IN THE COURT OF APPEAL OF TANZANIA

AT ARUSHA

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

CIVIL APPEAL NO. 45 OF 1998

BETWEEN

THE JUDGE i/c HIGH COURT, ARUSHA
THE ATTORNEY GENERAL ..... APPELLANTS

AND

N. I. N. MUNUO NG'UNI ..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Arusha)

(Mapigano, J., Mchome, J., And Rutakangwa, J.)

dated 17th March, 1998

in

Civil Cause No. 3 of 1993

J U D G M E N T

RAMADHANI, J.A.:

The respondent, N. I. N. Munuo Ng'umi, is an advocate of the High Court of Tanzania based at Arusha. On 4/11/1993 the High Court of Tanzania, Arusha Registry, assigned him six court briefs for a criminal session in Babati. He did not accept them. So, the learned Judge in charge of the High Court, Arusha, suspended his practice pending a reference to the High Court. He filed a suit claiming a number of things: that his suspension was illegal and that it should be lifted, that the court should make a declaration that the Legal Aid (Criminal Proceedings) Act, 1969, Act No. 21 of 1969, (hereinafter referred to as Act No. 21 of 1969) is ultra vires Article 23 of the Constitution of the United Republic of Tanzania, 1977, (hereinafter referred to as the Constitution), and that he should be awarded damages.

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He was successful in the High Court before a panel which had to consist of three judges since it was a claim under the Basic Rights and Duties Enforcement Act, 1994, Act No. 33 of 1994, (hereinafter referred to as Act No. 33 of 1994). The appellants filed a notice of appeal on 20/3/1998 and the respondent filed a notice of cross-appeal on 27/3/1998, that is, seven days afterwards.

At the hearing Mr. Kamba, Principal State Attorney, represented the appellants while the respondent appeared in person. The appellants raised a preliminary objection which we heard but reserved our ruling to the present. We now give it.

The appellants claimed that the notice of cross-appeal by the respondent was filed contrary to Rule 87 (2). Mr. Kamba submitted that the respondent was required to file a notice of cross-appeal after a copy of memorandum of appeal by the appellants was served on him and that he had thirty days in which to do so. Mr. Kamba contended that the respondent jumped the gun, so to speak.

The respondent simply said that the moment he received a copy of the notice of appeal by the appellants, he knew that he was the respondent and, therefore, he could only file a cross-appeal. He pointed out that Rule 87 (2) does not bar a person from filing a cross-appeal before service of a record of appeal and a memorandum of appeal. He submitted that rules should not be used to thwart substantial justice.

Mr. Kamba admitted that the appellants have not been prejudiced in any way by the filing of the notice of cross-appeal before the respondent was served with a copy of the record and memorandum of appeal. Now, it is trite law that procedural irregularity should

not vitiate proceedings if no injustice has been occasioned. (See: Rawal v. Mombasa Hardware [1968] EA 392; Mauji v. Arusha General Stores [1968] EA 137; and Cooper Motors Corporation (T) Ltd. v. A.I.C.C., [1991] TLR 165.) So, this ground is lame.

Then we agree with the respondent that rules should not be used to thwart justice. In fact a prominent judge in this jurisdiction, the late BIRON, J., said in General Marketing Co. Ltd. v. A. A. Shariff [1980] T.L.R. 61 at 65 that rules of procedures are handmaids of justice and should not be used to defeat justice.

To clinch it all, the thirteenth Amendment to the Constitution has promulgated Article 107A which provides, in sub-article (2)(e), as follows:

> 2) Katika kutoa uamuzi wa mashauri ya madai na jinai kwa kuzingatia sharia, mahakama zitafuata kanuni zifuatazo, yaani:
>
> a) ...
> b) ...
> c) ...
> d) ...
> e) kutenda haki bila ya kufungwa kupita kiasi na masharti ya kifundi yanayoweza kukwamisha haki kutendeka.

That can be translated as follows:

> 2) In the determination of civil and criminal matters according to law, the courts shall have regard to the following principles, that is to say:

a) ...
b) ...
c) ...
d) ...
e) administering justice without being constrained unduly by technical requirements, which are capable of preventing justice from being done.

In this case we are totally convinced that apart from affording the appellants a win by knock out, the appellants are not in any way prejudiced and sustaining their objection would only deny the respondent an opportunity of cross-appeal.

