IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CORAM: NYALALI, C.J., MUSTAFA, J.A. and OMAR, J.A.

CIVIL APPEAL NO. 23 OF 1986

JINA KHATIBU HAJI.....APPELLANT

and

1. JUMA SELEMANI NUNGU
2. THE HON. THE ATTORNEY GENERAL .....RESPONDENTS

(Appeal from the Decision of the High Court of Tanzania at Dar es Salaam)(MAPIGANO, J.) dated the 27th day of September, 1986

in

Misc. Civil Cause No. 96 of 1985

JUDGEMENT

NYALALI, C.J.:

This is an appeal by one JINA KHATIBU HAJI on preliminary matters of law concerning an election petition case instituted in the High Court of The United Republic of Tanzania, at Dar es Salaam, challenging the validity of the election results in the Parliamentary elections held in the Mwera Constituency on the 27th October, 1985 in Zanzibar. Jina Khatibu Haji, hereinafter called the appellant, was one of two candidates fielded by the Party to contest the election in that constituency. The appellant's opponent was one JUMA SULEIMAN NUNGU, hereinafter called the first respondent, who won the election.

When the petition came up for hearing in the High Court of the United Republic on the 16th September, 1986, Professor Shivji, learned advocate representing the appellant under a legal aid scheme of the Faculty of Law of the University of Dar es Salaam, applied for the case to be transferred to the High Court of Zanzibar for hearing and decision on the ground that the appellant lacked the means to bring witnesses from Zanzibar to Dar es Salaam, and that the High Court of Zanzibar had concurrent jurisdiction to hear and determine the case. In a considered ruling, the High Court of the United Republic, Mapigano, J. rejected the application and held in effect that the High Court of Zanzibar has no jurisdiction to hear

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election petitions concerning the Parliament of the United Republic. It also held that the High Court of the United Republic had territorial jurisdiction over Zanzibar in Parliamentary election cases and could consequently move to and sit in Zanzibar to hear an election petition such as this one.

The appellant was aggrieved by this outcome of his application, hence this appeal to this court. Professor Shivji again represented the appellant before us, whereas Mr. Mkude, Chief Corporation Counsel of the Tanzania Legal Corporation, appeared for the first respondent.
Mrs. Ngororo, learned state attorney, represented the Attorney-General of the United Republic, who is the second respondent joined in the petition by virtue of the provisions of Rule 4 of the Elections (Elections Petition) Rules, 1970. The Attorney-General of the Revolutionary Government of Zanzibar was notified to appear in these proceedings as AMICUS CURIAE as it was felt that this Court could benefit a great deal from his opinion on a matter, such as this case, which touches on a vital interest of the Zanzibar Revolutionary Government. Unfortunately neither the Attorney-General of Zanzibar nor any representative of his office appeared, and no communication concerning the non-appearance was received by this Court at the time of hearing the appeal. Since the actual parties to the appeal were present or represented, the Court decided to proceed with the hearing of the appeal.

In his memorandum of appeal the appellant raises three grounds of complaint as follows:

1. The Honourable Judge erred in law in holding that the High Court of Zanzibar had no concurrent jurisdiction with that of the High Court of the United Republic to hear and determine this election petition.

2. The Honourable Judge erred in law in holding that the High Court of the United Republic had exclusive jurisdiction to hear and determine this election petition.

3. The Honourable Judge erred in law in holding that the High Court of the United Republic could sit in Zanzibar for the purposes of hearing and determining this election petition.

From the proceedings both in this Court and the Court below, it is apparent that the first and second grounds of complaint involve constitutional issues which are more complex than those raised in the third ground.

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For that reason, it is better to deal with the last ground first. In dealing with this aspect of the case, the learned trial judge stated:

> "For myself I see no legal barricade that can stop the High Court of the United Republic to sit in Zanzibar, for the purpose of trying this election petition. In my opinion it is a sensible inference that the Legislature which in its proverbial wisdom, has vested jurisdiction to adjudicate upon such matters in the High Court of the United Republic also concomitantly vested in that High Court territorial jurisdiction to sit anywhere in the United Republic, inclusive of Zanzibar, when exercising that authority. In addition to that, I have always assumed that territorial jurisdiction 'invariably coheres to jurisdiction over the subject-matter of the legal action".

