

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPEAL NO. 46 OF 2012

(CORAM: MSOFFE, J.A., BWANA, J.A., And MJASIRI, J.A.)

RUTAGATINA, C.L. APPELLANT

VERSUS

1. THE ADVOCATES COMMITTEE }
2. CLAVERY MTINDO NGALAPA } RESPONDENTS

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

(Mandia, Mlay, Shangwa, JJJ.)

dated the 6th day of September, 2006

in

Civil Appeal No. 221 of 2005

JUDGMENT OF THE COURT

13th & 26th February, 2014

BWANA, J.A.:

Clavery Mtindo Ngalapa, the second respondent, wrote a letter to the Advocates Committee complaining that the appellant had solicited him for payment of some money which he, the appellant, was to use in bribing some court officials. Mr. Ngalapa had a court case then and Mr. Rutagatina, the appellant, was his counsel.

After the hearing of the complaint, the Advocates committee found Mr. Rutagatina guilty of professional misconduct as a practicing advocate for demanding money from the second respondent, to use it in corrupting court officials. As his punishment, he was removed from the Roll of Advocates. Aggrieved by that finding, the appellant lodged an appeal with the High Court. A Full Bench of the said High Court dismissed the appeal. Undaunted, he preferred this second appeal, raising the following grounds.

1. That the Honourable judges erred in law and fact by failing to consider jurisdictional errors raised by the appellant on appeal.
2. That the first appellate judges erroneously relied on extraneous matters which brought to bear on their decision.
3. That the first appellate judges failed to consider the complained violation of the rules of natural justice.
4. That the High Court was not decided leave alone being properly decided as the Hon. Judges avoided to determine the grounds of appeal or merit and regardless of the appellant's complaint that proof of allegations levelled against him was below the required standard.

5. That the Hon. Judges misdirected themselves by holding that Annexure CMN 13 (a) contained names of court officials to be corrupted without identifying their names or disclosing their source of information purportedly conveyed by the said annexure.
6. That generally, the punishment meted out to the appellant was excessively punitive without regard to matters he had raised under mitigation and not commensurate to the nature of the purported professional misconduct.

Before us the appellant was represented by Mr. George Kilindu, learned Advocate, while the first respondent was represented by Mr. Vincent Tangho, learned Principal State Attorney. The second respondent appeared in person. Both the appellant and first respondent filed written submissions in compliance with the provisions of Rule 106 of the Court of Appeal Rules, 2009 (the Rules) and which they adopted in the course of their respective addresses to the Court.

The above grounds of appeal may be paraphrased into the following three basic grounds:-

1. That the proceedings before the Advocates' Committee were null and void as they did not comply with the requirements and procedure laid down by Rule 3 of the Advocates (Disciplinary) Rules, GN 135 of 1955. Further, that the complaint was not proved to the required standard of proof.
2. That although the appellant had raised eight (8) grounds of appeal before the High Court, the learned judges of the High Court who sat as a Full Bench did not consider the said grounds in their judgment. Instead, they dealt with matters extraneous to the appeal before them.
3. As result of the misconduct and misdirections by the Advocates Committee and the first appellate court, the appellant was prejudiced and injustice caused against him.

We will consider the above matters shortly as we are convinced that they form the basis of our decision. We do note that Mr. Tangho, learned Principal State Attorney, does admit that the Advocates Committee did not comply with the requirements of Rule 3 of the Advocates Rules. He however, avers that non-compliance with the said Rule 3 did not prejudice

the appellant. We will focus our minds to that. Mr. Tangho further admits, and we are in agreement with him, that the Full Bench of the High Court did not consider the appellant's eight grounds of appeal in their judgment. They just made a generalized finding which does not meet the tenets of a judgment, as is well established. But, instead of allowing the appeal on that basis, Mr. Tangho requests us to vacate the High Court's decision, step into its shoes, consider the evidence on record and reach a decision we consider just.

What are the consequences of non-compliance with Rule 3? The said Rule provides thus:-

" An application to the committee to remove the name of an advocate from the Roll or to require an advocate to answer all allegations ***shall*** be in writing under the hand of the applicant in Form I set out in the schedule ***and shall*** be sent to the secretary ***together with an affidavit*** by the applicant stating the matters of fact on which he

relies in support of his application" (emphasis provided).

