

Let me start with the second cluster of complaints, that is, some four items were taxed off. Item 2 claimed shs. 100,000/= for the perusal of various documents. The Taxing Officer disallowed this item because under paragraph 10 of the Taxation of Costs (Third Schedule) these claims are considered as part of the instruction fees. With greatest respect paragraph 10 does not say so. The marginal note of that paragraph reads "Fees for drawing documents". So, I would allow this item.

Then item 6 demanded shs. 155,000/= for the filing of supplementary record of appeal. The Taxing Officer agreed with Mr. Mujulizi, learned advocate for the respondent, that the filing of a supplementary record is proof of the advocate's negligence. I would agree with the Taxing Officer that the filing of a supplementary record of appeal by the appellant raises a *prima facie* presumption that the advocate was negligent. It is up to the advocate to rebut that presumption. That has not been done here. So, this item was properly taxed off.

In item 18, shs. 2,000/= were claimed as Court fees paid for notice of change of advocate. These were taxed off because there was no receipt attached. I do not see how I can fault the Taxing Officer. So, that item was properly taxed off. However, I cannot agree with the Taxing Officer in respect of item 20 where shs. 6,000/= were claimed

for attending Court to receive the ruling on stay of execution. This claim too was taxed off because there was no receipt attached. That amount I think is reasonable and there can hardly be a receipt unless one went to the court by a taxi. But if one uses one's car that can be difficult to account with a receipt. So, I allow that claim.

Then was it proper to have a flat rate of 5% for all items? Mr. Mujulizi said that there was no rule which was violated by the Taxing Officer. I agree with him and I do not think that making a flat rate *per se* is wrong. But I would agree that there could be a question of whether or not the sum fixed is adequate and this is what I intend to explore.

The instruction fees claimed were a total of shs. 22,221,187/40. That was arrived at by taking 3% of the suit claim plus 7% interest. So, when the 5% rate was applied that amount was taxed to shs. 1,111,059/37. Was that appropriate?

Before I go further let me reiterate what has been said umpteen times that

... the allowance for instruction fees is a matter peculiarly in the taxing officer's discretion and courts are reluctant to interfere into that discretion unless it has been exercised unjudicially ... it will do so where he has acted upon wrong principles or applied wrong considerations in coming to his decision.

That is what the late LUGAKINGIRA, J. A. said in The Attorney General v. Amos Shavu, Taxation Reference No. 2 of 2000 at p.3 following Rahim Hasham v. Alibhai Kaderbhai (1938) 1. T. L. R. (R) 676 and Premchand Raichand v. Quarry Services of East Africa Ltd. [1972] E. A. 162. Now, I am a shade unsure whether imposing a flat rate for all items would be considered as an exercise of discretion of the part of a Taxing Officer when it comes to instruction fees. I am inclined to think that it is not.

Paragraph 9 of Third Schedule deals with instruction fees and it is required to be not less than shs. 100/= . However, the Taxing Officer has to take into consideration a number of factors like "the amount involved in the appeal, its nature, importance and difficulty, the interest of the parties, the other costs to be allowed, the general conduct of the proceedings, the fund or the person to bear the costs and all other relevant circumstances". Now, these cannot be said to have been taken into account in a flat rate as was done here.

As instruction fees was specifically singled out in the reference so I have to decide it. It was argued by Mr. Mujulizi that out of 13 grounds of appeal only one was decided upon by the Court and so, the appeal was not intricate. That may or may not be so. It all depends on the Court itself. In this case the Court said:

Although the learned advocates for the appellants had preferred thirteen grounds of appeal against the judgment of the court below, we proposed to deal

only with the fourth ground of appeal because, in our considered view, the resolution of that ground is sufficient to dispose of the appeal.

This does not mean that the remaining twelve grounds were useless and should not have been argued. Then judgment appealed against was to the tune of shs. 592,250,163/=. The Hotel itself was estimated to be shs. 2.2 billion. Those are colossal amounts.

The litigation was also quite involved. There was an application for stay of execution which was successful and that success was justified by the fact that the appeal itself was allowed. So, the labours of the applicant's advocates, who incidentally were on the whole four each engaged at various stage of the litigation, were not in vain and as a matter of course.

In these peculiar circumstances of this reference the amount claimed as instruction fees, in my considered opinion, cannot be said to be on the high side. So I grant what was claimed, shs. 22,221,187/40.

Mr. Mujulizi contended also that the reference was misconceived because Rule 119 provides for a reference in the case of a matter of law or principle. I have endeavoured to show that when deciding instruction fees the Taxing Officer did not at all use discretion but a flat rate reduction of the costs to 5%. That is both a matter of law and principle.

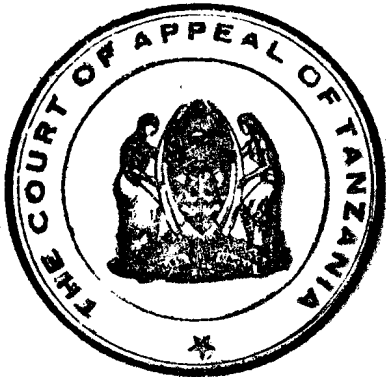
So, apart from item 1, instruction fees, item 2, perusal of documents, item 20, attending Court for a ruling on stay of execution and also items 6 and 18, which have been taxed off, the other items are as taxed by the Taxing Officer.

So, the reference is allowed to the extent explained above with costs.

DATED in DAR ES SALAAM, this 14th day of December, 2006.

A. S. L. RAMADHANI
JUSTICE OF APPEAL

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



(S. M. RUMANYIKA)
DEPUTY REGISTRAR