IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

AT TABORA

CIVIL APPEAL NO. 17 OF 2020

(Originating from Tabora Resident Magistrates' Court

(Civil Case No. 19 of 2018)

THE REGISTERED TRUSTEES OF EVANGELISTIC ASSEMBLIES OF GOD TANZANIA.....1ST APPELLANT

PETER MADAHA (SECRETARY EVANGELISTIC ASSEMBLIES OF GOD CHURCH – WEST ZONE.....2ND APPELLANT

AGUSTIN KADELEMA (VICE BISHOP EVANGELISTIC ASSEMBLIES OF GOD CHURCH – WESTEN ZONE..... 3RD APPELLANT

FREDERICK KASOMO (TREASURE EVANGELISTIC ASSEMBLIES OF GOD CHURCH– WEST ZONE.....4TH APPELLANT

CHARLES MAHUNA (BISHOP EVANGELISTIC ASSEMBLIES OF GOD CHURCH- TABORA SOUTH PROVINCE.....5TH APPELLANT

VERSUS

PETER CHARLES KASWIZA (VICE BISHOP) TABORA SOUTH PROVINCE EAGT CHURCH.....RESPONDENT

JUDGMENT

Date:16/2/2022& 25/3/2022

BAHATI SALEMA , J.:

The appellants, being dissatisfied by the decision and orders of the Resident Magistrates' Court of Tabora which were delivered on 28/8/2020 by Hon. Nsana, RM, are appealing to this court armed with three grounds that:

1. *The trial magistrate erred in law and fact by having an improper interpretation of the Constitution of the Evangelistic Assemblies of God Tanzania,*

2. *The trial magistrate erred in law and fact by entertaining the matter prematurely,*

3. *The trial magistrate erred in law and fact by improper evaluation of the evidence adduced that led to an erroneous decision.*

The facts that give rise to the dispute between the parties and, consequently, this appeal are not complicated. The respondent, Peter Charles Kaswiza, a pastor at the EAGT Tabora was promoted to the position of Vice Bishop in 2005, a title he held until he was suspended from his position on 16th January 2018. Dissatisfied by his suspension,

he filed a suit against the Registered Trustees of the Evangelistic Assemblies of God for unlawful termination. The trial court declared that the termination letters, which were written by the 2nd, 3rd, 4th, and 5th appellants, dated 16 January,2018 and 29 January,2019 were unlawful and contrary to the EAGT church constitution.

When the matter came up for hearing, the appellants were represented by Mr. Didas Kanyambo, learned counsel, while the respondent was represented by Mr. Kelvin Kayaga, learned counsel. With the leave of this court, both parties prayed to argue the appeal by way of a written submission, which this court granted and dutifully complied with the schedule.

In support of the first ground of appeal, the counsel for the appellants stated that the trial magistrate erred in law and fact by having an improper interpretation of the Constitution of the Evangelist Assemblies of God Tanzania, particularly Article that deals with the determination of the grievances between parties before resorting to the ordinary courts.

He submitted that the learned magistrate failed to interpret the provisions of the constitution governing EAGT, particularly Article XI B 4 (f)*(Mkutano wa Baraza la Waangalizi wengi utakata mashauri ya watumishi na wachungaji)* and Article X Item (b) (vii), *atashughulikia*

suala la wachungaji wote kitaifa which provides the proper forum for dealing with grievances of the members of EAGT. To him, the trial magistrate failed to interpret the subject provisions to ascertain whether or not the case brought by the respondent complied with the church's constitution. To amplify his argument, he cited the case of **Rev. Yered Charles Lesilwa and 2 others vs. Rev. Christool Isack Ngowi,** Civil Application No. 54 of 2019, High Court of Tanzania at Dar es Salaam (Unreported), in which Mgonya J, when faced with a similar scenario concerning the interpretation of the constitutional in a forum dealing with grievances, had this to say;

> *"With reference to the cited provision above and the nature of the matter before me, it is my view that it falls within the jurisdiction of the said respective Constitution."*

From the above-cited authoritative case law, the appellants further argued that it is evident that the learned magistrate in the present matter erred in interpreting the constitution.

