

**IN THE COURT OF APPEAL OF TANZANIA**

**AT DAR ES SALAAM**

**(CORAM: MUNUO, J.A., BWANA, J.A. AND MANDIA, J.A.)**

**CRIMINAL REVISION NO. 3 OF 2010**

**JUDGE ADVOCATE GENERAL ..... APPLICANT**

**VERSUS**

**P. 9219 Lt. ABDON EDWARD RWEASIRA ..... RESPONDENT**

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

**(Nyerere, Juma and Utamwa, JJJ.)**

**Dated the 7<sup>th</sup> day of September, 2010**

**in**

**HC. Court-martial Criminal Appeal No. 4 of 2009**

**.....**

**RULING OF THE COURT**

4<sup>th</sup> & 24<sup>th</sup> February, 2011

**MANDIA, J.A:**

The respondent P. 9219 Lieutenant ABDON EDWARD RWEASIRA appeared before a General Court-martial on a charge containing five counts, each one of them being under Section C. 64 of the Code of Service Discipline. The particulars of each one of the counts charged allege that the respondent engaged in conduct to the Prejudice of Good Order and Discipline. After due trial the General Court-martial found the respondent

guilty, convicted him and sentenced him to imprisonment for one year. Dissatisfied with the conviction and sentence, the respondent preferred an appeal to the Court-martial Appeal Court. On 3/6/2010 the Court-martial Appeal Court ordered that the appeal be argued by way of written submissions, and put a time schedule of the parties filing their respective submissions. This was duly done. On 7/9/2010 the Court-martial Appeals Court rendered its verdict in which it allowed the appeal, set aside the finding of the General Court-martial and directed a finding of not guilty to be recorded in respect of all the charges that had been preferred against the appellant.

The decision by the Court-martial Appeal Court was the end of the road for the matter because of the finality clause in the Code of Service Discipline. Section C. 153 of the Code reads thus:-

*"C.153 Any determination by the Court-martial Appeal Court of any appeal or other matter which it has power to determine under the provisions of this part shall be final and no appeal shall lie from the Court-martial Appeal Court to any other Court."*

Despite the finality clause, the Tanzania Peoples' Defence Forces wrote letter with reference number MMJ/2653-2 dated 30<sup>th</sup> October, 2010 pointing out various perceived shortcomings in the decision of the Court-martial Appeal Court dated 7/9/2010. The letter was addressed to the Hon. the Chief Justice of Tanzania who ordered revisional proceedings to be opened and the matter to be cause-listed in the present Sessions.

The Criminal Revision record opened showed **P. 9219 Lt. ABDON EDWARD RWE GASIRA** as the appellant and the **JUDGE ADVOCATE GENERAL** as the responded. Mr. Richard Rweyongeza, learned advocate appellant informed the Court that he did not prefer any appeal. It transpired that the revision was initiated by the court *suo moto*. The record of appearances was therefore set right with the JUDGE ADVOCATE GENERAL appearing as the Applicant. The Judge Advocate General was represented in court by Lt. Col. Mbindi. Lt. Col. Mbindi has also entered appearance for one Brigadier General Rwegasira who was invited by the Court as **amicus curiae**. Before the proceedings started, Lt. Col. Mbindi applied to have the attendance of the amicus curiae dispensed with. This application was granted.

The Preliminary Objection filed by the respondent is couched in the following terms:-

- "1. The Honourable Court of Appeal of Tanzania has no jurisdiction to call for and examine the record of proceedings of the Court-martial Appeal Court.
2. That this revision is misconceived and incompetent as it is not supported by any good and sufficient reason to justify the calling and examination of record of proceedings of the Court-martial Appeal Court.
3. That the composition of the Honourable Court of Appeal of Tanzania is incurably defective for want of impartiality of the friend of the court (**amicus curiae**)."

As we said earlier, the Court dispensed with the attendance of the **amicus curiae** after an application was made by Lt. Col Mbindi. This disposes of the third preliminary point of law.

We will tackle the issue of jurisdiction raised in the first preliminary point of law. In this regard, Mr. Richard Rweyongeza, learned advocate, advanced a three pronged argument. The first point he advanced is that the Court of Appeal is a creature of the Constitution exercising jurisdiction as conferred by the Appellate Jurisdiction Act, Chapter 141 R.E. 2002 of the laws, and any other Act conferring jurisdiction on it (i.e. the Constitution). The second point raised is that the Court of Appeal has revisional powers in the course of hearing an appeal under Section 4(2) of the Appellate Jurisdiction Act or when exercising the powers conferred upon it by Section 4(3) of the Appellate Jurisdiction Act. To put the matter in its proper perspective, we have found it necessary to quote Section 4(3) in full:-

"4-(1) .....

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(2) .....

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(3) Without prejudice to subsection (2), the Court of Appeal 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 as to the regularity of any proceedings of the High Court.

(4) .....

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(5) .....

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The argument by Mr. Rweyongeza, learned advocate, is that the revisional powers under Section 4(3) of the Appellate Jurisdiction Act can only be exercised in respect of proceedings conducted in the High Court. He argues further that the Court-martial Appeal Court is established under the National Defence Act, Chapter 192 R.E. 2002 of the laws which does not provide for revisional jurisdiction and which also has a finality clause in the

form of Section C 153. The third point advanced is that since the Court-martial Appeal Court is not within the line of traditional courts, the Court of Appeal cannot assume revisional jurisdiction over its proceedings in the absence of an express enabling provision of law. He contends that if the legislature wanted the Court of Appeal to have supervisory powers over the Court-martial Appeal Court it would have provided for the same in the National Defence Act, Mr. Rweyongeza, learned advocate, cited the case of 595 **SOCIETE GENERAL DE SURVEILLANCE S.E Versus VIP ENGINEERING AND MARKETING Ltd** (2004) TLR 135 for his proposition that the Court of Appeal is empowered to call for and examine the record of proceedings before the **High Court** only.

In answer, Lt. Col Mbindi, the Court of Appeal is the supreme court of the land and all other courts are subordinate thereto. The learned advocate argues that since Rule 65 of the Court of Appeal Rules allows the Court of Appeal to initiate revisional proceedings *suo moto* the proceedings before this court are proper.

We have given the arguments of both learned advocates due thought. We are of the opinion that the key lies in the interpretation of Section 146 of the Code of Service Discipline which establishes the Court Martial Appeal Court. The section reads thus:-

- C.146-(1) there shall be a Court-martial Appeal Court, which shall hear and determine all appeals referred to it under this Part.
- (2) The judges of the High Court shall be the judges of the Court-martial Appeal Court.
  - (3) The Court-martial Appeal Court may sit and hear appeals at any place or places, and the senior judge of the Court shall arrange for sittings and hearings as may be required.
  - (4) Three judges of the Court-martial Appeal Court constitute a quorum, and the decision of any appeal shall be determined by the vote of the majority of the judges present, and in the event of an equality of votes, the appeal shall be dismissed.
  - (5) The Court-martial Appeal Court is a Superior Court of Record.
  - (6) The Court-martial Appeal Court may hear evidence, including new evidence, as it may deem expedient, and the Court may sit in camera or in public.
  - (7) The Registrar of the High Court is ex officio the Registrar of the Court-martial Appeal Court and the officers, clerks employees appointed to the High Court shall perform the duties of their respective offices in relation to the Court-martial Appeal Court."



We will start with Section C. 146 (7). The section in effect creates a registry of the Court-martial Appeal Court in the High Court of Tanzania. By designating all the High Court registry staff, including the Registrar, as the registry staff of the Court-martial Appeal Court this means the of hearing of appeals from the General Court-martial or Disciplinary Court-martial has been moved **into** the High Court hierarchy. The argument by Mr. Rweyongeza. Learned advocate, seems to suggest that it is the High Court registry staff who move out into the Court-martial registry. This is not the intent and purpose of Section C. 146 (7) of the Code of Service Discipline. Rather it is the Court-martial registry staff who are submerged into the High Court registry.

Under Section 146 (2) and Section 146 (3) and 146 (4) the composition of the Court is three judges of the High Court who may sit at any place of their choosing as arranged by the senior judge. The Court, being a Superior Court of Record can hear evidence, including new evidence, which necessarily means it is bound by the customary rules of procedure and evidence applicable in the High Court. All these attributes we have enumerated show clearly that the Court-martial Appeal Court is

part of the High Court structure as is not an abnormality grafted into the High Court as suggested by learned advocate Mr. Rweyongeza.

We are therefore satisfied that the revision initiated by this Court falls under Rules 65 (1) and 65 (6) of the Court of Appeal Rules. We find the preliminary objections devoid of merit and dismiss them.

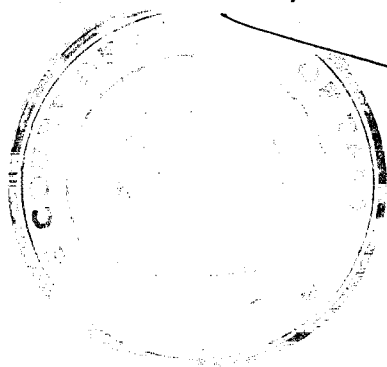
DATED at DAR ES SALAAM this 18<sup>th</sup> day of February, 2011

E. N. MUNUO  
**JUSTICE OF APPEAL**

S. J. BWANA  
**JUSTICE OF APPEAL**

W. S. MANDIA  
**JUSTICE OF APPEAL**

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



M. A. MALEWO  
**DEPUTY REGISTRAR**  
**COURT OF APPEAL**