IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., FIKIRINI, J.A. And KIHWELO, J.A.)

CIVIL APPEAL NO. 304 OF 2017

DR. JEAN-BOSCO NGENDAHIMANA .....APPELLANT

VERSUS

THE UNIVERSITY OF DAR ES SALAAM (UDSM) .....RESPONDENT

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

(Munisi, J.)

dated the 17th day of October, 2017
in
Miscellaneous Civil Cause No. 24 OF 2016

.....

JUDGMENT OF THE COURT

29th October & 20th December, 2021

KIHWELO, J.A.:

This is the first appeal against the decision of the High Court (Munisi, J.) in Miscellaneous Civil Cause No. 24 of 2017 dismissing the appellant's application for judicial review in which the appellant sought to move the High Court so that it could exercise its discretion and grant an order of *certiorari* to quash the decision of respondent's Senate of 9th January, 2014 which discontinued the appellant from studies and an order of *mandamus* compelling the respondent to confer the appellant a PhD degree in Law. The appeal has been sturdily contested by the respondent.

In order to facilitate an easy appreciation of the appeal we think, it is appropriate to preface the judgment with a brief historical background. The appellant Dr. Jean-Bosco Ngendahimana was a candidate at the University of Dar es Salaam, School of Law (UDSL), pursuing a PhD in Law with Registration Number 2009-07-00029 under the sponsorship of the Tanzania-German Center for Eastern African Legal Studies (TGCL) and jointly supervised by Prof. Chris Maina Peter and the late Dr. Sengondo Edmund Mvungi (supervisors). On 24th July, 2013 the appellant successfully defended his PhD thesis titled "*The Impact of Regional Integration on Human Rights Protection in Africa*". The *Viva Voce* examination panelists passed the appellant subject to minor corrections and revisions to the appellant's thesis. The appellant was then required to work on the corrections and submit six copies of error free thesis within six months for the degree award which the appellant complied within a month and was given an error free letter from his supervisors. As was the practice for all doctoral theses written under the auspices of TGCL, the appellant was required to submit a soft copy of his PhD thesis to Prof Urlike Wanitzek the TGCL Project Leader for review purposes before publication in TGCL Research Series. It was in the course of the review process that Prof Woodman who was commissioned by the TGCL to review the appellant's thesis discovered a possible case of academic

dishonesty involving the appellant and reported the matter to the TGCL Project Leader who relayed the information to the respondent.

The respondent then put its machinery of academic quality assurance in high gear. Initially, a preliminary investigation was conducted by the Department of Public Law of UDSL where the candidate belonged, and the department confirmed the existence of a *prima facie* evidence of academic plagiarism on the part of the appellant which if proved amounted to academic dishonesty contrary to the respondent's *Regulations and Guidelines for Postgraduate Programmes* and hence, the department reported this matter to the Dean UDSL who also reported the matter to the Director of Postgraduate Studies. Subsequently, the graduation of the appellant was withheld pending the determination of the allegations of academic dishonesty/examination irregularity and following thorough preliminary investigation the matter was referred to the Senate Postgraduate Studies Committee (SPSC) which summoned the appellant in defence on 23rd December, 2013. Upon hearing, the SPSC was satisfied that the appellant committed an examination irregularity as charged and transmitted its findings to the Senate which at its 305th Meeting held on 9th January, 2014 it received and discussed the appellant's case and ultimately decided to discontinue him from studies.

Aggrieved, the appellant instituted Miscellaneous Civil Cause No. 24 of 2016 in the High Court of Tanzania Main Registry challenging the respondent's decision. The application was predicated under section 2 (3) of the Judicature and Application of Laws Act, Cap 358 R.E 2002 (now R.E 2019), section 17 (2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap 310 R.E 2002 (now R.E 2019) and Rules 4 and 8 (1) (a) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014. Upon hearing the application, the High Court (Munisi, J) dismissed the application for being devoid of merit. Undeterred, the appellant has knocked the door of this Court seeking to challenge the decision of the High Court.

