IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

(CORAM: MAKAME, J.A., LUBUVA, J.A., And LUGAKINGIRA, J.A.)

CRIMINAL APPEAL NO. 61 OF 1999

BETWEEN

AUGUSTINO LYATONGA MREMA ..... APPELLANT

AND

THE REPUBLIC ..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam)

(Msumi, J.K.)

dated the 5th day of May, 1999

in

Miscellaneous Criminal Cause No. 10 of 1999

R U L I N G

LUGAKINGIRA, J.A.:

This case came before the Court by way of appeal but for reasons which will shortly appear, we decided to proceed by way of revision. The designations "appeal" and "appellant" are retained in order to avoid confusion.

The appellant, Augustine Lyatonga Mrema, was charged before the Resident Magistrate's Court at Kisutu in Dar es Salaam on nine counts under various penal laws. At the conclusion of the case for the prosecution, the trial Principal Resident Magistrate ruled that the appellant had a case to answer on the first and third counts, which allege presenting false documents to a Parliamentary Select Committee contrary to s. 23 of the Parliamentary Immunities, Powers and Privileges Act, No. 3 of 1988, and on the ninth count, which alleges raising discontent and ill will contrary to s. 63B (1) of the Penal Code. In this ruling we are concerned with the first and third counts. To paraphrase them, the first count alleges that

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on 9 September, 1996 the appellant presented to a Parliamentary Select Committee a false letter purporting to originate from the Chief Secretary to the President directing the distribution of 900m/= in bribe money to some high ranking persons in government and the ruling Chama cha Mapinduzi (CCM); and the third count alleges that on the same occasion the appellant presented to the Committee another false letter purporting to originate from the CCM and addressed to the President requesting for 300m/= to be used for the purpose of eliminating the appellant politically.

A preliminary hearing was held at the commencement of the trial and three matters were listed as undisputed. It was agreed that in August 1996 Parliament set up a Select Committee to investigate into the appellant's allegations regarding bribery of 900m/=, it was also agreed that on 9 September, 1996, the Committee summoned the appellant to testify on those allegations; it was finally agreed that in the course of testifying the appellant presented the letters aforesaid. Those letters were tendered as Exhs. P1 and P2 in the course of the trial. Subsequent thereto a certificate granted to the appellant by the Committee pursuant to the provisions of s. 20 (1) of Act No. 3 of 1988, was also tendered as Exh. D2. At that juncture the defence submitted that the proceedings respecting the first and third counts be stayed and the appellant be discharged as required by s. 20 (3) of Act No. 3 of 1988. The learned trial magistrate overruled the submission and pressed on with the trial. The submission was renewed in the arguments for no-case to answer but it was again rejected by the magistrate who observed that it was without his power to reverse himself.

The appellant then appealed to the High Court contending, among other things, that the trial court had no jurisdiction to

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try the first and third counts on account of the provisions of s. 20 (3). And in what was listed as the fifth ground of appeal, the High Court was asked "to examine section 20 (3) of Act No. 3/88 to satisfy itself with the correctness or otherwise of the interpretation given to the statute and hence the legality or propriety of counts 1 and 3." In other words, the High Court was being asked, in case it did not go along with the appeal, to revise the decision of the trial magistrate. To that end the petition of appeal cited s. 373 (1) (b) of the Criminal Procedure Act. The High Court (Msumi, J.K.) dismissed the appeal and did not consider the alternative of revision, citing two reasons. First, that the appeal raised matters which had previously been raised and adequately dealt with by the same court in Misc. Criminal Application No. 37 of 1997. Second, that the law did not provide for appeals by accused persons from interlocutory orders. From that decision the present appeal was brought through learned counsel Mr. Nyange who also appeared for the appellant before the High Court and partly in the trial court.

Mr. Nyange filed a five-point memorandum of appeal but we think it is all summarised in the fifth ground which states:

> The jurisdiction of the Resident Magistrate's Court to try the appellant in respect of count Nos. 1 and 3 of the charge sheet is subject to and has been taken away by the Parliamentary Immunities, Powers and Privileges Act, No.3/88.