The respondents in this appeal conceded, and rightly so, that the High Court of the United Republic has no territorial jurisdiction over Zanzibar in election cases and cannot therefore sit in Zanzibar inconnection with this case. With due respect to the learned trial judge, no sensible inference of territorial jurisdiction over Zanzibar can be drawn from the mere fact of vesting in the High Court of the United Republic jurisdiction to hear election petitions arising from Zanzibar territory. It is not unoommon for a Court to be vested with jurisdiction over matters without at the same time being vested with jurisdiction over the territory on which the matter occurs. A good example can be seen in the provisions of section 6(b) of the Penal Code which has always vested in the Courts in Tanganyika with criminal jurisdiction to try offences comitted anywhere outside Tanganyika by anyone belonging to Tanganyika. Under this provision such courts have jurisdiction to try an appropriate offence committed in a country like the United Kingdom, but it cannot be said either sensibly or legally that such courts have territorial jurisdiction over the United Kingdom. The assumption made by the learned trial judge that jurisdiction over a subject matter coheres with territorial jurisdiction is not correct. One has only to look at all the Courts, including the High Court of the United Republic, to find that every Court established in the United Republic, has its territorial jurisdiction provided for by statute. This is the case in respect of magistrates' Courts under the Magistrates' Courts Act, 1963 as well as the Magistrates' Courts Act, 1984.

It is the same for the High Court of the United Republic under the Tanganyika Order in Council, 1920 read together with the Tanganyika (Constitution) Order in Council 1961 and the Judicature and Application of Laws Ordinance Cap. 453. Under section 17 and 20 of the Tanganyika Order in Council, 1920 it was clearly provided that the High Court thus established had jurisdiction over the entire territory of Tanganyika. There was no derogation of territorial jurisdiction under the Tanganyika (Constitution) Order in Council, 1961 which repealed and replaced the Order in Council of 1920. As for the Court of Appeal of Tanzania, its territorial jurisdiction is the same as that of the High Court of the United Republic as well as that of the High Court of Zanzibar by virtue of the provisions of Section 3(2) of the Appellate jurisdiction Act 1979 and the First Schedule to the Constitution of the United Republic which lists the Court of Appeal as one of the "Union Matters".

There is thus no doubt that the learned trial judge erred in law in holding as he did that the High Court of the United Republic has territorial jurisdiction to hear and determine Parliamentary election petitions originating from Zanzibar. This means that in hearing an election petition originating from Zanzibar, The High Court of the United Republic must sit in Tanzania Mainland.

One now comes to the first and second grounds of the memorandum of appeal They are inter linked and for that reason, it is better to consider them together.

Professor Shivji has submitted before us that the High Court of the United Republic does not have exclusive original jurisdiction to hear and determine an election petition, such as this one, but has concurrent jurisdiction with the High Court of Zanzibar. Professor Shivji advances two main arguments in support of his submission. Firstly he contends in effect that since the Parliament of the United Republic and Parliamentary elections thereto are not listed among 'Union matters' in the First Schedule to the Constitution of the United Republic, the Revolutionary Government of Zanzibar is not precluded from exercising jurisdiction over the matter by having the relevant elections petition heard and determined by its High Court. Secondly,

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he argues in effect that since the Elections Act, 1985 was enacted by the Parliament of the United Republic and was made by the same applicable "thoughout the United Republic of Tanzania" by virtue of section 1(3) of the Act, and since that Act provides under section 110(1) that "every election petition shall be tried by the High Court" without qualifiction, then the High Court of Zanzibar is vested with jurisdiction concurrently with the High Court of the United Republic by virtue of the provisions of Article 115(2) ofthe Constitution of the United Republic which provides in effect that:

> "Subject to this Constitution and to any law enacted by the Parliament, where jurisdiction isconferred on a High Court by a law of the Parliament of the United Republic which applies to Zanzibar, the jurisdiction of the High Court of Zanzibar shall be concurrent with that of the High Court of the United Republic".

It is Professor Shivji's opinion that the proviso contained in Article 115(1) to the effect that "subject to Article 83 and 116 of this Constitution, the High Court of Zanzibar shall have such jurisdiction as may be conferred under any law in force in Zanzibar" does not preclude the High Court of Zanzibar from hearing and determining such election cases, but precludes only the enactment of legislation in Zanzibar vesting in the High Court of Zanzibar exclusive jurisdiction to hear election cases concerning Parliamentary elections to the Parliament of the United Republic. In conclusion, it is his contention that the Courts should construe the provisions of the Constitution in keeping with the principle of duality of the United Republic providing for matters which are within the exclusive domain or jurisdiction of the Revolutionary Government of Zanzibar on the one hand and the Government of the United Republic on the other hand, and for matters which are within the concurrent competency of both two governments.

