

A Finally, there is the doctrine of fundamental change of circumstances. This doctrine is much wider than learned counsel for the petitioners has put forward to us. It includes termination of a treaty by operation of law, such as a supervening impossibility of performance known to the municipal law of contract which will have the effect of frustrating the execution of the terms of the treaty. A good example would be the merger of two sovereign nations into one sovereign state in which case the emerging state will take over treaty obligations of its constituent states. This must be so because the constituent states lose their legal personality when they merge. It follows that Tanganyika and Zanzibar have long since lost their legal personality. It may be correct to say that the unilateral breach of a treaty has as one of its consequences to absolve the party not in breach of all obligations under the treaty. True, as Jennings argues in his book **The Law and The Constitution**, (5 ed, 1959) at page 170, the British Acts of Union were passed to ratify the Treaties of Union and that the amendments to the treaties were carried out in accordance with the *maxim nobis sic stantibus*, that is, it is a tacit condition attaching to all treaties that they shall cease to be obligatory soon as the state of facts and conditions upon which they were founded has substantially changed. We have given serious consideration to this contention. We are satisfied, however, that although the Eleventh Amendment has introduced changes in the Articles of Union, those changes are founded on the lawful and legitimate exercise of legislative power by Parliament. It follows that no breach of the treaty of Union has been established. Thus, the position here is different from Britain. So whereas the Articles of Union form the treaty of Union and consequently part and parcel of our Constitutional law, and even though they constitute the basic norm reflecting the birth of a new grand-norm for our nation, unlike the position in Britain, they are, as we have already held, justifiable as part of the Acts of Union. It follows, therefore, that the doctrine of fundamental change of circumstances cannot apply in the manner it is being argued here. Accordingly this issue would also fail. Upon the foregoing considerations the petition is dismissed with costs

JAMES FUNKE GWAGILO v. ATTORNEY GENERAL (HCT)

HIGH COURT OF TANZANIA
AT DAR ES SALAAM
(Kyando, J.)

CIVIL CASE No. 307 OF 1999

Torts – Elements of the tort of malicious prosecution – Reasonable and probable cause – Plaintiff prosecuted in an Economic Criminal Case – Whether the prosecution was without reasonable and probable cause.

Torts – Elements of the tort of malicious prosecution – Plaintiff prosecuted by the police – Plaintiff fails to disclose specific police officer who bore malice against him – Whether malice proved

Torts – False imprisonment – Plaintiff arrested, detained and prosecuted – Whether detention in police custody was justified.

Torts – Trespass to the person – Whether trespass to the person was justified.

Civil Service – Whether retirement in the public interest is a disciplinary proceeding – Regulation 46(1)(a) of the Civil Service Regulations 1970.

Civil Practice and Procedure – Pleadings – Defence not pleaded in the Written Statement of Defence – Whether court bound to accept the unpleaded defence.

The plaintiff, a civil servant, who had risen to the senior positions of Principal Secretary and Regional Development Director was on 25 April 1988, at Tabora, arrested by the Police and tried with others in (HC) Economic Criminal Case Number 3 of 1989. In a judgment delivered on 17 August 1991 the plaintiff was acquitted of all the offences he was charged with. But before the conclusion of the trial of the economic criminal case the plaintiff was retired from the public service in the public interest. Upon acquittal the plaintiff filed this suit against the defendant claiming damages for false imprisonment, trespass to the person and malicious prosecution. In an effort to justify

A the retirement of the plaintiff from the Public Service, the defendant decided to launch a defence which was not pleaded in his Written Statement of Defence.

Held: (i) There was reasonable and probable cause in the plaintiff's prosecution in Economic Criminal Case Number 3 mentioned herein;

B (ii) It was necessary for the plaintiff to indicate the particular police officer(s) who bore malice towards him which actuated him or them to prosecute him;

C (iii) Malice in the tort of malicious prosecution does not mean spite or hatred; what it means is merely wrong motive; malice, was not in this case proved;

(iv) The arrest and detention were not unlawful or malicious. There was thus no false imprisonment and/or trespass to the person committed by the police;

D (v) Retirement in the public interest does not fall under Regulations 37 to 39 (on Disciplinary Proceedings) of the Civil Regulations 1970. So, regulation 46(1)(a) of the Civil Service Regulations does not bar the act of retiring an officer in the public interest by the President and it has no application to such an act at all;

E (vi) The defendant is bound by his pleadings and the additional grounds or points raised are rejected for not having been pleaded.