The respondent Republic lodged a preliminary objection to the appeal through Principal State Attorney Mr. Kaduri to the effect that the appeal was incompetent and premature, it being an appeal against an interlocutory order. At the hearing Mr. Kaduri elaborated on the

objection and pointed out that the jurisdiction of this Court to entertain appeals in criminal proceedings derives from s. 6 of the Appellate Jurisdiction Act, No. 15 of 1979. He pointed out that subsection (1) of same permits an accused person to appeal against conviction and sentence only. Citing the decision of the Court in Seif Shariff Hamad v. S.M.Z. [1992] TLR 43, he argued that s. 6 deliberately denies accused persons the right to appeal from interlocutory orders in order to prevent the protraction of proceedings.

On his part, Mr. Nyange, albeit reluctantly, conceded the limitations of s. 6 so far as appeals by accused persons were concerned. He was of the view, however, that this was a lacuna in the statute and invited the Court to remedy the deficiency by supplying an amendment. He alluded to Joseph Warioba v. Stephen Wassira [1997] TLR 272 for a precedent. He buttressed his argument by citing Rule 3 (2) (a) and (b) of the Court of Appeal Rules which empower the Court to make orders for the purpose of dealing with any matter for which provision is not made in the Rules or any other written law or for better meeting the ends of justice. He said there was a problem in this case, the problem of interpreting s. 20 of Act No. 3 of 1988 and charged that there had been a glaring disregard of that provision. There must be exceptions to Hamad's case, he contended, and the instant case was such an exception. Perhaps sensing that the argument for reading words into s. 6 might not find favour, Mr. Nyange alternatively invited the Court to invoke its revisional powers under Act No. 15 of 1979 as amended by Act No. 17 of 1993. He submitted that the decision of the High Court was erroneous for implying that the issue of jurisdiction was dealt with in Misc. Criminal Application No. 37

of 1997 when in fact jurisdiction never featured in that application. He said this was a proper case for the Court to exercise its powers of revision and vindicate the appellant's rights under the country's laws and Constitution rather than wait until he is sent to prison.

In a brief rejoinder, Mr. Kaduri submitted that Rule 3 (2) applied where neither the Rules nor any other written law made provision for the matter in controversy but Act No. 15 of 1979 made provision for appeals. However, Mr. Kaduri did not respond to the invitation for revision.

We begin by restating that the Court has no jurisdiction to entertain appeals by accused persons from interlocutory orders. Hamad's case cited to us and the decisions of the erstwhile Court of Appeal for Eastern Africa cited therein, put this beyond conjecture. This Court is a creature of statute and can only exercise the powers conferred upon it by its creator. It has no inherent powers to assume jurisdiction and even if it were desirable that the Court acquired them, they cannot be called into existence by assuming them: cf. R. v. Collins [1969] 3 All E.R. 1562, 1564. In Hamad's case, too, the Court went further to suggest reasons for the state of the law but it seems necessary to restate them. The Court said:

> The reasons for prohibiting a party other than the DPP from appealing against interlocutory orders are not far to seek. The criminal proceedings would undoubtedly be very protracted as an accused person would be attracted to appeal against every order.

This is a telling indictment on this very proceeding. It was commenced on 25 June, 1997; it has been to the High Court twice

and this Court twice; and it is yet to be concluded in the trial court, almost four years hence.

Mr. Nyange spent considerable time trying to seek assistance from Rule 3 (2), but we are unable to see the relevance of that Rule, either. It reads:

> (2) Where it is necessary to make an order for the purpose of -
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> (a) dealing with any matter for which no provision is made by these Rules or any other written law;
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> (b) better meeting the ends of justice; or
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> (c) preventing an abuse of the process of the court,
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> the Court may, on application or on its own motion, give directions as to the procedure to be adopted or make any other order which it considers necessary (emphasis ours).

First of all, we agree with the learned Principal State Attorney that the Rule is not applicable in the case because provision for appeals is made in s. 6. We would go further and say that as the law stands today, the fact that an accused person cannot appeal in interlocutory matters does not mean that he has no other remedy. He may now turn to the revisional jurisdiction vested in the Court by Act No. 17 of 1993. It is therefore not correct to say that there is a lacuna in the statute. Secondly, as per the words emphasized in that behalf, the Court can give directions under Rule 3 (2) in matters of procedure but not substantive law.