Rule 87 (1) and (2) provide as follows:

> 87. - (1) A respondent who desires to contend at the hearing of the appeal that the decision of the High Court or any part of it should be varied or reversed, either in any event or in the event of the appeal being allowed in whole or in part, shall give notice to that effect ....
>
> (2) A notice given by a respondent under this Rule ... shall be lodged in quadruplicate in the appropriate registry not more than thirty days after service on the respondent of the memorandum of appeal and the record of appeal. (The emphasis is ours.)

It is clear to us that there are two possibilities under this Rule: One, a party wants to appeal but is forestalled because the opposite party or parties has/have filed a notice

of appeal first. So, the only venue open to him is to file a cross-appeal. In this case Mr. Kamba conceded that the respondent was aware of the notice of appeal of the appellants and so, he could only file a cross-appeal. The second possibility is where a party is not intending to appeal at all but is wary of the appeal of the other party and is afraid of the consequences of the success of that appeal, in whole or in part, so he files a cross-appeal.

It appears to us that in the first instance, the party need not wait for the memorandum and record of appeal to be served on him. His cross-appeal has not been prompted by the appeal of the other party. However, a party in the second category needs to know the grounds of appeal of the intended appellant before he files his notice of cross-appeal. For such a person the Rule provides that he files his notice of cross-appeal not later than thirty days after service on him of the memorandum and record of appeal.

It is our considered opinion that the aim of the Rule is not to prevent the first type of an intended cross-appellant from filing his notice of cross-appeal but it protects the intended appellant from being ambushed by the second type of an intended cross-appellant. Hence the Rule prescribes this period of thirty days as the outermost time limit for a person in the second category to file his notice of cross-appeal.

Our opinion is that that rule does not prohibit a person to file a notice of cross-appeal before he is served with record and memorandum of appeal. For the reasons given above we dismiss the preliminary objection.

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Mr. Kamba had seven grounds of appeal and decided to combine the first two. In grounds one and two the complaint was that the learned judges erred in holding that the first appellant had a duty to give the respondent a right of hearing before exercising his powers of suspending an advocate under section 22 (2) of the Advocate Ordinance, Cap 341 as amended by Act No. 10 of 1990 (hereinafter referred to as the Ordinance).

Mr. Kamba, in our opinion, argued in the alternative: first he submitted that there was no need to give a right of hearing under the Ordinance and in any case the respondent was accorded that right by the first appellant. The learned Principal State Attorney reiterated the argument at the trial that Exh. P. 3, a letter from the first appellant to the respondent, was a notice to show cause and that the respondent ignored the opportunity to be heard.

The respondent said that he gave evidence in court and was not challenged. He submitted that Exh. P. 3 was not a notice of hearing but it was a threat of administering an unspecified disciplinary action.

Section 22 (2) (b) of the Ordinance provides as follows:

> Any Judge of the High Court shall have power to suspend any advocate in like manner /i.e. from practicing/, temporarily, pending a reference to, or disallowance of such suspension by the High Court.

Does that paragraph dispense with the principle of natural justice of audi alteram partem, that is, hear the other side? We think not. Admittedly, the action of a High Court judge under that

paragraph is purely interim and awaits the decision of the High Court. It nevertheless affects the human rights of an individual. We agree with the learned trial judges that the current trend and tempo of human rights demands that there should be a right to be heard even for such interim decision.

In fact, nowadays, courts in some jurisdictions, like the Eire Republic, demand not only that a person be given a right to be heard but that he be given an "adequate opportunity" to be heard. (See The Irish Constitution, by J. M. Kelly, 3rd Ed. by Gerald Hogan and Gerry Whyte (Butterworths, 1994) p. 350). We also agree with the judgment of McCARTHY, J. in The State (Irish Pharmaceutical Union) v. Employment Appeals Tribunal [1987] ILRM 36 that:

> ... it is a fundamental requirement of justice that a person or property should not be at risk without the party charged being given adequate opportunity of meeting the claim, as identified and pursued. If the proceedings derive from statute, then, in the absence of any set or fixed procedures, the relevant authority must create and carry out the necessary procedures; if the set and fixed procedure is not comprehensive, the authority must supplement it in such a fashion as to ensure compliance with constitutional justice.