The appellant has filed this appeal which is grounded upon five (5) points of grievance, namely:

1. *That, the Honourable trial Judge erred in law and in fact when she held that, the respondent conducted investigation and was satisfied that, there was credible evidence that, the appellant had committed an offence of plagiarism.*
2. *That, the Honourable trial Judge erred in law and in fact when she held that, the respondent had clear guidelines on plagiarism.*
3. *That, the Honourable trial Judge erred in law and in fact when she held that, the appellant was accorded a fair hearing.*

4. *That, the Honourable trial Judge erred in law and in fact when she held that, the respondent had acted within its prerogative and without any flagrant abuse of that authority and therefore, she could not have interfered against the decision to discontinue the appellant from studies.*

5. *That, the Honourable trial Judge erred in law and in fact when she held that, since the appellant knew what were the allegations against him then there was no need to provide reasons for the decision reached to discontinue him from studies because the reasons were already in the appellant's understanding.*

When the appeal was placed before us for hearing on 29th October, 2021 Mr. Armando Swenya, learned counsel appeared for the appellant while Mr. Hangi Chang'a, learned Principal State Attorney together with Mr. Stanley Mahenge, learned State Attorney appeared for the respondent. Both counsel prayed to adopt the written submissions which were lodged earlier on in terms of Rule 106 of the Tanzania Court of Appeal Rules, 2009 as amended (the Rules). The appellant's counsel further prayed to adopt the list of authorities they filed earlier in terms of Rule 34 of the Rules without more. The learned Principal State Attorney, similarly had nothing more to add.

In support of the appeal, the counsel for the appellant prefaced his written submission by combining grounds 1, 2 and 3 of the grounds of appeal and curiously argued that, the respondent at the time of discontinuation of

the appellant from studies did not have clear rules on plagiarism which was punishable by the university regulations as it is now. In trying to fortify further his argument, the counsel for the appellant referred us to pages 112 to 114 of the record of appeal and submitted that the guidelines and regulations on plagiarism came out in January, 2016. He went on to argue that, there was no clear charge which was preferred against the appellant and that, no investigation was carried out and no report was issued to the appellant so as to enable him give explanation or defence as required under rules of natural justice. He contended that, the appellant was condemned and adjudged on mere allegations of possibility of plagiarism. To bolster his submission, he referred us to pages 98 to 106 of the record of appeal and submitted that those were matters which were not communicated to the appellant to controvert until when the matter went to the trial court. The learned counsel argued further that the thesis was not subjected to any acceptable test such as turnitin. He rounded up his submission by challenging the trial Judge's findings that there was investigation and that the respondent had clear rules of plagiarism and implored us to find that the 1st, 2nd and 3rd grounds meritorious.

The respondent's learned counsel, in reply forcefully argued that at the time of the alleged examination irregularity the respondent had clear rules

in place governing plagiarism and that when the appellant defended his PhD thesis on 24th July, 2013 the *General Regulations and Guidelines for Postgraduate Programmes* of February, 2013 (the Regulations) were already in place. The respondent submitted further that, it was surprising that the appellant has at his convenience referred to the *Guidelines and Regulations for Plagiarism and Deployment of Postgraduate Students for Teaching or Technical Assistants* of January, 2016. He argued further that the allegations that the respondent had no clear guidelines on plagiarism at the time of discontinuation of the appellant is a total misconception and unfounded and that, the respondent acted within its mandate as set out by the Regulations and therefore, the trial Judge rightly found that the plagiarism rules of the respondent were in place.

In response to the grievance that the appellant was not afforded the right to be heard, the respondent was fairly brief and contended that, the appellant was afforded the right to be heard since he was properly made aware of the allegations of plagiarism levied against him by the respondent and there after the appellant was afforded the right to appeal.

After a careful consideration of the entire record and the rival submissions by advocates for the parties, there remains two issues which this Court is required to answer in order to dispose the first set of grounds

of appeal; **One**, whether the respondent had clear rules on plagiarism at the time of the appellant's discontinuation and **Two**, whether the appellant was afforded the right to be heard.