On the other hand, the concluding clause, "or make any other order which it considers necessary," being general, has to be construed ejusdem generis with "procedure." We think, therefore, Rule 3 (2), being procedural, does not purport to authorise the Court to read into s. 6, a substantive provision, words which are not there.

The decision in Joseph Warioba, in which the Court read words into s. 114 of the Elections Act, No. 1 of 1985, stands on a different footing and was not inspired by Rule 3 (2). That was an appeal against the refusal by the High Court to certify a corrupt practice to the Director of Elections after finding that the respondent had committed a corrupt act during an election campaign. The High Court took that position because s. 114 did not make provision for certification on corrupt practices although it provided so for illegal practices. The question this Court had to answer was whether the omission in s. 114 to require certification of corrupt practices was deliberate or was through inadvertence. The Court traced the history of electoral corrupt practices and noted that the offence was originally contained in various provisions of Act No. 1 of 1985, including s. 114. It was removed therefrom by Act No. 13 of 1990 and was transferred into the Prevention of Corruption Act by Act No. 20 of 1990. It was finally restored into Act No. 1 of 1985 by Act No. 6 of 1992 except in s. 114. The Court turned to the objects and reasons appended to the Bill for Act No.6 of 1992 which objects and reasons made it manifestly clear that the intention of Parliament was to re-introduce corrupt practices into Act No. 1 of 1985. Thus by adopting historical and purposive approaches to construction the Court reached the view that the omission to restore corrupt practices into s. 114 was inadvertent.

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It therefore proceeded to read into the section the words "corrupt or" immediately before the word "illegal" wherever it occurred. The Court emphasized, however, that it was not amending the section but reading into it the words which Parliament had originally used but which were inadvertently left out when it was decided to restore corrupt practices into Act No. 1 of 1985. In the case before us, there is no question of any inadvertent omission in s. 6. It is complete and deliberate in intendment. We therefore uphold Mr. Kaduri's preliminary objection and strike out the appeal. We think, however, there is merit in the invitation to revise the decision of the High Court and proceed to do so.

The Court's powers of revision under s. 4 of Act No. 15 of 79 arise in two ways. First, under subsection (2) thereof, the Court is conferred with powers of revision for the purpose of and incidental to the hearing and determination of any appeal. That is to say, revision under this subsection may be resorted to as a device in the disposal of an appeal. Second, the powers arise under subsection (3), and this reads:

> (3) Without prejudice to subsection (2), the Court shall have the power, authority and jurisdiction to call for and examine the record of any proceedings before the High Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision made thereon and as to the regularity of any proceedings of the High Court.

Certain features characterise this subsection. First of all, the power granted thereby is not dependent upon the existence of any appeal; it is a power additional to the power conferred under

subsection (2). Secondly, subsection (3) makes no distinction between civil and criminal proceedings or between interlocutory and concluded proceedings. It applies to "any proceedings before the High Court." In the exercise of the powers under the subsection, the Court has evolved certain propositions which it is desired to recapitulate. These propositions have largely been articulated upon in the context of civil proceedings but we think they can be applied in criminal proceedings as well. They are summarised in Halais Pro-Chemie v. Wella AG [1996] TLR 269, 272 in these terms:

> (i) The Court may, on its own motion and at any time, invoke its revisional jurisdiction in respect of proceedings in the High Court;
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> (ii) Except under exceptional circumstances, a party in proceedings in the High Court cannot invoke the revisional jurisdiction of the Court as an alternative to the appellate jurisdiction of the Court;
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> (iii) A party to proceedings in the High Court may invoke the revisional jurisdiction of the Court in matters which are not appealable with or without leave;
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> (iv) A party to proceedings in the High Court may invoke the revisional jurisdiction of the Court where the appellate process has been blocked by judicial process.