We are aware that the audi alteram partem, like all legal rules, have exceptions. For instance, the whole object of censorship legislation would be defeated if a censorship board would be required to give adequate opportunity to be heard to a publisher who could not be readily traced (Irish Family Planning Association v. Ryan [1979] IR 295). But this case was not in that category.

To come back to the appeal, was the respondent given an opportunity to meet the claim of the first appellant? Was such opportunity given in Exh. P. 3? Was it notice to show cause and the respondent let it go?

The first appellant wrote to the District Registrar Exh. P. 3 saying:

> Following the discussions we had in my chambers yesterday, please write to Mr. Munuo, Advocate to inform him that I have seen his letter to you and I have satisfied myself that he has no good reasons for not taking the dock briefs assigned to him and that refusal by him to take them will result in immediate disciplinary action against him under Cap 341 of the Laws. He should signify acceptance by tomorrow. (Emphasis is ours.)

We have no flicker of doubt in our minds, and we agree with the respondent, that this letter was nothing but an ultimatum. The first appellant had already made up his mind to take disciplinary action. He was not even in a position to accommodate a hearing, let alone giving that opportunity.

In the third ground of appeal, the appellants averred that the learned trial judges erred in finding that the suspension order violated Article 13 (6) (a) of the Constitution:

> When the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency concerned;

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We do not think that this ground should take much of our time. Entitlement to a fair hearing includes the principle of audi alteram partem. So, that principle is part of the Constitution. Since we have found that the suspension order violated the principle of audi alteram partem, then, it has also violated the Constitution. So, this ground of appeal also fails.

In the fourth ground, the appellants sought to fault the learned judges in holding that section 4 (2) of Act No. 21 of 1969 has violated the basic rights of the respondent secured under Article 23 (2) of the Constitution. Mr. Kamba conceded that a maximum remuneration ceiling of shs. 500/= imposed by section 4 (2) is low. Nevertheless, he argued that it is not necessarily unconstitutional. The respondent merely acknowledged the admission of Mr. Kamba that the amount is low and added that that was so even in 1993.

Admittedly, the Act was enacted in 1969 and at that time shs. 500/= was substantial. But at the present time that amount is peanuts. As such we entertain no doubt at all in our minds that that amount obviously infringes Article 23 (2) which provides:

> Every person who works is entitled to just remuneration.

Now, the Pocket Oxford Dictionary defines the word "just" as:

> Equitable, fair; deserved, due; well-grounded; right in amount; proper; exactly.

We are of the considered opinion that that definition speaks for itself and it needs no elaboration on our part. A remuneration of shs. 500/= for defending a serious criminal case like murder, does not compare with any of the above-quoted adjectives.

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We agree with the learned judges that section 4 (2) of the Act No. 21 of 1969 infringes Article 23 (2) of the Constitution. We, therefore, dismiss this ground of appeal. Of course, there is what is to be done to that offensive subsection. The learned judges struck it out. There is no ground of appeal challenging that though Mr. Kamba addressed us on it. We shall deal with it shortly.

In the fifth ground the appellants sought to fault the learned judges for holding that the second appellant was to blame for his negligence to take steps to amend section 4 (2) of Act No. 21 of 1969. Again Mr. Kamba conceded that the Attorney General is duty-bound to initiate amendments but argued that the respondent has also an obligation to draw the attention of the A. G. to pieces of legislations needing revisiting. The respondent submitted that the A. G. is the principal legal adviser to the Government under Article 59 (3) of the Constitution and contended that it was his duty to amend the offending section.

Their lordships had this to say in their judgment:

> In actual fact a number of repeals and amendments of the law have been made since the commencement of Act 16/84. But nothing has been done to the impugned provision in order to bring Act 21/69 into conformity with the basic rights provisions of the Constitution. There being no evidence that the Attorney General has taken any steps in that direction, the reasonable inference is that he has been remiss in his duty and a charge of neglect, not negligence, has thus to stick.

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For the sake of clarity we have to point out that Act 16/84 referred to by their lordships is the Constitution (Consequential, Transitional and Temporary Provisions) Act, 1984. That Act gave the Government three years in which to bring existing laws into conformity with the basic rights provisions of the Constitution and thus stalling any action in that period of time.

We are at one with the learned judges and, we wish to add, that this Court prompted the A. G. into action in Attorney General v. W.K. Butambala, [1993] TLR 46 which dealt also with section 4 (2) of Act No. 21 of 1969. This Court said at p. 54:

> By way of post-script we desire to add that the fees payable under s. 4 of the Legal Aid (Criminal Proceedings) Act, 21 of 1969, may be grossly inadequate and out of date. We think something positive must be done ...

This Court said that on 14th June, 1991, yet up to 9th November, 1993, when the cause of action in this matter arose, a period of almost thirty months, nothing was done by the A. G. In that appeal, just as in this one, the A. G. was very ably represented.

We, therefore, find that the learned judges were justified to hold that the charge of neglect was correctly placed at the door of the second appellant. We cannot fault them. This ground, too, fails.

The sixth ground was that the learned judges erred in holding that the reputation of the respondent was injured by the wrongful acts of the appellants. The learned judges said:

> In relation to the first respondent, we take it /injury to reputation/ to have reference to his failure to give the petitioner a hearing and so his decision to suspend the petitioner from legal practice; and in relation to the second respondent we understand it to have reference to his failure to have section 4 (2) of Act 21/69 amended appropriately.

Both Mr. Kamba and the respondent reiterated their submissions for grounds one and four. However, the respondent added, and correctly so, in our opinion, that to an advocate with a blameless record for the sixteen years of practice, an illegal suspension is obviously injurious to his reputation.

We agree with Mr. Kamba that the second appellant has not in any way injured the respondent. The neglect to amend section 4 (2) of the Act did not in any way injure the respondent's reputation. So, we have only to consider the first appellant.

We agree with the learned judges that:

> We have come to the conclusion that this complaint has substance. It is certainly an infliction of great harm on the reputation of an advocate to call him undisciplined, as it was done in the Majira article ... Mr. Songoro /learned Senior State Attorney/ contends that there is no corroborative evidence that the petitioner has suffered such injuries, probably forgetting that a court is entitled to believe the word of a complainant and to apply common sense.

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However, the learned judges made it abundantly clear that "upon the evidence it cannot be held that the first respondent was behind the publicity given to the suspension order". Nevertheless, they found it as a fact that the Majira newspaper published it and their lordships were satisfied that "the suspension was bound to be known by the members of the public". But, we ask, would that have injured the respondent's reputation?

For the avoidance of doubt, we reiterate that the learned judges were emphatic that the first appellant was not behind the publication in the Majira newspaper. We agree with their lordships that the public was bound to know of the suspension. However, the public would only have known that the respondent was suspended because he refused to take up dock briefs protesting the payment of shs. 500/= per brief. We do not think that that would have injured his reputation even though the suspension was illegal. What injured the respondent's reputation was what Majira wrote, that he was undisciplined. That was not the work of the first appellant.

Thus even the first appellant did not injure the respondent's reputation and we, therefore, allow this ground of appeal.

The last ground was that the learned judges erred in law in their assessment of special and general damages. Mr. Kamba pointed out that special damages have to be specifically pleaded and proved and that neither of the two was done. Mr. Kamba said that the learned judges accepted a document produced by the respondent as evidence that his income was shs. 300,000/= per month (Exh. P. 4). The learned Principal State Attorney pointed out that the respondent himself conceded that Exh. P. 4 was not signed by its maker and therefore, it should not have been relied upon.

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The respondent, on the other hand, pointed out that damages were specifically pleaded in paragraph 17 of the Amended Plaint. The respondent also said that a lawyer is entitled to more than what was awarded him. He referred us to the decision of this Court in Grace Ndeana VS. Consolidated Holding Corporation, Civil Appeal No.76 of 1999 (unreported) where this Court awarded a Head Teacher of a Primary School Shs.50,000,000/= for defamation.

In paragraph 17 of the Amended Plaint the respondent merely said:

> That the petitioner's reputation has been injured by the respondent act or omissions and he claims damages amounting to T.Shs. 100,000,000 Million (sic).

He did not say whether what he claimed was special or general damages. We agree with Mr. Kamba that special damages have to be specifically pleaded and they were not in this case, even loss of earnings as an advocate. The learned judges were, of course, aware of this and they addressed themselves on the matter. This is what they said:

> The omission to plead the damages specifically is however, not fatal. The rule has been judicially evolved, and we consider it a sensible one, that a court should take liberal approach to rules of practice and procedure where basic rights and freedoms are invoked, so as to give to the complainant a full measure of his rights; see Jaundoo Vs. A.G. [1971] AC 972 at 983; and Rev. Longwe and Others Vs. A.G. and Another, Misc. Civ. App. No.11/93 of the Malawi High Court (unreported).

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> The rationale is that since the rights guaranteed by the Constitution are effectively enforced, and that to decline to examine the merits of a petition on the basis of a procedural technicality would be an abrogation of that duty. We wholly subscribe to that view.

We have not been given any reason, let alone a good one, and we do not see any, why we should differ from our learned brothers in the view they have wholly subscribed to.

But even this Court has been very liberal on the question of pleadings in respect of damages. We have held in Cooper Motor Corporation Ltd. v. Moshi/Arusha Occupational Health Services, /1990/ T.L.R. 96 at p. 100 that it suffices in the case of general damages merely to aver that such damage has been suffered. We reiterated that in Dr. Ally Shabhay v. Tanga Bohora Jamat, Civil Appeal No. 40 of 1997 (unreported).

However, this Court said in Cooper Motor Corporation that

> It is abundantly clear from the above quoted passage that only general damages can be asked for by a "mere statement or prayer of a claim" and this is what has been done in this case. (Emphasis added.)

It is clear that this Court excluded asking specific damages by a mere statement or prayer. But since this is a claim on basic and fundamental rights, from above cited persuasive authorities from sister jurisdictions, we are duty bound to admit a mere statement and prayer in asking for specific damages, like loss of earnings from the practice as an advocate for the 17 months the respondent was suspended.

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It is true that the respondent produced a document in support of his monthly income, which was not signed by the auditor, and so, it should not have been acted upon. However, we agree with the learned judges' opinion that an income of shs. 300,000/= per month for an advocate is rather on the low side. So we fail to fault the learned judges on that score.

The respondent had six grounds in his cross-appeal but he decided to abandon the first four grounds and argued the last two, that is, grounds five and six. In ground five he averred that shs. 5 million was not a fair compensation and that damages for injury to reputation should be enhanced. He asked us to consider his arguments in reply to ground five of the appeal. Mr. Kamba also recapitulated what he had submitted in his appeal and concluded by saying that he was leaving the issue of general damages to the Court.

As we have already upheld the learned judges in their finding of injury to the reputation of the respondent, we have to consider whether or not shs. 5 million is adequate compensation.

In Grace Ndeana, the appellant borrowed some money from the National Bank of Commerce and when she failed to pay, the respondent's agents went around Singida town in a van saying "kukopa harusi, kulipa matanga" while they were advertising the auction of the mortgaged house. This Court awarded shs. 50 million to the appellant, a Primary School Head Teacher, as compensation for defamation.

Mr. Kamba properly pointed out that in Grace Ndeana defamation on the part of the respondent was proved. This case, therefore, is distinguishable from Grace Ndeana as we have found that the action of the first appellant did not injure the respondent's reputation.

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Even then we are prepared to find that the seventeen months suspension did cause mental pain and suffering to the respondent. We think also that a compensation of shs. 5/= million leans more on the law side since the respondent has been an advocate based in Arusha and Moshi for sixteen years and has a family. So, we think a compensation of shs. 10/= million may be adequate in the circumstances. So, we allow ground five of the cross-appeal to that extent.

In ground six of the cross-appeal, the respondent was claiming that the order of stay of execution granted to the appellants in their Civil Application No. 4 of 1998 perpetrated his pain and suffering. This ground was dropped because the respondent conceded that he ought to have sought a reference from that order of a single judge and that the order should not be a subject of cross-appeal because it was not a decision of the learned trial judges.

Now, we have to go back to what should be done to section 4 (2) of the Act No. 21 of 1969 once we have upheld the learned judges that it infringes Article 23 (2) of the Constitution. We ask this in view of section 13 (2) (a) of the Basic Rights and Duties Enforcement Act, 1994. Subsection (2) and paragraph (a) of that section provides as follows:

> "(2) Where an applicant alleges that any law made or action taken by the Government or other authority abolishes or abridges the basic rights, freedoms or duties conferred or imposed by sections 12 to 29 of the Constitution and the High Court is satisfied that the law or action concerned to the extent of the contravention is invalid or unconstitutional then -

> (a) the High Court shall instead of declaring the law or action to be invalid or unconstitutional, have the power and discretion in appropriate case to allow Parliament or other legislative authority concerned, as the case may be, to correct the defect in impugned law or action within a specified period, subject to such conditions as may be specified by it, and the law or action impugned shall until the correction is made or the expiry of the limit set by the High Court which ever be shorter, be deemed to be valid. (Emphasis added.)

The learned trial judges considered that section and had this to say in their judgment:

> Section 13 (2) (a) is an extremely strange and curious provision, to put it mildly. It is certainly pregnant with problems, some of which are fundamental ...
>
> We consider that provision as an absurdity. It is impossible for the court to apply it with any judicial candour. We have, therefore, to invoke the principle of harmonization, like the learned judge did in the Mtikila's case. We also have to invoke the principle that fundamental rights provisions should be construed as to make them meaningful and effective, like it was done by the Supreme Court of Zimbabwe in Salem v. Chief Immigration Officer and Another [1994] 1 LRC 343.

> With that we must proceed to declare that section 4 (2), and not the whole Act, is unconstitutional, and nullify the same to the extent that it provides for unjust and unfavourable remuneration to the advocates who render services under the Act. We so do.

We have to reiterate what we have already said earlier that of the seven grounds of appeal by the appellants, and especially second appellant, the Attorney General, there is none seeking to fault their lordships in making the above declaration. Was that an oversight? But could the A.G. overlook such a stark declaration? Can we make an "adverse inference" of that omission, that is, silence signifies agreement with the declaration?

However, Mr. Kamba, in a by-the-way mood, when arguing ground three, that is, contesting that section 4 (2) of Act No. 21 of 1969 contravenes Article 23 (2), said "It was not proper for the learned judges to nullify that section 4 (2) ... they should have given directions to appropriate authority ...". Since the declaration goes against the unambiguous provisions of 13 (2) of Act No. 33 of 1994, we are duty bound to address it.

Our first observation is that that subsection gives the court "power and discretion in appropriate case to allow" the relevant organ to correct the defect impugned. The provision does not oblige the court to refer the matter to the relevant organ in all cases but leaves it with "discretion" and then only in "appropriate case". Now, in the case of section 4 (2) of Act No. 21 of 1969, our opinion is that it was not an "appropriate case" to refer the matter to the

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A.G. after the same had been referred to him in Butambala's case, though not expressly, thirty months earlier and after the expiry of the three years period of grace under the Constitution (Consequential, Transitional and Temporary Provisions) Act, 1984.

But is that subsection really necessary or is it "extremely strange and curious" or "absurd" as their lordship found?

We have no doubt in our minds that that provision seeks to circumscribe the powers of the High Court in dealing with issues of fundamental rights. This might have been an overreaction on the part of the executive after the decision of the High Court in A.G. v Rev. Christopher Mtikila [1995] TLR 3. But, with respect, the courts have generally, and particularly in that case, demonstrated maturity in judicial restraint. So, we endorse what our learned brothers said about principles of harmonization and that of construing fundamental rights provisions so as to make them meaningful and effective. We would add two other reasons for departing from section 13 (2) of Act No. 33 of 1994.

It was decided in Smith v. East Elloe Rural District Council [1956] AC 736 at 750-1 that courts will not lean towards a construction which will oust their jurisdiction, though they must, of course, give effect to plain words. That was cited with approval in D.C. Kiambuu v. R and Others [1960] EA 109 at 114:

> My Lords, I think that anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order

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that the grievance may be remitted to some other tribunal. But it is our plain duty to give the words of an Act their proper meaning ...

Those observations are backed by the Thirteenth Constitutional Amendment of February 2000, introducing Article 107A (1) and (2) (a), which provide that:

(1) Mamlaka ya utoaji haki katika Jamhuri ya Muungano itakuwa mikononi mwa Idara ya Mahakama na Idara ya Mahakama ya Zanzibar na kwa hiyo hakuna chombo cha Serikali wala cha Bunge au Baraza la Wawakilishi la Zanzibar kitakachokuwa na kauli ya mwisho katika utoaji haki.
(Emphasis is ours.)