Suit dismissed

Cases referred to:

- F (1) *Moris A. Sasawata v. Mathias Maleko* [1980] T.L.R. 158
- (2) *Hosia Lalata v. Gibson Mwasote* [1980] T.L.R. 154
- G (3) *Hicks v. Faulkner* (1881) 8 QBD 167
- (4) *Herniman v. Jenkins* [1838] AC 305
- (5) *Mitchell v. Jenkins* (1933) 5B and D 588
- H (6) *Brown v. Hawkes* [1891] 2 QB 718
- (7) *Pike v. Waldrum* [1983] 1 Lloyd's Rep. 431
- (8) *Stevens v. Midland Countries Railway* (1854) 10 EX 352
- I (9) *Hemchand v. Areylal, A.* 1942 PC 64

Statutory provision referred to:

(1) Civil Service Act Number 16 of 1989, sections 19(3) and 23(2)

Mr Njulumi, for the Plaintiff

Mr Magoma, for the Defendant

JUDGMENT

(Delivered 25 April 2000)

Kyando, J.: In this case the plaintiff, who was a long time Civil Servant and had risen to the very senior positions of Principal (now Permanent) Secretary and Regional Development Director in the Public Service of Tanzania, was, on 24 May 1988, at Tabora, arrested by the Police and then tried with others in (HC) Economic Criminal Case Number 3 of 1989. There was a count alleging conspiracy contrary to section 384 Penal Code; and a count alleging giving false information contrary to section 122 and one count charging robbery with violence contrary to section 286 of the Penal Code. In a judgment delivered on 17 August 1991, Korosso, J. acquitted the plaintiff of all the offences charged in the above counts. But before the conclusion of the trial of the economic criminal case above the plaintiff was retired from the Public Service in the public interest by a letter (Exhibit P 1) which reads as follows:

Kustaafishwa Kwa Manufaa Ya Umma 15 Mei 1990:

1. Nimeagizwa nikuarifu kuwa Rais, chini ya Kifungu cha Sheria ya Utumishi Serikalini (Act Number 16/1980), kifungu 8 (f) cha Sheria ya Malipo ya Pensheni Sura 371) na Standing Order F. 35 amekustaafisha kazi kwa manufaa ya Umma, kuanzia tarehe 15 Mei 1990.
2. Kutokana na uamuzi huu wa Serikali, utalipwa haki zako za Pensheni kwa Utumishi wako Serikalini hadi kufikia tarehe 14 Mei 1990.
3. Ili kuepusha ucheleweshaji wa kukulipa haki zako, Katibu Mkuu wa Wizara ya Tawala za Mikoa na Serikali za Mitaa anaagizwa

- A kukutayarishia Hati za malipo ya Pansheni yako mapema na kuziwasilisha kwa Katibu Mkuu wa Wizara ya Fedha, kwa malipo.
4. Mwisho, napenda kuchukua nafasi hii kukushukuru kwa niaba ya Serikali na kwa niaba yangu mwenyewe kwa utumishi wako wa muda mrefu na ushirikiano wako mkubwa ulionyenyeshwa wakati wote ukiwa Mtumishi wa Umma na pia kukutakia kila la kheri katika maisha yako ya baadaye.
- B
- C Sgd: WH Shellukindo
Katibu Mkuu (Utumishi)
- It is shown on the letter (Exhibit page 1) that the plaintiff received it on 8 January 1991. By the time of his arrest and trial the plaintiff was Regional Development Director for Tabora Region and was stationed at Tabora. And because of the economic criminal charges he was facing, by letter Reference Number PM/PCF.6763/7 dated 28 December 1989, the Acting Principal Secretary, Office of the Prime Minister and First Vice President, interdicted him under Regulation 35 of the Civil Service Regulations 1970. The plaintiff was aggrieved by both his retirement in the public interest and his arrest and prosecution in the Economic Crimes Case referred to above. He brought this action against the defendant, therefore, seeking the following reliefs:
- D
- E
- F
- (a) A Declaration that the termination of his services with the Government of the United Republic of Tanzania was wrongful.
- G
- (b) A Declaration that he is still the lawful employee of the Government of the United Republic of Tanzania;
- (c) Payment of TZS. 211 916 485-38 as per paras 4-10 of the Plaintiff.
- H
- (d) Payment of salary and other fringe benefits at current rate from the date of filing the suit until his reinstatement.
- (e) Costs of the suit,
- I
- (f) Any other or further reliefs as to the court may appear fit and just to grant.