Mr. Mkude, learned counsel for the first respondent submitted on the other hand quite firmly to the effect that the High Court of the United Republic is vested with exclusive original jurisdiction to hear and determine election petitions by Article 83(1) of the Constitution which provides in effect that:

"(1) Any matter for decision as to whether -

(a) any person has been validly elected or appointed as a member of the National Assembly; or

(b) any member of the National Assembly has ceased to be a member and his seat has become vacant

shall be instituted and determined in the High Court of the United Republic at first instance"

It is part of Mr. Mkude's contention that although the Elections Act, 1985 describes the forum vested with jurisdiction by referring to it simply as "the High Court", that Act has to be read together with Article 83(1) of the Constitution of the United Republic.

Mrs. Ngororo on her part has submitted in effect that the relevant provisions of the Constitution and the law cannot be construed to confer on the High Court of Zanzibar jurisdiction to hear and determine election petitions such as this which is the subject of this case, because historically the provisions of Article 115(2) of the Constitution of the United Republic existed in the interim Constitution of the United Republic of 1965 as section 63(2) long before any elections were contemplated in Zanzibar. Mrs. Ngororo could as well have referred also to the provisions of section 125 of the Elections Act, 1970 which vested jurisdiction to hear and determine election petitions in the High Court when elections were still not yet contemplated in Zanzibar. The provisions of section 125 of the Elections Act 1970 are reproduced as section 110 of the current Elections Act 1985 which repealed and replaced the earlier legislation on the matter. It is her contention that the High Court of Zanzibar had no jurisdiction to hear and determine election petitions either in 1965, or 1970 and no subsequent legislation has been enacted specifically to confer jurisdiction thereafter.

I propose to deal with Mrs. Ngororo's submissions first. With respect there is a fundamental flaw in her position. The provisions of section 63(2) of the Interim Constitution of 1965, which were substantially reproduced as Article 115(2) of the current Constitution of the United Republic, were not restricted to the situation as it existed in the United Republic in 1965 but applied to the future as well. This is apparent from the wording of that sub-section which then read as follows:

"(2) Subject to this Constitution and to any express provision of an Act of Parliament, where jurisdiction is conferred on a High Court by a law of the Parliament of the United Republic which applies to, or a law in force in Tanganyika which is extended to, Zanzibar, the jurisdiction of the High Court of Zanzibar shall be concurrent with that of the High Court of the United Republic."

Clearly these provisions were intended to cover any existing or future "law of the Parluament of the United Republic which applies to, or a law in force in Tanganyika which is extended to, Zanzibar". In other words these provisions would cover a law such as the Elections Act 1985 which is extended to Zanzibar unless it can be said that these provisions no longer existed in the Constitution at the time the Elections Act 1985 was enacted by the Parliament of the United Republic. When the Interim Constitution of 1965 ceased to exist, these provisions were retained even if allowance is made for changes in the vocabulary occassioned by the use of the Kiswahili language to express the Constitution of the United Republic for the first time in the Constitution of 1977 which replaced the interim one of 1965. One has only to look at Article 67 of the 1977 constitution to find them. There they remained and were not affected by the major constitutional changes effected by the Fifth Constitutional Amendment Act No. 15 of 1984. With the publication of the consolidated version of the Constitution in 1985, these provisions appeared as Article 115(2). They were thus in operation when the Elections Act, 1985 was enacted and extended to Zanzibar by the Parliament of the United Republic. But as it shall be demonstrated hereafter, the Election Act 1985 has to be read together with Article 93 of the Constitution and that fact precludes the High Court of Zanzibar from acquiring jurisdiction concurrently with the High Court of the United Republic.

It is appropriate at this stage to deal with one of the limbs of Professor Shivji's arguments. Undoubtedly one of the major changes effected by the First Constitutional Amendment Act, 1979 was the establishment of the Court of Appeal of Tanzania consequent upon the break up of the East African Community. The Court of Appeal was vested with jurisdiction to hear appeals from the High Court of the United Republic in matters including election petitions. Until then, the High Court of the United Republic was what was expressly stated in Article 38 of the 1977 Constitution as "ndiyo pekee yenye

mamlaka ya kusikiliza na kuamua". That meant in effect exclusive and final jurisdiction. There were no appeals in election petition cases either to the Court of Appeal of East Africa or any other court. With the establishment of the Court of Appeal of Tanzania with appellate jurisdiction in election matters, the provisions of Article 38 of the 1977 Constitution had to be amended and were actually amended in 1979 firstly, by specifically stating under a new Article 38(3) that appeals in election matters would lie to the Court of Appeal against the decision of the High Court of the United Republic, and secondly by omitting the words "pekee" and "kuamua" which had expressed the exclusiveness and finality of the High Court jurisdiction in election cases.

Mapigano, J. in dealing with these changes stated:

> "I take the view that the alteration of the language in the 1979 amendment did not signify any departure from the essence of the provision as it previously stood. It is not uncommon. There are several instances to be found in the statute book of the legislature deviating from language previously used for the purpose of conveying a certain meaning without thereby intending to depart from that meaning".

While this court should be slow to differ about information given on the state of the statute book by one of the most experienced and senior judges of the High Court of the United Republic, one is bound to state with respect that in the present instance the alteration in the language used in the provisions of the relevant article signified a departure in meaning. But what is this meaning? According to Professor Shivji, that change conferred concurrent jurisdiction on the High Court of Zanzibar by removing the exclusive jurisdiction of the High Court of the United Republic.

With due respect to Professor Shivji, his contention cannot be correct. It is apparent that the amendments concerning the jurisdiction of the High Court of the United Republic were two-pronged. Firstly, the amendments removed the exclusiveness and finality of jurisdiction vested in the High Court of the United Republic; and secondly, they opened a way by specifically providing under Article 83(3) for appeal to the Court of Appeal of Tanzania. If it was intended that there should also be a way opened for concurrent jurisdiction in the High Court of Zanzibar it would also have been similarly

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provided specifically therein. It is inconceivable that Parliament would have chosen instead to effect such a major change almost incidentally by leaving it to the Courts to puzzle it out.

In any case, the Elections Act, 1985 was enacted by the Parliament of the United Republic under the enabling provisions of Article 83. This means that the Act has to be read together with the provisions of Article 83. Since the Court vested with original jurisdiction under Article 83 is specified to be the High Court of the United Republic of Tanzania, it must follow that "the High Court" described in the Elections Act, 1985 as having jurisdiction to hear and determine election petitions cannot be other than that specified under Article 83. Thus one is led to the inevitable conclusion but for different reasons, that the learned trial judge was correct in holding that the High Court of the United Republic has exclusive original jurisdiction to hear and determine election petitions such as the present one. However, as already found, the High Court of the United Republic of Tanzania has no territorial jurisdiction over Zanzibar and cannot therefore sit there to hear this or similar election petition. It must sit on the mainland.

This legal position does not derogate in any way from the principle of duality of the United Republic of Tanzania, but is a manifestation of one of the three dimensions or characteristics of that duality. It is apparent from the basic structure or scheme of the Constitution of the United Republic that these dimensions relate firstly, to matters which concern exclusively that area which before the Union constituted what was then known as Tanganyika, and is presently referred to under the Constitution as Tanzania Mainland. These matters under the scheme of the Constitution fall under the exclusive domain of the Government of the United Republic. The Revolutionary Government of Zanzibar has no jurisdiction over these matters. Secondly, there are matters which concern exclusively the other side of the Union, that is, Zanzibar. Clearly these matters fall within the exclusive domain of the Revolutionary Government of Zanzibar. The Government of the United Republic has no jurisdiction whatsoever over such matters.

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Thirdly, there are the matters which concern both sides of the Union - that is, they concern Tanzania Mainland as well as Zanzibar. According to the basic scheme or structure of theConstitution of the United Republic, these matters appear to be dealt with in triple ways:

One; Some of these matters of common concern are listed in the First Schedule to the Constitution. Historically this list has not stood still but has gradually increased. The latest inclusion in the list is the Court of Appeal of Tanzania. This trend is probably an indication of a healthy growing confidence and trust between the people and leadership on both sides of the Union. These matters contained in the First Schedule fall within the exclusive domain of the Government of the United Republic as provided under Articles 4 and 64 of the Constitution.

Second; there are other matters of concern both to Zanzibar and Tanzania Mainland and which are not listed in the First Schedule but are specifically provided for under the Constitution of the United Republic. Such is the right of audience of the Attorney-General of the United Republic in the courts of the United Republic. Although Mapigano, J. in his ruling was of the view that the Attorney-General of the United Republic as defined under Article 151 of the Constitution had no right of audience in the courts of the Revolutionary Government of Zanzibar, that view cannot be correct. Article 59(4) clearly provides in Kiswahili:

> "Katika kutekeleza kazi na shughuli zake kwa mujibu wa ibara hii, Mwanasheria Mkuu atakuwa na haki ya kuhudhuria na kusikilizwa katika Mahakama zote katika Jamhuri yaMuungano"

It is abundantly evident that the right of audience of the Attorney-General of the United Republic extends to all the courts throughout the United Republic, which consists of Tanzania Mainland and Zanzibar.