(2) /already cited at p. 3/
(a) ...
(b) kutocheleweshe haki bila sababu ya kimsingi;

That can be translated as follows:

(1) The authority of administering justice in the United Republic is vested in the Judiciary and the Judiciary of Zanzibar, and, therefore, no organ of the Government or of the Parliament or of the House of Representatives of Zanzibar shall have the final say in the administration of justice.
(Emphasis is ours.)

(2) /already cited at p. 3/
(a) ...
(b) not to delay justice without a good reason;

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So, when section 13 (2) of Act No. 33 of 1994 requires the High Court to stop short of declaring that an enactment or an action is invalid or unconstitutional and demands the court to refer the matter to Parliament or another relevant authority to remedy the wrong, it is, in our considered opinion, giving "the final say in the administration of justice" to that other organ. And that is contravening the express provision of the Constitution.

Of course, compliance with the provisions of Act 33 of 1994 would also cause delay in rendering justice and that is also contrary to the Article quoted above. This is because time will elapse between the decision of the court and the action by the relevant organ and also during all this time the offensive law or action is allowed to go on. We dare point out that justice would be delayed for no apparent good reason.

However, if we uphold the decision of our learned brothers to strike out section 4 (2) of Act No. 21 of 1969, then we are going to seal the abolition of any sort of remuneration to advocates for court briefs. We dare say that the High Court erred in making that decision. We agree with their lordships that the whole of Act No. 21 of 1969 cannot be declared unconstitutional. But on the same reasoning we disagree with them in declaring the whole of section 4 (2) unconstitutional. What contravene the Constitution are only the amounts stipulated.

But let us see what exactly section 4 (2) provides:

> (2) Remuneration payable under this section shall not be less than <u>one hundred and twenty</u> shillings nor more than <u>three hundred</u> shillings in respect of each

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proceeding, or in respect of each accused where the certifying authority certifies that accused persons jointly tried should be separately represented:

Provided that in the case of a proceeding before the High Court the Judge hearing the proceeding and, in the case of a proceeding before any other court, the Chief Justice, may, for special reasons, regard being to the complexity of the proceeding or the duration thereof, authorize the payment of a higher remuneration not exceeding five hundred shillings in respect of each proceeding, or in respect of each accused person, as the case may be. (Emphasis is ours.)

So, we strike out the amounts "one hundred and twenty", "three hundred" and "five hundred". However, since court briefs will continue to be assigned, we cannot leave a vacuum. We have to provide for stop-gap remuneration for court briefs to advocates until such time as the office of the Honourable Attorney General deem it fit to revisit that sub-section.

What criteria we shall use for fixing, at least the maximum, amount of fees has exercised our minds a great deal. It is clear from section 4 (2) quoted above that the fees payable for a dock brief is between shs. 120/= and shs. 300/=. The payment of shs. 500/= is only for extraordinary cases. The fact that that amount is now the standard payment for court briefs is a clear testimony, on the part of the Judiciary, that the stipulated fees are extremely low. So, to ameliorate the situation the

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court administration has been giving the maximum amount under the current law, shs. 500/=, which, too, we have already said is grossly inadequate and unconstitutional.

When the Act was enacted in 1969 shs. 500/= was a substantial amount. At the moment a judge on duty outside his/her station gets a per diem of shs. 40,000/=. We have taken that a trial would normally take two days and possibly three, everything else being in order. So we consider giving an advocate the per diem of a judge for two and a half days, that is, shs. 100,000/= per a dock brief. However, that is a substantial amount of money which has not been budgeted for. So, the new fees shall be payable from July 01, 2002. For the avoidance of doubt, the respondent was not seeking a relief on this issue because he had not taken up the court briefs assigned to him unlike the Butambala case. So, there is not such urgency of relief.

So, we dismiss all the grounds of appeal with costs. We allow one ground of appeal [illegible] general damages, also with costs.

DATED at DAR ES SALAAM this 05 day of MARCH, 2002.

L. M. MAKAME
JUSTICE OF APPEAL

A.S.L. RAMADHANI
JUSTICE OF APPEAL

K.S.K.LUGAKINGIRA
JUSTICE OF APPEAL

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

(F.L.K. WAMBALI)
DEPUTY REGISTRAR