Concerning the retirement the plaintiff has stated in paragraph 5 of his plaint (See Amended Plaintiff presented on 19 August 1997) that it was wrongful "*because at the time of the purported retirement, the plaintiff was under interdiction at half pay for reasons of facing Economic Crimes Case Number 3 of 1989*" [emphasis supplied]. In paragraph 6 he states that by the time of his retirement he was claiming TZS. 3 320 309-60 from the Government made up of several items which he has listed in the paragraph and in paragraph 7 he says as a result of the retirement he further claims TZS. 52 596 179-78 "being monies from entitlements of the plaintiff in accordance with his terms of service contained in letters collectively marked with letters 'E.I-10' and 'F.I-17' respectively." The particulars for these have also been set out in the plaint.

In paragraph 8 of the plaint the plaintiff states that the Police were instrumental in his arrest, detention and subsequent prosecution in the Economic Criminal Case mentioned above and in paragraph 9 he claims damages of TZS. 30 000 000 for false imprisonment, TZS. 40 000 000 for malicious prosecution and TZS. 50 000 000 for trespass to the person. He says this was because he was subjected to psychological and bodily torture and humiliation in the prosecution he had to endure in the economic criminal case. In paragraph 10 he states that as a result of his retirement he failed to pay up his THB loan and to complete his house "and he, therefore, claims TZS. 36 000 000 being loss of expected earnings from the house."

The above amounts are the ones which add up to the total of TZS. 211 916 485-38 prayed for in relief (c) above. It may be added that besides the criminal proceedings in which he was involved, the plaintiff also faced disciplinary charges of (i) doing acts that are scandalous and embarrassing to the Government Service contrary to Standing Order F 36 read together with Regulations 1970 (G.N. 288 of 1970), in that, while Regional Development Director for Tabora Region, knowing that he could have official dealing with matters concerning M/s Soud Saidi S.K. Saidi, a businessman of Nzega, on the 2 January 1986, he borrowed TZS. 500 000 from the said Soud

- A Saidi/S.K. Saidi, and (ii) doing acts that are scandalous and embarrassing to the Government Service, in that, the plaintiff, while Regional Development Director for Tabora Region, used his position "as such RDD to prevent the allocation of 500 crates of beer which ought to have been lawfully allocated by the Regional Allocation Committee for essential commodities, which commodity he allocated through racketeering means."

- C The inquiry into the above charges was commenced on 1 August 1988 and concluded on 29 January 1989. It was conducted by Mwaikasu, J. and ended in the plaintiff's favour, i.e. he was, again, acquitted on both the counts.

- D In his Written Statement of Defence the defendant first raised a number of points by way of Preliminary Objections to the suit. Some of these objections do not seem to have been followed through, but as for the main one, i.e. that the suit is incompetent "as by virtue of section 23(2) of the Civil Service Act Number 16 of 1989, courts have no jurisdiction to inquire into the exercise of Presidential powers under section 19(8) of the Civil Service Act and article 36 of the Constitution of the United Republic of Tanzania of 1977", in a long ruling delivered on 10 January 1994 Mwalusanya, J. overruled it, holding that the President's power under section 19(3) of the Civil Service Act to remove civil servants in the public interest can be challenged in courts of law.

