopher Humphrey Kombe v. Kinondoni Municipal Council***, CAT-Civil Appeal No. 19 of 2019; and ***Elizabeth Mpoki & 2 Others v. MAF Euro Dodoma***, CAT-Civil Application No. 431/1 of 2016 (both unreported).

The respondent was expectedly laconic in his submission. He conceded to the fact that his preliminary objections were not subjected to any arguments by the parties. Instead, the court went straight to fix a date for judgment.

The law takes cognizance of the powers that courts are vested with, to deviate from the issues in controversy, and resolve teething matters that arise in the course of the proceedings. Where such issues are raised *suo motu* by a court, or where they are brought up by a party, the court's obligation is to let the parties address the court on the new points of contention. This position has been emphasized in a multitude of decisions.

In ***Oriental Insurance Brokers Limited v. Transocean (Uganda)***

***Limited*** [1992] EA 260, it was guided as follows:

*"Under the provisions of Order 13 of the Civil Procedure Rules, a trial court has the jurisdiction to frame, settle and determine issues in a suit. A trial court may frame issues based on the evidence of the parties or statements made up by their counsel though the point has not been covered by the pleadings provided that that parties are afforded an opportunity to address the court on the new issues framed."*

So important is the right to be heard, that its violation attracts undesirable consequences to the decision and proceedings bred from the flawed conduct. In ***EX-B.8356 S/Sgt Sylvester S. Nyada v. The Inspector General of Police & Attorney General***, CAT-Civil Appeal No. 64 of 2014, the Court of Appeal of Tanzania held:

*"There is similarly no controversy that the trial judge did not decide the case on the issues which were framed, but her decision was anchored on an issue she framed suo motu which related to the jurisdiction of the court. On this again, we wish to say that it is an elementary and fundamental principle of determination of disputes between the parties that courts of law must limit themselves to the issues raised by the parties in the pleadings as to act otherwise might well result in denying of the parties the right to fair hearing."*

In the end, the superior Court guided as follows:

*"We desire to add, as correctly submitted by the appellant that where this is done, prudence requires that the parties be afforded opportunity to address the Court on the issues so amended or added, in tandem with the audi alteram partem principle of natural justice as has been insisted in a range of cases including those relied upon by the appellant as pointed out at the beginning."* [Emphasis added]

See: ***D.P.P v. Benard Mpangala & 2 Others***, CAT-Criminal Appeal No. 28 of 2001 (unreported).

It follows that, since the path taken by the 1<sup>st</sup> appellate court violated the cherished principle that is now a key constitutional requirement, the violation is serious and bears an impact on the legitimacy of the proceedings. I hold that the judgment from which the instant appeal arises was a derision of justice that is abhorrent and intolerable. It simply cannot hold.

In consequence of the highlighted anomaly and, on this ground alone, I allow the appeal. I quash and set aside the judgment and remit the matter back to the 1<sup>st</sup> appellate court for calling upon the parties to address the court on the objections raised by the respondent before the magistrate retires to compose a decision.

Parties shall bear own costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 18<sup>th</sup> day of July, 2022.



**M.K. ISMAIL**

**JUDGE**

**18/07/2022**