The other matter which is specifically provided for under the Constitution and which concerns both sides of the union is the jurisdiction to hear and determine election petitions cases. This matter is the root of the present case. As already demonstrated this jurisdiction is vested in the High Court of the United Republic.

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There is also the Permanent Commission of Enquiry established and regulated under Articles 129, 130 and 131. So is the Constitutional Court established and regulated by Articles 125, 127 and 128. Both have jurisdiction throughout the United Republic although they are not listed in the First Schedule to the Constitution. Another one is the Leadership Code Committee established and regulated under Article 132 of the Constitution. Although under Article 123 of the Constitution of Zanzibar there are provisions recognizing the Permanent Commission of Enquiry, the Leadership Code Committee and the Constitutional Court as established under the United Republic Constitution, it is doubtful whether the absence of the relevant provisions under the Constitution of Zanzibar would affect the validity of these institutions, since the Constitution of the United Republic underwhich they are established is a union matter listed under the First Schedule to the Union Constitution.

Other matters which are specifically provided for under the Constitution of the United Republic are certain legislations of the Parliament of the United Republic which are enacted in accordance with the provisions of Article 64(4). The Elections Act, 1985 which applies throughout the United Republic of Tanzania appears to be one such legislation enacted under Article 64(4)(a). Undoubtedly this legislation does not concern a union matter listed under the First Schedule to the Union Constitution and would appear to infringe the provisions of Article 78(1) of the Constitution of Zanzibar which provides in effect that, "All legislative powers in Zanzibar over all non-union matters is vested in the House of Representatives".

Professor Shivji has expressed the opinion, though he did not wish to press it, that the Elections Act, 1985 and similar legislations extended to Zanzibar on non-union matters require the adoption or similar action by competent authorities of the Zanzibar Revolutionary Government to give such legislations legal force or validity in Zanzibar. Fortunately there is no need for this Court to make a decision on this point in this case since the validity of the Elections Act, 1985 in so far as it operates in Zanzibar.

has not been made an issue in this case. The matter has to await an appropriate case.

Third and lastly; the Constitution of the United Republic does not contain provisions for dealing with every non-union matter which concerns both sides of the Union. Such are the fishing activities in the territorial waters of Tanzania in the Indian Ocean. Such, and undoubtedly there may be many other matters of common concern, are not yet specifically provided for under the Constitution of the United Republic or that of Zanzibar. These are matters which in the course of time, as the people of Tanzania continue to mature in their nationhood, will find their place either as union matters listed in the First Schedule to the Constitution or as matters specifically provided elsewhere under the Constitution of the United Republic and that of Zanzibar.

For the moment, it has been sufficiently demonstrated, I hope, that the exclusive original jurisdiction of the High Court of the United Republic in hearing and determining election petitions inrespect of Parliamentary elections to the National Assembly is in keeping with the basic structure of the Constitution of the United Republic of Tanzania. In the final analysis therefore this appeal partially succeeds on the third ground of the memorandum of appeal but fails and is dismissed on the first and second grounds. In the light of this outcome, and since the appellant is on legal aid, no order as to costs will be made. Since my learned brothers Mustafa, J.A. and Omar, J.A. agree with me, it is ordered accordingly.

F. L. NYALALI
CHIEF JUSTICE

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

L. A. A. KYANDO
REGISTRAR

Based on such "assumptions" he arrived at the figure of 117. He stated, in view of the majority of 370 in favour of the 1st respondent, even if the 117 votes were taken into account, that would not have affected the results.

Mr. Rutashobya had, not unnaturally, tried to rely on these "assumptions", as if they were findings of fact. We venture to think that perhaps the trial judge had meant that if he was wrong on certain issues, then the appellant should have had the advantage of 117 votes, and even then, the election results would not have been affected.

Thea appeal is dismissed with costs.

DATED at DAR ES SALAAM this 22nd day of July 1987.

A. MUSTAFA
JUSTICE OF APPEAL

A. M. A. OMAR
JUSTICE OF APPEAL

D. P. MAPIGANO
Ag. JUSTICE OF APPEAL.

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

(J. H. MSOFFE)
DEPUTY REGISTRAR.