- G Then, in paragraph 6 of the Written Statement of Defence the defendant states that the plaintiff was RDD. "only up to second March, when he was transferred to the Central Establishment. In paragraphs 9 to 10 the defendant disputes the plaintiff's claims to the entitlements which he has made in paragraphs 6 - 7 of the *Plaint* and denies *in toto* the claims in paragraph 8 to 12 of the *Plaint*. He prays for dismissal of the suit therefore.

- I The background to the arrest and detention of the plaintiff on 24 May 1988 is that in the evening on 23.05.88 the plaintiff and a Dr Lamu went to the Police at Tabora to report a robbery, at gunpoint,

A of a vehicle, Registration Number TZ 91943. The said Dr Lamu was a doctor at the Regional Government Hospital, Kitete, Tabora, and the vehicle had been assigned to him in relation to his duties. According to SP Goodluck Joseph Mongi (DW3), who was then a police officer at the Tabora District Police Station, the report made by the plaintiff and Dr Lamu at the Police Station was to the effect that they (the plaintiff and Dr Lamu) had been out in the villages on duty and they were robbed of the vehicle there. They said they had been with one Moses Lyimo on the vehicle when the robbery took place. The police, upon receiving the report, directed road-blocks to be put up in efforts to catch the robbers and possibly recover the vehicle as well. The vehicle was not traced that night, however.

D On 24 May 1988, the said vehicle was used in a robbery at the Sikonge Branch of the then National Bank of Commerce. Some of the robbers in the bank robbery were a Captain Numuzi Ambrose Lamu and Christopher Lembo. DW3 stated in his evidence: "It was then said that Numuzi Lamu was a relative of Dr Lamu. From police investigations, it was revealed that during the day, on the date when the vehicle was stolen at gunpoint Numuzi Lamu and Christopher Lembo had been together with the plaintiff and Dr Lamu in the vehicle. In these circumstances, i.e. that the plaintiff and Dr Lamu had reported robbery of the vehicle, together with the reports that during the day the plaintiff, Dr Lamu and some of the robbers had been seen together on the vehicle, it was concluded by the Senior Officials that the plaintiff and Dr Lamu had been involved in a conspiracy to rob the bank and that the report by the plaintiff and Dr Lamu about the robbery of the vehicle had only been a camouflage to show that the vehicle had been robbed from them by unknown people. There must have been a relationship of some sort between the plaintiff and Dr Lamu on the one hand and Numuzi Lamu and Lembo on the other in view of the reports that they had been together during the day at the villages before the plaintiff and Dr Lamu came to the police to report the robbery of the vehicle. After the linkage of the plaintiff to the bank robbery as explained above, he and others were taken to court."

A This is how the plaintiff came to be involved in the economic criminal case mentioned earlier on above and it is this involvement of him in that case which has resulted into the claims of damages for false imprisonment, trespass to the person and malicious prosecution in this suit.

The drawn issues of the case or suit are these:

- (1) Was the removal from employment in the public interest wrongful or not?
- (2) Was there false imprisonment?
- (3) Whether the defendant committed any criminal trespass to the body of the plaintiff.
- (4) Was there any malicious prosecution?
- (5) To what relief, if any, are the parties entitled?

I propose to start with issues numbers (2)-(4). These arise, as shown above, from the arrest, detention and eventual prosecution of the plaintiff in the economic criminal case mentioned herein. As regards these issues, the torts of false imprisonment and malicious prosecution have been fully expounded on by Samatta, J. (as he then was), that legal luminary, in the cases respectively of *Moris A Sasawata v. Mathias Maleko* (1) and *Hosia Lalata v. Gibson Mwasote* (2). False imprisonment and trespass to the body are inter-related. In fact false imprisonment is a form of trespass to the person. False imprisonment is the total unlawful restriction of a person's freedom of movement. It includes unlawful arrest. As for trespass to the person, this is the wrongful direct interference with another person. An action for trespass to the person is in modern times brought for intentional acts, in the form of actions for assault, battery and false imprisonment and it is actionable *per se*, i.e. without proof of actual damage. In view of the shown inter-relationship between false imprisonment and trespass to the person, pleading them separately in this case was a result of confusion on the part of the plaintiff.