The list is by no means exhaustive but new situations may suggest additional rules. Meanwhile, the instant case can be placed under the third rule. The appellant has no immediate right of appeal,

he can appeal only at the conclusion of the trial. The problem of this case, however, is not the sort of problem that can be postponed to an unknown date when the right of appeal would accrue. It is a problem of a misconception of the law which goes to the root of the trial - the power and jurisdiction of the trial court and the constitutionality of any sanctions that may flow from a conviction. We think it must have been in contemplation of such and similar situations that Parliament in its wisdom vested the Court with the discretion to intervene at any stage. The case of Seif Shariff Hamad came well before the amendment by Act No. 17 of 1993. We have had the opportunity to examine the record of proceedings in the High Court, it being with us already, and the question is whether the record reveals any incorrectness, illegality or impropriety of any finding, order or any other decision made thereon. We think it does. In order to appreciate this answer, it becomes necessary to turn to s. 20 of Act No. 3 of 1988, to the decision of the trial magistrate thereon and to the decision of the High Court on first appeal.

> 20 (1) Every witness before the [National] Assembly or an authorised committee who shall answer fully and faithfully any questions put to him by the Assembly or such committee to its satisfaction shall be entitled to receive a certificate stating that such witness was upon his examination so required to answer and did answer any such questions.
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> (2) Every certificate under subsection (1) shall, in the case of a witness before the Assembly, be under the hand of the Speaker, and in the case of a witness before a committee, be under the hand of the chairman thereof.

> (3) On production of such certificate to any court of law, such court shall stay any proceedings, civil or criminal, against such witness for any act or thing done by him before the time and revealed by the evidence of such witness, and may, in its discretion, award to such witness the expenses to which he may have been put.

These provisions were first introduced into our law vide Act No. 3 of 1988 which was enacted by Parliament in January of that year. There was no similar or equivalent provision in the erstwhile Legislative Council (Powers and Privileges) Ordinance, Cap. 359. The purpose of the provision is to bar civil and criminal proceedings against witnesses who are issued with certificates after testifying before the National Assembly or a committee thereof on account of answering the questions put to them fully and faithfully. We have seen that the appellant was issued with such a certificate after testifying before the Select Committee. We have also seen that the certificate was produced at the trial as Exh. D2. When the trial magistrate was then asked to stay the proceedings in counts one and three in accordance with subsection (3), he refused to do so and couched his reasons in these terms:

> It can be seen that after enacting s. 20 in Act No. 3 of 1988 Parliament continued to enact other provisions creating offences such as s. 21 for giving false evidence to the Committee or s. 23 for presenting among other things fabricated or falsified documents with intent to deceive.
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> That is why I am saying that Parliament did not enact s. 20 (3) of Act No. 3 of 1988 to defeat its own course (sic) or

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> oust the jurisdiction of the court or absolve any witness to any of its Committees of any criminal charges preferred against him under the laws of our country. I therefore refrain from staying these proceedings against the 1st accused and acquitting him as urged by his counsel. I accordingly so order.

We think, with respect, this is unfortunately wrong. The effect of s. 20 is, in our view, two-fold. First, once a certificate is granted to a witness under subsection (1), an irrebuttable presumption arises that the witness fully and faithfully answered the questions put to him. In other words, a certificate would not issue to a witness unless the Assembly or committee is satisfied that the witness has answered the questions fully and faithfully. This is not to say that the witness spoke the truth or gave correct answers; to answer fully and faithfully means simply to answer to the best of one's knowledge and belief. The witness's knowledge might be faulty and his belief might be erroneous, but so long as he answers fully and faithfully, he is entitled to receive the certificate. The second effect derives from the production of the certificate before any court of law. The moment that takes place, such court has to stay any proceedings, civil or criminal, against a witness for any act or thing done by him in his testimony to the Assembly or committee. The only matter for inquiry is whether the act or thing is revealed by his testimony; if it is, the court has to stay the proceedings. There is no discretion in this matter as the provisions of subsection (3) are mandatory in terms. So long as the witness was issued with a certificate and the certificate is produced in court, he is immune from

further process. Such privileges are granted to Parliament and to those who are called upon to assist in its business in order to enable the House to discharge its functions with least difficulty. The existence of the offence sections, i.e. ss. 21 and 23, does not take away the immunity accruing under subsection (3). The Assembly or committee is not expected to grant certificates to every witness who appears before them; certificates are grantable to those witnesses only who answer questions fully and faithfully. Sections 21 and 23 are intended to take care of those witnesses who are not granted certificates.

Before leaving this matter we desire to make further observations in relation to Act No. 3 of 1988 although they are not necessary for this ruling. According to s. 9 (1), it is prohibited for any member or officer or person employed to take or transcribe minutes of evidence before the Assembly or committee to give evidence elsewhere respecting the contents of such minutes of evidence, or of the contents of any document laid before the Assembly or committee, "without the special leave of the Assembly first had and obtained." Section 19 (1) is to the same effect. Special leave may be granted by the Speaker or the Clerk of the Assembly where the Assembly is on recess or adjournment. To us, "special leave" implies the availability of tangible evidence of leave being granted. The grant cannot be informal or general. We reach this view on account of the importance placed on that leave by vesting the power of granting it in the National Assembly. This leave, therefore, cannot be presumed either by the witness-to-be or by the court, least of all in a criminal matter where the liberty of an individual is at stake. In view of these provisions, it is surprising that three members of the Select Committee, PW2 Idd Simba,

PW13 Wilson Masilingi and PW29 Arcado Ntagazwa, as well as two officers of the committee, PW20 Esther Nyagawa and PW28 Paulo Masami, were permitted to give evidence and to refer to the contents of the minutes of evidence and the documents laid before the committee, without the slightest indication that they had obtained special or any leave to do so. We think, with respect, the evidence of these witnesses was, in the absence of special leave, inadmissible and its reception was a fundamental irregularity in the trial even if the question of a certificate had not arisen. It is still more confounding, going by the record before us, that even though the provisions of ss. 9 and 19 were drawn to the attention of the learned trial magistrate, not only did he not record that fact, but he proceeded to receive the evidence as if those provisions did not exist or matter. Generally, we cannot pretend to be happy with the magistrate's style in the conduct of the trial.

These remarks aside, we are satisfied that the trial magistrate was gravely in error when he refused to stay the proceedings in counts one and three upon the production of the committee's certificate. The subsequent proceedings were conducted without jurisdiction and were null and void. Coming now to the High Court, we note that when the question of jurisdiction was raised, Msumi, J.K. refused to look into it but stated:

> ... I am satisfied that the matters which are the substance of this appeal were previously raised and adequately dealt with by this court.

That view was erroneous. The issue of jurisdiction was not raised in Misc. Criminal Application No. 37 of 1997 which came before Nsekela, J. In that application the appellant was complaining

about perceived bias on the part of the trial magistrate. He cited the magistrate's refusal to stay the trial and send the record to the High Court when it was called for, his refusal to withdraw from the trial when it was submitted that the appellant had no confidence in him, and his refusal to record and rule on a submission that the trial had been prejudiced by some newspaper reports. Those were the only aspects of Misc. Criminal Application No. 37 of 1997, an application for revision, and the prayer was for a trial de novo before the same or another magistrate or an order compelling the magistrate to discharge the appellant on account of the prejudicial press reports. We think had the learned Jaji Kiongozi directed himself correctly on the subject of that application, he would have realised that jurisdiction was not covered therein. And as demonstrated by us, he would no doubt have held that the trial of counts one and three was a nullity and would have put an end to it pursuant to the High Court's revisional powers under s. 373 (1) (b) of the Criminal Procedure Act.

Accordingly, we set aside the decision of the High Court and substitute therefor an order quashing the trial of counts one and three and discharging the appellant therefrom. The trial can proceed on the remaining ninth count.

DATED at DAR ES SALAAM this 8th day of March, 2001.

L. M. MAKAME
JUSTICE OF APPEAL

D. Z. LUBUVA
JUSTICE OF APPEAL

K.S.K. LUGAKINGIRA
JUSTICE OF APPEAL

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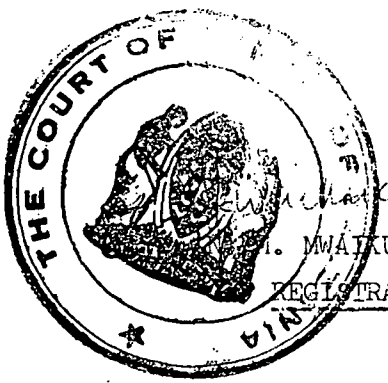

THE COURT OF ... OF ... NIA

M. MWAIKUGILE

REGISTRAR