In the instant matter the second respondent did not set out in an affidavit facts which he were relying upon. He merely wrote a letter to the Secretary. No affidavit in support of such allegations was attached. The Advocates' Committee (the Committee) then proceeded to hearing the complaints without observing those essential requirements which in our considered view, were conditions precedent. Non-compliance with those procedural requirements therefore rendered the committee's proceedings a nullity. Mr. Tangho appears to argue that Rule 22 of the Rules gives power to the Committee to dispense with some requirements of the Rules where it appears to be just. We agree with the appellant on this point that the Committee comes into realm upon being moved by the applicant. Such motion has firstly to comply with Rule 3. Therefore Rule 22 would not salvage what is a nullity *ab initio*.

Since the requirements envisaged under Rule 3 were not complied with, all that followed at the Committee hearing as well as at the first

appellate stage, was a nullity. The first appellate stage did not correct the serious error committed by the Committee.

Mr. Tangho's submission that the serious flaw notwithstanding, the appellant was not prejudiced is to say the least, an afterthought. Had he not been prejudiced the appellant would have not fought "for his rights" all the way up to this Court. In conclusion on this first point therefore, we hold that the trial before the Committee and the proceedings before the first appellate court, the Full Bench of the High Court, were but a nullity.

Before we leave this point, we would like to observe, in passing, the issue raised by the appellant regarding the standard of proof in cases of this kind. Both the Committee and the High Court seem to have adopted a low standard of proof. We would like to subscribe to the views expressed in ***An Advocate v. Advocates' Committee*** (1955) 22 EA 260, 262 thus:-

" in every allegation of professional misconduct involving an element of deceit or moral turpitude, a ***high standard of proof is called for***, and we

cannot envisage anybody of professional ment
sitting in judgment on a colleague who would be
content to condemn on a mere balance of
probabilities...." (Emphasis provided).

In his treatise titled ***Legal Ethics, Accountability for Lawyers and Bench – Bar Relations*** (9th Ed) 210, ***Prof. Kailash Rai*** states (concerning ***standard of proof***):

"... Proceedings before the Disciplinary Committee is essentially quasi-criminal in nature and therefore ***the standard of proof for this purpose is the same which is required for convicting an accused in a criminal charge. The benefit*** of doubt is given ***to the advocate concerned ... the disciplinary committee must be guided by the doctrine of benefit of doubt*** and is under obligation to record finding of guilty only upon being ***satisfied beyond reasonable doubt...***" (Emphasis provided).

As stated earlier, we subscribe to the above views. Considered in the circumstances of this appeal, we are of the firm view that neither the Committee nor the High Court considered the matter against the appellant along those lines. Proof seemed to be based on a balance of probabilities, as opposed to proof beyond reasonable doubt, which is expected in cases of this kind.

The other point for consideration is whether the failure on the part of the first appellate court to consider the eight grounds of appeal raised by the appellant and instead, basing its decision on matters extraneous to the case caused injustice/prejudice. Having gone through the judgment of the said Court, we are in total agreement with the appellant that he suffered injustice. Further, as a second appellate court, we are reluctant to take up Mr. Tangho's request of stepping into the "shoes" of the High Court by re-considering the evidence on record and take up a decision we think just. We firmly hold that making such a move is uncalled for. We cannot validate that which is invalid.

Finally, we firmly hold that given the prejudice the appellant suffered as a result of this case which has lasted for more than nine years now and all the specific issues discussed hereinabove, the appeal must be allowed, as we hereby hold. We pronounce that for reasons stated herein, the entire proceedings from the Advocates' Committee to the High Court (first appellate court) is declared to have been a nullity and hereby quashed. Mr. Rutagatina, the appellant, is reinstated to the Roll of Advocates forthwith unless prevented by other lawful cause.

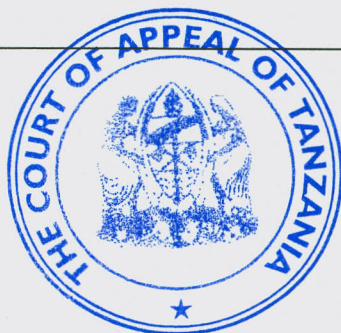
Dated at Dar es Salaam this 19th day of February 2014

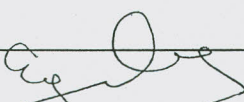
J. H. MSOFFE
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

S. MJASIRI
JUSTICE OF APPEAL

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




E. Y. MKWIZU
DEPUTY REGISTRAR
COURT OF APPEAL