Concerning malicious prosecution, in order to succeed in a suit for damages for this kind of tort, the plaintiff must prove:

- (a) that he was prosecuted by the defendant;
- (b) that, the prosecution ended in his favour;
- (c) that the prosecution was conducted without reasonable or probable cause;
- (d) that in bringing the prosecution the defendant was actuated by malice.

Now, starting with issue number 4 amongst the three issues under discussion first, there is no dispute that the plaintiff was prosecuted in Economic Crimes Case Number 3 of 1989 as alleged in paragraph 8 of the plaint. There is no dispute, too, that the prosecution terminated in the plaintiff's favour, i.e. that he was acquitted. There is however, great controversy between the parties as to whether or not (i) the prosecution was conducted without reasonable or probable cause and (ii) whether or not in bringing the prosecution the defendant was actuated by malice. In relation to these two points, I have, unfortunately, not been able to find a local authority in which the complaint was directed, as in this case, against the police generally. Almost all the cases on the subject which came to the courts here were against defendants who were private persons or individuals. However, looking at **Civil Actions Against the Police** by Clayton and Tomlinson (Sweet and Maxwell) (London) (1992) pages 284 - 306, a book kindly availed to me by Mr Njulumu who acts for the plaintiff, it is possible for there to be an action for malicious prosecution against the police, too.

Was there a reasonable and probable cause in prosecuting the plaintiff in this case? "Reasonable and probable cause" probably requires to be explained, and the standard is that given by Hawkins J. in the case of *Hicks v. Faulkner* (3) at page 171 and approved by the House of Lords in *Herniman v. Smith* (4). Reasonable and probable cause, according to this explanation, is:

an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances,

A which, assuming them to be true, would reasonably lead any ordinary
 prudent and cautious man, placed in the position of the accuser, to the
 conclusion that the person charged was probably guilty of the crime imputed.

B In his evidence, the plaintiff says very little, if anything at all, about
 his prosecution being without reasonable or probable cause. He only
 mainly concentrates on it having been actuated by malice. In his
 submissions Mr Njulumu relies on circumstances which were shown
 in the judgment of Korosso, J. in the Economic Crimes Case Number
 C 3 of 1989 (*supra*) to show that there was no reasonable and probable
 cause in the police prosecuting his client, the plaintiff. In the book
Civil Actions Against the Police mentioned hereinabove, the learned
 authors state at page 285: "Malicious prosecution has become an
 D extremely difficult tort to prove, requiring the proof of a negative.
 Without some hard evidence of lack of honest belief in the charges
 made on the part of the prosecuting police officers, a plaintiff faces
 an extremely difficult task." Well, as indicated already, the plaintiff
 E in the instant case gave no evidence to prove lack of reasonable or
 probable cause on the part of the police in prosecuting him. He has
 thus failed to prove this element of the tort of malicious prosecution.
 But also, looking at the circumstances of the whole case myself, I
 F am far from persuaded that there was lack of reasonable and probable
 cause in prosecuting the plaintiff. The circumstances which led to
 his prosecution have been explained by DW3 in his evidence which
 I have reproduced above. I am of opinion that those circumstances
 G furnish sufficient circumstantial evidence for me to accept that the
 Police honestly believed in the guilt of the plaintiff in relation to
 the crimes he was charged with and were justified therefore in prosecuting
 him. Captain Lamu, one of the bandits who participated in the robbery
 at the Bank, and who was tried together with the plaintiff, was convicted
 H of the robbery. This man was connected to Dr Lamu, a person who
 had gone together with the plaintiff to report the motorvehicle robbery
 to the Police. Christopher Lembo was also convicted. The Police
 had received reports that both Captain Lamu and Lembo had been
 I together with the plaintiff and Dr Lamu during the day on the date
 the vehicle was reported to have been stolen at gunpoint. This was

A besides the relationship between Captain Lamu and Dr Lamu. The
 allegedly stolen vehicle was only the following morning used in the
 Bank robbery. Surely the circumstances linked the plaintiff to the
 Bank robbery and he cannot now be seriously heard to complain
 B that there was no reasonable and probable cause in the police prosecuting
 him. I reject his contentions in regard to this therefore, and hold
 that there was reasonable and probable cause in the plaintiff's prosecution
 in Economic Criminal Case Number 3 mentioned herein.

C I move now to consider the element of malice. It is now well
 established that by *malice* in the tort of malicious prosecution it
 does not mean spite or hatred; what it means is merely *wrong motive*.
 (See *Mitchell v. Jenkins* (5) and *Brown v. Hawkes* (6)). It is wrongful
 D to intend to use legal process for something other than its legally
 appointed and appropriate purpose: *Pike v. Waldrum* (7) at page 451.
 In *Stevens v. Midland Counties Railway* (8) at page 356, Alderson
 B put it thus:

E Any motive other than that of simply instituting a prosecution for the purpose
 of bringing a person to justice, is malicious motive on the part of the
 person who acts in that way.

F So, now, has the plaintiff in the present case proved that his prosecution
 by the police was actuated by malice on their part. In the first place
 he does not specify any particular police officer in his plaint or
 evidence who could have been propelled by malice into prosecuting
 him. Malice exists in human beings; it does not exist in inanimate
 G bodies such as, say, the Police force as such. As those who constitute
 "the Police" are individual human beings, it was necessary for the
 plaintiff to indicate the particular police officer(s) who bore malice
 towards him which actuated him or them to prosecute him. There is
 H no identity, as indicated, of any such police officer(s).

I In his evidence the plaintiff says the police acted maliciously
 because the Regional Security Officer and the Regional Commissioner
 showed animosity towards him in the inquiry conducted by Mwaikasu,
 J. Yet, the allegations in the plaint are against the police and not

A against the Regional Commissioner and Regional Security Officer as well. Secondly, there is nothing to show that the Police in prosecuting the plaintiff were acting under the direction of these two officials or that they were acting in concert with them. So there is no proof
B of any malice by the Police through the Regional Commissioner and the Regional Security Officer.

The plaintiff further states in his evidence that his prosecution was actuated by malice because (i) he was acquitted, (ii) he reported
C the vehicle as a good citizen and witness but was turned into a robber and (iii) he was charged three times. With respect, none of these are evidence of malice. The acquittal is only an element of the whole tort of malicious prosecution and not proof of malice as such; as
D for reporting the robbery of the vehicle, as DW3 told the court, the Police believed that the report was a cover up for plans for the robbery at the Bank. I see no malice in this belief myself on the part of the police. As for charging him three times in two criminal cases and in
E the disciplinary inquiry - I do not see how this establishes malice in so far as Economic Criminal Case Number 3, which is the subject of his complaint, is concerned. Who after all, in relation to that case was malicious? None, as already indicated, has been identified.

F On the other hand, as I have explained in relation to the element of want of reasonable and probable cause, the police acted honestly and on reasonable grounds in prosecuting the plaintiff. Malice therefore has not been proved in this case and I reject here the allegation that
G the Police were actuated by malice in prosecuting the plaintiff.

This disposes of issue number 4 of the suit. It is decided in the negative against the plaintiff.

H I pass now to consider issues numbers 2 and 3, which I think should be considered together in view of my opinion above that false imprisonment and trespass to the person are interrelated. There is no dispute in the case that the plaintiff was arrested by the Police in relation to the Bank robbery and that he was detained for some time
I and then released. He says in his evidence that he was detained for a

total of 91 hours. He claims, as shown above, too, to have been manhandled
A by the Police upon his arrest and that he developed BP due to his incarceration. So imprisonment has been proved. Was it justified? This is for the defence to establish for, as it has been stated in **Halsbury's
B Laws of England**, Volume 38, (3 ed), page 765, paragraph 1266:

The gist of false imprisonment is the mere imprisonment; the plaintiff
need not prove that the imprisonment was unlawful or malicious, but establishes
C a *prima facie* case if he proves that he was imprisoned by the defendant; the onus then lies on the defendant of proving justification.