Starting with the first issue, indeed, the record bear out that, the respondent had rules in place on plagiarism and this is conspicuously clear from the correspondence found in annexure "B", the letter from the Head of Department of Public Law, UDSL titled "Possible Case of Academic Dishonesty" which was addressed to the Dean UDSL who upon that information from the Head of Department informed the Director of Postgraduate Studies through the letter annexure "C" titled "Possible Case of Plagiarism" and acting on such information, the Director of Postgraduate Studies ordered the withholding of the graduation of the appellant and further directed the Head of Department to initiate the examination irregularity process.

In particular, the letter from the Head of Department to the Dean UDSL referred to the regulations. For clarity, we wish to extract the relevant part at pages 55 and 56 of the record of appeal;

> *"Our preliminary investigation has confirmed the existence of a prima facie evidence of plagiarism on the part of the student which if proved amounts to*

academic dishonesty contrary to Regulation 3.3 of the UDSM General Regulations and Guidelines for Postgraduate Studies, 2013."

We find it appropriate to digress a bit the relevant Regulations, Regulation 2 is on Thesis /Dissertations Phase and Regulation 2.3 is on Academic Dishonesty while Regulation 3.3.1 which is the most relevant in this case reads;

"Acts of academic dishonesty include but are not limited to:

(a) ***Plagiarism****, or*

(b) The acquisition, ***and use, without acknowledgement, of academic materials belonging to someone else****."*

3.3.2 The term "plagiarism" includes but is not limited to, a deliberate or negligent use by paraphrase or direct quotation of the published or unpublished work of another person without full and clear acknowledgment.

3.3.3 ***Any candidate found guilty of academic dishonesty shall be deemed to have committed an examination irregularity and shall be discontinued forthwith from studies.***

3.3.4 If cases of academic dishonesty are discovered after the candidate has been awarded a degree, the University shall have the power to withdraw the award."

The above excerpt and provisions of the Regulations demonstrates in no uncertain terms as rightly argued by the respondent that, when the appellant was discontinued on 24th January, 2014 there was in place clear regulations dealing with acts of academic dishonesty which among others include plagiarism. We, therefore, do not find merit in the appellant's complaint that the respondent did not have clear rules of plagiarism at the time of his discontinuation.

We will now address the complaint that the respondent did not afford the appellant a fair hearing. The right to be heard is one of the fundamental constitutional rights as it was religiously stated in the landmark case of **Mbeya-Rukwa Autoparts and Transport Limited v. Jestina George Mwakyoma** [2003] TLR 251 at page 265 thus:

> *"In this country, natural justice is not merely a principle of the common law, it has become a fundamental constitutional right. Article 13(6)(a) includes the right to be heard among the attributes of equality before the law and declares in part:*
>
> ***(a) Wakati haki na wajibu wa mtu yeyote vinahitaji kufanyiwa uamuzi na Mahakama au chombo kinginecho kinachohusika, basi mtu huyo atakuwa na haki ya kupewa fursa ya kusikilizwa kwa ukamilifu."***

In the above case the Court stressed that a party does not only have the right to be heard but to be fully heard. The right of a party to be heard was similarly discussed in the case of **Abbas Sherally & Another v. Abdul Sultan Haji Mohamed Fazalboy**, Civil Application No. 33 of 2002 (unreported) in which the Court, among other things, observed as follows:

> *"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice."*

Corresponding observations were made in the cases of **VIP Engineering and Marketing Limited and Others v. CITI Bank Tanzania Limited**, Consolidated Civil References No. 5, 6, 7 and 8 of 2008, **Samson Ng'walida v. The Commissioner General of Tanzania Revenue Authority**, Civil Appeal No. 86 of 2008 and **R.S.A Limited v. Hanspaul Automechs Limited and Another**, Civil Appeal No. 179 of 2016 (all unreported). In the latter case, the respondent faulted the learned trial judge for dismissing the points of objection without hearing the parties

in violation of the fundamental constitutional right to be heard and the parties were prejudiced. The Court declared the entire judgment a nullity.