Further, the appellants' counsel submitted that according to the records, particularly on page 9 of the typed judgment, the learned Magistrate relied heavily on Article 2 (c), which does not exist, read together with Article XI (B) (8) (d) of the Constitution, in resolving that the appellants have no power to terminate the appointment of the

respondent. On the other hand, the learned magistrate was faulted for having failed to read out the provisions of the constitution which dictate that a member of the EAGT who is aggrieved by such decisions, should refer his grievances to a specified constitutional forum before resorting to the courts of law. Based on that, he submitted that the learned magistrate erred in interpreting the provisions of the Constitution of EAGT and hence reached unfair decision.

Submitting to the second ground of appeal that the trial magistrate erred in law and fact by entertaining the matter prematurely. The appellant's counsel stated that since the respondent had never exhausted the available local remedies as enshrined in the EAGT, particularly Articles X and VIII (2). To him, the trial magistrate entertained the matter before the court without satisfying himself as to whether the respondent had exhausted the remedies. Consequently, the trial court adjudicated the suit that was filed prematurely.

Furthermore, he stated that members of the registered religious trustees have no direct access to the ordinary courts as the respondent did without exhausting the available remedies. Referring again to the case of **Rev. Yered Charles Lesilwa's** (supra at page 13), he relied on the quotation that ;

"... In my opinion, members of the registered religious trustees and their respective denomination cannot seek direct recourse to ordinary courts of law without first channeling their grievances, complaints, or disputes to their respective relevant supreme authority; in this respect the EAGT as seen constitution above".

In line with the above-cited authoritative case law, the learned magistrate was faulted for having erred by entertaining the case which was filed prematurely without ascertaining whether the respondent had exhausted all available remedies before resorting to the ordinary court.

Further, he submitted that the learned magistrate failed to take into consideration the evidence adduced in favor of the appellants to prove the misconduct of the respondent in violation of the Constitution, which testimonies were not much challenged by the respondent. The evidence of DW4 and DW5 proves that the respondent persuaded other pastors to convene the revolutionary meeting at Dar es Salaam, contrary to the Constitution of EAGT. Thus, the respondent went to equity with dirty hands, which the learned Magistrate failed to take into consideration.

It was also stated that it is an established principle that the courts should look at the weight of the evidence to rule in his favour. The said

principle was established in the case of **Farah Mohamed Vs. Fatuma Abdallah** [1992] TLR 205. In that matter, the appellants' evidence was heavier than that of the respondent, which the learned magistrate failed to take into consideration.

On the third ground of appeal, the appellants' counsel argued that the trial magistrate conducted the case without jurisdiction. He submitted in this connection that, from the records, the respondent instituted a case challenging the procedures of the decision passed by the members of the EAGT, which was a fit case for judicial review under section 17 of the Law Reform (Fatal Accidents and Miscellaneous Judicial Review) to be entertained by the High Court. In that, the magistrate entertained a case without jurisdiction.

To bolster his argument, he stated that the issue of jurisdiction is fundamental as it was established in the case of **Fanuel Mantiri Ng'unda Vs. Herman M. Ng'unda and others** (TLR) in 1995. From the case law, the case before the learned Magistrate was for judicial review of which the trial court had no jurisdiction.

In rebuttal, the counsel for the respondent submitted on the first and second grounds that; the appellants' arguments that Article XI B 4 f, and Article X (b) (vii) of the constitution of EAGT ousted the jurisdiction of the District Court to try the case and that the plaintiff

(respondent herein) ought to have resorted to internal bodies within EAGT are misplaced.

The evidence on record, according to him, shows that the 2nd – 6th appellants removed the respondent from his position as the Vice Bishop while acting for and under the blessings of the 1st respondent, which act went contrary to Article X (C) (2) (c) of the constitution of EAGT, providing that "*a Vice Bishop of the Province (Askofu Msaidizi Jimbo) shall be removed through the same procedure as the Province's Bishop.* Now Article X(C) (2) (c) on page 18 provides for the removal of the province's Vice Bishop (as the respondent was) while Article X(C) (1) (c) on page 18 provides for the removal of the province's bishop.

Article XC (2) (c) on page 18 reads;

> *"Askofu was Jimbo Msaidizi Kuondolewa madarakani,*
>
> *Sawa na njia zilizotumika kumuondoa Askofu wa Jimbo na sababu zile zile. "*

Article XC (2) (c) on page 18 reads;

> *"Askofu wa Jimbo Kuondolewa madarakani,*
>
> *Atachaguliwa kwa njia sawa na alivyochaguliwa Askofu wa Kanda na ataondelewa kwa njia ya kusimamishwa na Halmashauri ya*

Kanda na ataondolewa na Mkutano mkuu wa Jimbo kwa sababu zile zilizofanya Askofu wa Kanda aondolewe."

Further Article XI B (4) (f) of the E. A. G.T constitution reads;

"Mkutano wa Baraza la waangalizi

2. *f) Utakata mashauri ya watumishi na wachungaji".*

He further stated that during the trial it was proved by evidence and conceded by appellants and their witnesses that, they did not mount to *Mkutano Mkuu wa Jimbo*, they did not have jurisdiction to remove the respondent from the said position, and the respondent was not afforded a right to defend or refute allegations raised against him. Hence, the rules of natural justice were not complied with and the trial court observed as such.

Again, the wording of Article XI (B) (4) (f) of the EAGT *Constitution* simply shows the general powers of the said *Mkutano wa Baraza la Waangalizi* and nothing more. The said "*Mkutano wa Baraza la Waangalizi*" as described in Exhibit P3 is not a disciplinary authority therein.

Also, the EAGT constitution does not provide anywhere that a person aggrieved by the decision or action of the said "*Halmashauri Kanda*" or

members posing as such must file an appeal to another body or authority within it.

He further submitted that in this country, an appeal is a creature of statute, and there is no inherent right to appeal. He referred to the case of **H. M. Chamzim and 71 Others Vs. Tanzania Breweries Limited**, Civil Appeal No. 57/2004, CAT at Dar es Salaam (Unreported).

Therefore, the respondent was not obliged to refer the matter to any other person or official of EAGT before filing his suit. And as such, since the same has already been dealt with by the internal organs, which such dealing has geared towards the institution of the suit, it is clear that even if such a need was not legally there, it cannot be said that the respondent did not attempt to exhaust internal mechanisms before going to court, even though that is not the mandate of the law. The appellant placed reliance in the case of **Rev. Yered Charles Lesilwa and 2 others Vs. Republic Christomoo Isack Ngowi and 4 others**, Civil Application No. 54/2019, High Court at Dar es salaam (Unreported).

He stated that the cited case is distinguishable in that, firstly, in that case, the applicants were praying for leave to file a representative suit, unlike herein. Secondly, the dispute, in that case, had not originated from the decision of the internal bodies of the EAGT. The dispute is, in the first place, the decision of the internal body of the EAGT and its

members posing as such, and the suit challenges the legality of the decision taken while exhausting internal remedies. Thirdly, the intended suit was purely against the members of the registered trustees for breach of trust and misuse of church funds, unlike the case at hand. Fourthly, in this case, the dispute had not been discussed within the church leadership at all, while the case at hand is different.

So, under the circumstances, it cannot be said that the case was prematurely filed or that the trial court misinterpreted the constitution to mean that there was another forum.

Lastly, the Constitution of United Republic of Tanzania,Cap.2 guarantees the fundamental right to access the court under Articles 13 (1) and (2) and also Article 107A of the Constitution of the United Republic of Tanzania 1977. The law places confidence in the courts to be the final authority when justice is in question. The constitution of EAGT cannot be used to override the norms enshrined in the constitution. The constitution of EAGT cannot, therefore, oust a court's jurisdiction, and if that were the case, it could only be done by clear words of the statute or the same. But under the present circumstances, the argument that the case was filed prematurely lacks merit.

On the third ground of appeal, the appellants argued that this was a fit case for judicial review. For purposes of judicial review, judicial review

is always a remedy against government agencies and public authorities/statutory bodies, and none of the appellants is a public authority for purposes of judicial review.

The stance of the law in Tanzania is that judicial review is not amenable to a religious institution like a church. In similar circumstances, this court in **Aman Mwenegoha, Secretary-General (E.L.C.T) Vs. The Registered Trustees of the Lutheran Church in Tanzania and 3 Others,** Miscellaneous Civil Cause No. 8/2005, High Court of Tanzania at Dar- es salaam (Unreported) stated in the last two pages to the effect that a religious body is not a public body and has no public duties towards the public at large. The court stated;

"The first respondent is a body corporate of which I take judicial notice of its incorporation under the Trustee's Incorporation Ordinance, Cap.375. I have looked at the statutes and I can find no provision which creates legal functions or duties for the public at large or individuals, such as performing public functions. I now proceed to hold that even if there were facts to justify the grant of prohibition, the 1st, 2nd, and 3rd respondents are not in law the body of persons created by statute to perform statutory duties.

On the totality of my holding in the preceding paragraph in the preceding paragraphs, it is my conclusion that the respondents are not amenable to judicial review in the circumstances of the present case. "

Also, in the case of **Amani Mwenegoha, Secretary-General (E.L.C.T) Vs. The Registered Trustees of the Lutheran Church in Tanzania and 3 others**, (supra), while discussing another decision of the High Court by Mwalusanya J, the court stated that;

> *"...He quoted a passage from Lord Denning in **Edward Vs Society for Graphical and Allied Trades** (1971) 1 CH. 354, regarding the powers of a private society or association to give itself power by its rules to expel or withdraw a man from his membership without being given the opportunity to be heard. Lord Denning said the courts could interfere, and Mwalusanya, J said he could adopt that reasoning".*

By analogy, this supports the stance that the respondent was justified in bringing his matter to court to challenge the unlawful decision of the appellants and the move behind it, in the manner that they did.

Also, in the case of **Rev. Archbishop Daniel Itaja Vs. Rev. Francis Rwechungura,** Misc. Civil Cause No. 3/1995, High Court at Tabora (unreported), this court at page 8 stated that;

*"...That was the decision in **R. v. St Edmunds Bury and Ipswich Diocese (chancellor, ex p. White, [1948]** ikb 195. So, it is the case both in England and Ireland, and now in this country, that order of certiorari will not be issued to a religious body, its administrative councils, or tribunals. "*

The decisions of the court cited above are relevant up to date since Section 17 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310 [R.E. 2019] has remained the same. Therefore, the decisions cited above were made in the late 1990s.

Lastly, the trial court considered and properly evaluated the evidence on record, as it was better placed to do that. In **Ali Abdallah Rajab Vs Saada Abdalla Rajab and others** [1994] TLR 132, the court stated that;

> *"Where the decision of a case is wholly based on the credibility of a witness, it is the trial court which is better placed to assess their credibility than an appellate court which merely reads the transcript of the record."*

Also, in the case of **Hemed Saidi vs. Mohamed Mbilu** [1984] TLR 113 (HC) at page 116, the court stated that:-

"According to the law, both parties to a suit cannot tie, but the person whose evidence is heavier than that of the other is the one who must win."

He submitted that the respondent's evidence held more credence than that of the appellants and that the suit was established and proved against the appellant. Hence, this court should find it fit to maintain such a decision with costs.

Having heard the rivalry arguments from both parties, the issue before me is whether the filed grounds are meritorious.

In respect to the first ground, it has been argued that the trial magistrate erred in law and fact by having an improper interpretation of the constitution of the Evangelistic Assemblies of God Tanzania, in particular on the aspect of the constitution that deals with the determination of the grievances by the aggrieved party before resorting to the ordinary courts.

It is undisputed that internal mechanisms in resolving disputes within the religious organization like the one at hand or in any other organization are highly encouraged in our laws as observed in the case of **Parin A. Jafar and Another vs. Abdulsual Ahmed Jafari and Two Others [1996] TLR 110** where the court held that where the law

provides for extrajudicial machinery to resolve the dispute then the applicant has to exhaust those available remedies.

I understand that the constitution is the governing tool of the EAGT, but having traversed through it, I do not agree with the argument that the remedies are all provided in such a constitution. According to the EAGT constitution, the removal of the Vice Bishop is provided for under Article X 2 (c), which provides that, and I quote;

Kuondolewa madarakani

Ataondolewa madarakani /kusimamishwa kwa sababu zile zile kama Ibara na. X kifungu Na.1 (c) kwa kikao cha Halmashauri Kuu kitakachoitishwa na Askofu Mkuu."

Having perused through the proceedings of the trial court, what I noted from the evidence testified by DW2, Secretary of the Western Zone, DW3, pastor and accountant, and DW4, Bishop of Tabora Southern Province, and DW5, Assistant Bishop of the Western Zone, is that before convening a meeting, DW5, Augustino Issa Kadelema, conducted a meeting of three people, namely, Pastor Madaha, the Secretary, and Pastor Fredrick Kasomo by phone and arrived at the decision to suspend the respondent from his position. They then agreed to write a letter convening a zonal meeting on 25 January, 2018.

From the respondent's submission, during the trial, it was conceded by DW5, Augustino, and their witnesses that they did not convene "*Mkutano Mkuu wa Jimbo*" and that the respondent was not afforded any right to be heard before his suspension, hence the right to be heard was not observed.

Since the respondent was removed from his position as Vice Bishop, which was contrary to Article X(c)(2) C of the constitution of the EAGT, I subscribe with the respondent's counsel that the wording of Article XI (B) (4) (f) of the subject constitution simply shows the general powers of the said *Mkutano wa Baraza la Waangalizi* and nothing more, which is not a disciplinary authority herein.

Also, as I was going through the Constitution of the EAGT and submissions by the respondent's counsel, I noticed that the EAGT Constitution does not provide anywhere that a person aggrieved by the decision or action of the said: "*Halmashauri Kanda* or members posing as such" must file an appeal to another body or authority within it.

Since the appeal is a creature of the statute, there is no inherent right to appeal. **H.M.Chamzim and 71 others vs. Tanzania Breweries Limited,** Civil Appeal No. 57/2004, CAT, Dar es Salaam (Unreported). I find this argument unmeritorious since the EAGT constitution has no clear provision.

As to the second ground of appeal, the trial magistrate erred in law and fact by entertaining the matter prematurely.

Relying on Article X and VIII of the constitution of the EAGT, the respondent rushed to this court without exhausting internal remedies given by the Constitution of the Church.

As submitted by the appellants, they contend that the remedy is the General Assembly of the EAGT, which, according to Article X of the EAGT Constitution that reads "*Vii Askofu Mkuu atashughulikia swala la wachungaji kitaifa*" is the final authority in all matters and affairs of the church and its respective organs.

As opposed by the respondent's counsel, the constitution does not grant such leeway, and the respondent also insisted that although the dispute is within the church, the jurisdiction of the court is not waived to determine the matter. Having keenly read the constitution, I noted that although the EAGT has its constitution, it does not provide the proper mechanism on how to resolve the dispute, as noted in Article XI B (4) (f), which provides that;

Mkutano wa Baraza la Waangalizi

1. *Utakata mashauri ya watumishi na wachungaji.*

Having traversed through the constitution of EAGT, it does not provide a clear mechanism by which a person who is dissatisfied with the said decision or action must file an internal appeal to resolve the dispute before going to the court of law to obtain the church's consent. It is my view that since there was no such validation, the matter was not prematurely filed.

It is on record that the termination letter dated 16/01/2018 shows the applicant was suspended from his position for violating Article IX(a) 1-1V but Article ix is found and there is no paragraph (a)1 –IV and it is not anyhow relevant to reasons advanced by the appellants. The respondent was punished for violating a non-existing rule in the *constitution of the EAGT*. Therefore, this anomaly amounted to offending the principle of the rule of law and the canon principle that "*Nulla poena sine lege."* Hence, I also find this ground to have no merit.

I now turn to the third ground: that the trial magistrate erred in law and fact by improper evaluation of the evidence adduced and that led to an erroneous decision.

It is an established principle that the courts should evaluate the weight of the evidence to reach a fair decision. The said principle was established in the case of **Farah Mohamed Vs. Fatuma Abdallah** [1992]

TLR 205 and also in **Ali Abdallah Rajab Vs. Saada Abdala Rajab and others** [1994] TLR 132.

Upon examining the trial court's evidence adduced by PW1, Charles Kaswiza, and the appellants, I am satisfied that the evidence given by the respondent was heavier than that of the appellants. The trial court found that the respondent was not afforded a right to defend before he was suspended on January 16, 2018 and the EAGT Constitution was not adhered to. Further, PW2, PW3 in the proceedings supported the argument that the EAGT Zonal office had no power to suspend the respondent from the position of Vice Bishop since such powers are vested in the Zonal Council and that DW2, DW3, DW4 and DW5 conceded this fact. The evidence in DW4 and DW5 is to the effect that the respondent persuaded other pastors to convene a revolutionary meeting at Dar es Salaam. However, this act is not justifiable.

Lastly, the appellants' counsel contended that this case was one fit for judicial review.

Having examined this appeal before me, the stance of the law in Tanzania is that, judicial review does not apply to religious institutions. I respectfully agree with the learned counsel for the respondent that judicial review, being a public law procedure, would not be available for the matter subject of this appeal as it involves private law.

I find it useful in the following 6 passages from the *Uganda Civil Justice Bench Book, The Law Development Centre (LDC) 1st Edition*, 2016 at page 340 that;

> *"Judicial review is the process by which the High Court exercises its supervisory jurisdiction over proceedings and decisions of inferior courts, tribunals, and other bodies or persons who carry out quasi-judicial functions or who are engaged in the performance of* ***public acts and duties.*** *Those duties may affect the rights or liberties of the citizen. It is a matter within the ambit of administrative law. " [Emphasis supplied].*

To qualify for judicial review, the applicant must establish that it was performing quasi-judicial functions or that it was engaged in the discharge of public functions. I do not see how this matter could be brought within the ambit of administrative law.

From the above, the issue now is whether the procedures of the decision passed by the members of EAGT-Tanzania are subject to judicial review.

The meaning of a public body is construed by looking at the functions or services performed by that body. This is why Section 18(1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310,

under which the appellants are seeking refuge, require this court to summon the Attorney General when such an application is made. Therefore, it is my considered view that this matter is not subject to judicial review.

For the reasons given in the analysis of the grounds of appeal before this court, I uphold the decision of the trial court with costs.

Order accordingly.

A.BAHATI SALEMA

JUDGE

25/3/2022

Ruling delivered under my hand and Seal of the court in Chamber this 25th day March, 2022 in the presence of both parties.

A. BAHATI SALEMA

JUDGE

25/03/2022

Right to appeal is fully explained.

A. BAHATI SALEMA

JUDGE

25/03/2022