I have shown in the discussion above in relation to want of reasonable
or probable cause and malice that there was justification in the prosecution
D of the plaintiff and that there was no malice in such prosecution. My consideration and conclusions in relation to those elements apply equally to the questions of whether or not there was justification in
E the arrest and detention of the plaintiff. I hold therefore that the circumstances in which the plaintiff was arrested in this case justified the arrest and detention and the said arrest and detention were not
F unlawful or malicious. There was no false imprisonment and or trespass to the person committed by the police in such arrest and detention in this case and the contention by the plaintiff that there were is rejected. This disposes of issues numbers 2 and 3 of the suit which
are also determined against the plaintiff.

I turn now to a consideration of the issue of the plaintiff's retirement
in the public interest. This appears, as I understand the case, to be
G the more crucial one in view of the lot that has been put into it. As shown above, in his plaint the plaintiff alleges that his retirement was wrongful because at the time of the purported retirement he,
H the plaintiff, was under interdiction at half pay for reasons of facing Economic Crimes Case Number 3 of 1989. However, as the case progressed, especially following the ruling of Mwalusanya, J. on
I the competence of the suit, a number of other grounds, not pleaded in the plaint, have proliferated and have been raised in efforts to show that the retirement was wrongful. These included that (i) the plaintiff was not told, in Exhibit P1, the nature of the public interest

A that necessitated his retirement; (ii) the retirement was retrospective; (iii) no reasons were given for the retirement and (iv) the plaintiff was not afforded an opportunity to be heard in his defence before the decision to retire him was taken.

B The defence too, in an effort to justify the retirement, decided to launch the unpleaded defence that at the time the plaintiff was retired he had already reached his age of compulsory retirement. But the defence, as already stated, was not part of the defendant's case in his Written Statement of Defence.

C What do the rules of pleading say in relation to the situation revealed above? The general rule is that a party is bound by his pleadings and should not be allowed to succeed on a case not made out in his pleadings, i.e. plaint and/or Written Statement of Defence. In *Hemchand v. Areyal* (9), an Indian case, the Privy Council characterised as irregular procedure of the trial court in allowing evidence to be adduced on points not raised in the pleadings or issues and held that this should not have been allowed without amendment of the pleadings and issues. I see no grounds in the instant case for departing from these general rules of pleading. This is because the parties had ample opportunity to amend their respective pleadings and include the points that were later raised but did not utilise that opportunity. They are now therefore bound by their pleadings and the additional grounds or points raised are hereby rejected for having not been pleaded.

E As for the defence that the plaintiff had already reached retirement age, I find it a rather ludicrous defence. If the plaintiff had reached that age, why was it then found necessary to retire him in the *public interest*? Normal procedure demands that he should only have been informed that he had reached his age of compulsory retirement already and he should retire. He would then have gone into retirement in the normal way. That he had to be retired in the public interest shows to me that he had to be retired before his normal age of compulsory retirement and that is what, in my view, is partly meant by retirement in the public interest i.e. that although one has not reached his age of compulsory retirement, for some reason he should be retired before reaching that age in the public interest.

A Did the retirement of the plaintiff in the public interest while under interdiction make the retirement wrongful? This is the question I now proceed to consider. The plaintiff relies on rule 46(1)(a) of the Civil Service Regulations 1970. The rule reads:

B 46(1) Where an officer is alleged to have committed a disciplinary offence and the act or omission constituting such offence also constitutes a criminal offence under any written law, then, notwithstanding the provisions of any law to the contrary, the following rules shall apply:

C (a) if no disciplinary proceedings under these Regulations have been commenced in respect of the disciplinary offence, but proceedings for the criminal offence (hereinafter referred to as "criminal proceedings") are instituted against the accused officer in any court of law, then *no disciplinary proceedings shall be commenced until the conclusion of the criminal proceedings*. [emphasis supplied]