We hasten to state that, in the instant appeal the respondent's counsel is undeniably right to argue that, the appellant was made aware of the charges levied against him and that the appellant was afforded the right to be heard including the right to appeal. Record revealed that the appellant was made aware of the charges from the very inception stage of the preliminary investigation, and this is evident from the email communication dated 16th October, 2013 between the appellant and Prof Ulrike Wanitzek, the TGCL Project Leader at page 54 of the record of appeal in which the appellant admittedly states in part that:

> *"the only mistake I accept to have done is not to cite Anthea Elizabeth Roberts in both footnotes and bibliography but as Prof. Woodman rightly mentions it, at pages 68 and 69 of the work, I talked of her but unfortunately forgot to acknowledge her piece of work."*

The investigation which was conducted and which the appellant's counsel claims that it was not served on the appellant, was the basis of the Senate referring the examination irregularity to the SPSC which is a sub-committee of Senate. The SPSC on 18th December, 2013 summoned the appellant to the 66th SPSC Board Meeting held on 23rd December, 2013 and

it was categorical that the invitation was concerning his examination irregularity in his PhD thesis, the SPSC profoundly found out that the appellant had copied word by word his thesis from other eminent authors following which the appellant on 24th January, 2014 was notified that he was discontinued from studies by the 305th Senate which sat on 9th January, 2014. Dissatisfied, the appellant on 18th February, 2014 lodged an appeal which unfortunately was not successful too. For these reasons, we do not also find merit in the appellant's complaint in ground number two above, that he was not afforded the right to be heard. In view of the foregoing position, it cannot be doubted that the first, second and third grounds of appeal are misconceived and therefore dismissed.

Looking at the fourth and fifth grounds of appeal, which were also argued conjointly, the appellant contends that the trial Judge was wrong to hold that the respondent acted within her prerogative and without abusing her authority and that there was no need to give reasons for the decisions since the appellant knew exactly the allegations before him. On his part, the respondent's counsel contended that, the respondent acted within its statutory powers and that is why the appellant was able to exhaust all the available remedies. He therefore, supported the trial Judge's findings.

We have examined the records of appeal and we are inclined to agree with the counsel for the respondent that the trial Judge rightly held that the respondent acted within the purview of the UDSM Charter which was made pursuant to the Universities Act, 2005 Act No. 7 of 2005, Rules made under the Charter and Regulations. In particular Article 18 (b) of the Charter clearly spells out that the Senate is the principal academic decision-making body and which has delegated its powers to the SPSC as one of the committees under it but whose decisions are subject to ratifications by the Senate. Considering the fact that the appellant was found guilty of academic dishonesty contrary to Regulation 3.3.1 when read together with Regulations 3.3.2 and 3.3.3 the respondent rightly acted by discontinuing the appellant from studies having carried out due process. Rather strangely, this decision does not seem to have registered correctly in the mind of learned counsel for the appellant. We take the view that, the proceedings of the SPSC were conducted in accordance with the rules of natural justice and so is the decision of the Senate.

Moving to the complaint on the failure to assign reason for the decision, we think this issue should not detain us much. We wish to let record of appeal, at page 60 speak for itself;

*"**RE: DISCONTINUATION FROM STUDIES ON GROUNDS OF EXAMINATION IRREGULARITY***

Refer to the subject above.

This is to inform you that the University of Dar es Salaam has at its 305th Senate Meeting held on Thursday 9th January, 2014 discussed a case in which you were alleged to be involved in examination irregularity of plagiarism in the thesis you submitted for PhD degree award contrary to General Examination Regulations.

The Senate was satisfied with the findings of the Senate Postgraduate Studies Committee before which you appeared in defence that you committed an examination irregularity as you were charged. In view thereof, the Senate discontinues you from studies.