E Was the offence in Economic Criminal Case Number 3 of 1989 in respect of which he was interdicted the reason for the plaintiff's retirement in the public interest? The letter of his retirement (Exhibit P1) does not state why the plaintiff had to be retired in the public interest. Is it safe to assume that he was retired in relation to the offence in the Economic Criminal Case? In view of the silence of the letter as regards the grounds for the retirement, especially because, as shown, the plaintiff had been involved in other proceedings inquired into by Mwaikasu, J., he could have been retired because of the allegations in those proceedings alone as well especially after he was acquitted by Mwaikasu, J. His retirement would therefore have not been related to the interdiction which was the result of Economic Criminal Case Number 3 of 1989 and it (the retirement) cannot be said to have been wrongful because it was done while the plaintiff was under interdiction for that case then.

I Secondly, the provisions of Regulation 46(1)(a) prohibit the commencement or continuance of *disciplinary proceedings* during the pendency of criminal proceedings. Is retirement in the public

- A interest a disciplinary proceeding within that rule? Disciplinary proceedings are explained in Regulations 37 - 39 of the Civil Service Regulations. Retirement in the public interest does not fall in those regulations. So Regulation 46(1)(a) of the Civil Service Regulations does not bar the act of retiring an officer in the public interest by the President and it has no application to such an act at all.

As shown, the prohibition in Regulation 46(1)(a) of the Civil Service Regulations is the only ground the plaintiff relies in challenging his retirement in the public interest according to his plaint. The regulation having been held to be inapplicable to his case, i.e. to retirements in the public interest, his entire challenge to his retirement collapses. I hold here that the plaintiff has not proved that his retirement in the public interest by the President was wrongful. I find in respect of issue number 1 of the case therefore in the negative too, against the plaintiff. The claims in paragraphs 6-7 of the plaint hinge on this issue and having determined the issue against the plaintiff, those claims fail too.

In the final result, having determined all the issues of the case against the plaintiff, the suit fails and it is dismissed with cost.

RASHID BARANYISA v. HUSSEIN ALLY

IN THE HIGH COURT OF TANZANIA
AT TABORA

(Mwita, J.)

CIVIL APPEAL No. 40 OF 1998

(Appeal from the decision of judgment of Kigoma District Court)

Land Law – Right of occupancy granted over land held under customary law – Whether the right of occupancy extinguishes the title held under customary law.

Land Law – Land held under customary law in an area declared a planning area – Whether holder of land under customary law is automatically rendered a squatter after declaration.

Land Law – Revocation of offer – Offer for granted right of occupancy issued – Whether it can be revoked.

Land Law – Revocation of offer – Proper procedure for revocation.

Appellant instituted the suit at Kigoma District Court seeking to have respondent evicted from plot number 2 Block B Maheme Trading Centre, Kigoma District. Before this area was designated a trading centre and surveyed the respondent held land in that area under a deemed right of occupancy. In 1989, the land in Mahembe was surveyed. In August 1989, the appellant applied to the District land allocation authorities for the disputed land, indicating that the land was his. The Allocation Authority accepted the application and the appellant paid fees in part. Later on, he was issued with a letter of offer. But all this transpired before the District Land Allocation Authorities had visited the area to verify his claim. On the land authorities visiting the disputed area it was discovered that the plot was the respondent's; Land Officer then withdrew the offer to the appellant and issued the letter of offer to the respondent. The appellant sued the respondent in District Court where the suit was dismissed. On Appeal, counsel for the appellant argued that there was double allocation of the plot and that revocation of the letter of offer to the appellant was unlawful as he was not given notice to show cause nor shown cause why the offer was revoked.

Held: (i) The mere act of designating the area a trading centre and surveying it did not have the effect of extinguishing the deemed right of occupancy of the respondent over the land and reducing him into a squatter.

(ii) The purported allocation of the plot to the appellant was ineffectual.

(iii) Withdrawal of the letter of offer issued to the appellant was proper.

Appeal dismissed

Cases referred to:

- (1) *Mtoro Bin Mwamba v. Attorney General* [1953] 2 T.L.R. 327
- (2) *Methusela Paul Nyagaswa v. Christopher Mbote Nyirabu* [1985] T.L.R.