You are by this letter required to return all University properties in your possession to the appropriate University Authorities."

Clearly, the above excerpt was detailed enough for the appellant who was aware of the allegations against him ever since the preliminary investigations started as hinted before. We, on our part, think the trial court, was right in holding that the appellant knew exactly the allegations before him and the gravity of the allegations and therefore even when his appeal was found without merit the appellant was well aware of the reasons. In

view of the foregoing position, it cannot be doubted that the fourth and fifth grounds of appeal have no merit and therefore, stand dismissed as well.

We think it is momentous that we should remark in passing before we take leave of the matter that, the position of the law is long settled and clear that, *certiorari* and *mandamus* would lie against anybody of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially but act in excess of their legal authority. See, for instance, **R v. Electricity Commissioners** (1924) KB 171. It is also a peremptory principle of law that an authority which exercises its power within the ambit of the establishing statute is immune from judicial review provided that the exercise of its authority is done judicially in accordance with the rules of natural justice. See, for instance, **Juma Yusufu v. Minister for Home Affairs** [1980] TLR 80 and **Simeon Manyaki v. IFM** [1984] TLR 304. The weight of modern authorities is in favour of the view that disciplinary proceedings in higher educational institutions have to be conducted in conformity with the rules of natural justice. See, for instance, **R v. Aston University Senate, *Ex Parte* Roffey and Another** [1969] 2 QBD 538 and **Glynn v. Keele University** [1971] 1 WLR 487.

However, there is also a considerable body of case laws to show that courts have been reluctant to interfere in matters of academics in colleges

and universities especially through judicial review. See, for instance, **R v. University of London ex parte Vijayatunga** (1987) 3 All ER 222, **Clerk v University of Lincolnshire and Humberside** (2000) 3 All ER 763 and **David Joseph Jumbe & Others v. The Council Dar es Salaam Institute of Technology & Others,** Miscellaneous Civil Cause No. 112 of 2004 (unreported). The reason is not far-fetched, whereas disciplinary proceedings in higher learning institutions deals with college or university students general conduct, academic affairs of colleges and universities lies at the heart of academic excellence for which examination of any kind be it written or oral, thesis or dissertation is a reliable measurement tool of knowledge and skill of the candidates and therefore, are meant to be honestly and honorably conducted by both colleges and universities as well as students such that courts are not the appropriate machinery to compel academic institutions to confer an academic award which is the exclusive monopoly of internal academic mechanisms within the respective colleges and universities and the aim being to maintain the integrity and quality of academic awards. It is convenient to point out here that courts cannot compel colleges or universities to confer or grant an academic award, the minimum that courts can do is to direct colleges and universities to comply with existing academic machinery. The very purpose of which is to allow

academic freedom and advance the course of academic excellence and the integrity of the examination process.

In view of the aforesaid, we find no merit in the appeal. Consequently, we dismiss it in its entirety with costs.

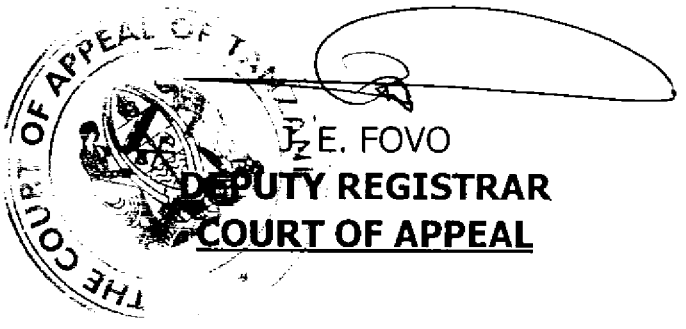
DATED at **DAR ES SALAAM** this 14th day of December, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The Judgment delivered on this 20th day of December, 2021, in the presence of Mr. Armando Swenya, learned counsel for the appellant, while Mr. Stanley Mahenge, learned State Attorney for the respondent is hereby certified as a true copy of the original.



E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL