On the other hand, it is my considered view that the second point of objection has force and merit. As already observed, the present appeal is against the order striking out the appellant's suit. It is certainly not an appeal against a decree. However, in terms of the provisions under Order XL, Rule 2 as read with order XXXIX of the Civil Procedure Code, 1966 (hereinafter referred to as the 'CPC'), rules governing appeals from original decrees also apply to appeals from orders. In this regard, Order XXXIX, Rule I(1) provides:

> Every appeal shall be preferred in the form of a memorandum signed by the appellant or his advocate and presented to the High Court or to such officer as it appoints in his behalf. *The memorandum shall be accompanied by a copy of the decree appealed from* and (unless the Court dispenses therewith) of the judgment on which it is founded. [emphasis supplied]

Indeed, Order XL Rule 2 provides;

> *The rules of Order XXXIX shall apply, so far as may be to appeals from orders* [emphasis supplied].

The combined effect of the provisions in the CPC herein above quoted is that the Memorandum of Appeal in the present matter ought to have been accompanied by a copy of an order appealed from and not a decree. RM'S Civil Case number 26 of 1996 was not heard on its merits and, consequently, no judgement was delivered. It should have been an order striking out the appellant's appeal and the extract of that order which ought to have accompanied the memorandum of the present appeal.

Admittedly, the present appeal is accompanied by what is captioned as a 'decree'. The last paragraph of that purported Decree is titled the word "Order". Surely, the Memorandum of Appeal envisaged under Order XXXIX, Rule I(1) cannot be accompanied by both a Decree and an Order at one and the same time. It is perhaps in recognition of this apparent deficiency that Mr. Nyangarika was quick to submit that; in the absence of a drawn order accompanying the memorandum, the appeal cannot stand in the light of Order XL Rule 2 as read with

Order XXXIX, Rule I(1) of the Civil Procedure Code. With respect, I agree.

It cannot be said that in the present appeal the memorandum is accompanied by an order properly drawn and which is envisaged under the forestated provisions of the Civil Procedure Code. However, the mistake made by the Trial Court in captioning the word 'Decree' instead of the word 'Order' on a document accompanying a memorandum could be cured under the provisions of section 96 of the Civil Procedure Code which provides:

> Clerical or arithmetical mistakes in judgements, decree or orders or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court either of its own motion or on the application of any of the parties ...

In the absence of an order accompanying the memorandum, the present appeal is certainly not proper before this Court. It is incompetent and should be struck out, as I hereby do.

In view of the fact that applications to correct mistakes are not subject to any limitation period *Jewels & Antiques T. Ltd .v. Nasaco Ltd* (1), the appellant is at liberty to file, in the Trial Court, the necessary application for correcting mistakes apparent on the document accompanying the memorandum. Should he succeed in that endeavour, he may as well feel free to pursue his intended appeal subject to the law of limitation.

MVITA CONSTRUCTION COMPANY *v.* TANZANIA HARBOURS AUTHORITY

COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM

(Ramadhani, Mroso and Kaji, JJA)

CIVIL APPEAL No. 94 OF 2001

(From the decision of the High Court of Tanzania at Dar es Salaam, Msumi, P.J., dated 23 January 2001, in Miscellaneous Civil Cause number 138 of 1999)

Advocates – Right of audience – Advocates admitted to the High Court of Zanzibar with right of audience before the Court of Appeal of Tanzania sitting in Zanzibar – Whether they have automatic right to appear in the High Court of Tanzania and the Court of Appeal sitting in Tanzania Mainland.

Arbitration – Arbitration proceedings – Statutory provisions prescribing special conditions to be observed in instituting legal proceedings against defendant – Whether the conditions similarly apply to arbitration proceedings against that defendant – section 67 of the Tanzania Harbours Authority Act 1977.

Arbitration – Matters for reference to arbitration – Contract requiring all matters referred to arbitration to be referred first to Engineer – Matters referred to arbitrator without first referring them to Engineer – Whether the arbitrator has jurisdiction to entertain them.

Arbitration – Objection to the jurisdiction of arbitrator – Party not registering protest to the jurisdiction of arbitrator and taking part in arbitration proceedings – Whether right to object is waived.

Contract – Building contract – Claim for compensation for devaluation of currency without prior reference of the matter to Engineer – Whether the claim is valid.

Civil Practice and Procedure – Case brought before two different judges at different times on different matters – No res judicata and no conflicting decisions or violation of stare decisis .

Civil Practice and Procedure – Appeal – Notice to affirm the decision being appealed against – Notice should contain the grounds for seeking to affirm the decision – Rule 87(1) of the Court of Appeal Rules, 1979.

Civil Practice and Procedure – Appeal – Notice to affirm decision the decision being appealed against – Notice of affirmation containing grounds that seek to vary the decision – Whether proper .

In August, 1977 the appellant and the respondent entered into a contract under which the appellant, a marine contractor, was to undertake certain civil engineering works at the Port of Dar es Salaam. The contract had a provision for the settlement of disputes between the parties by arbitration. Mvita undertook the works between September, 1977 and March, 1980, when the respondent entered upon the site and the works and took over the constructions, plant, temporary works and materials belonging to Mvita. The dispute that arose was referred to a sole arbitrator, one Geoffrey Hawker, under clause 67 of the contract. The parties further entered into a written agreement to refer which authorized the arbitration to determine, among others things, identified matters in dispute contained in a schedule to the agreement. Following a number of unsuccessful attempts to challenge interim awards and the issue of jurisdiction of the arbitrator the respondent, Tanzania Harbours Authority (THA), again raised the issue of jurisdiction of the arbitrator which led to a fourth interim award, by way of case stated. Eleven questions were stated for the opinion of the High Court. Msumi, P.J., who heard the application held against Mvita. Mvita appealed to the Court Appeal, arguing its grounds in nine groups relating to jurisdiction, estoppel and waiver of jurisdiction, pleadings before the Arbitrator, *res judicata*, limitation period, the application or otherwise of section 67 of the THA Act 1977 (prescribing special conditions for instituting legal proceedings against THA), clause 67 of the conditions of the contract between the partiers, conflicting decisions of the High Court, alleged violation of principles of *stare decisis,* damages, costs and compensation resulting from the devaluation and depreciation of the Tanzania shilling. THA also cross appealed, and also filed notice of affirmation, purportedly under Rule 87(1) of the Court of Appeal Rules, 1979, setting out three substantive grounds on which it

desired the High Court's opinion to be varied. Before the hearing of the appeal started the issue of whether the advocates admitted in Zanzibar with audience in the Court of Appeal sitting in Zanzibar had automatic audience in the High Court of Tanzania and in the Court of Appeal sitting on the Mainland.

Held: (i) Although the two advocates have audience before the Court of Appeal sitting in Zanzibar in order to appear before the High Court of Tanzania and the Court of Appeal sitting on the Mainland it is necessary to seek admission from the High Court of Tanzania;

(ii) section 67 of the Tanzania Harbours Authority Act 1977 envisions a situation where an action is taken against THA to settle a dispute or enforce a remedy in a Court of law; it was irrelevant to the powers or jurisdiction of the Arbitrator;

(iii) The Arbitrator had jurisdiction to entertain only those matters which had been referred to the Engineer in terms of clause 67 of the contract between the parties and were contained in the Agreement to Refer;

(iv) The Arbitrator was competent to adjudicate and give awards in all claims which were properly before him either because the procedural pre-requisites were followed or because THA had not raised any objection to jurisdiction;

(v) Since THA did not register any protest to jurisdiction following Mvita's failure to comply with the procedural preconditions under clause 67 of the contract to submit to arbitration but took part in the arbitration it waived, by conduct, the right to object to jurisdiction;

(vi) THA's objection to the claims for compensation resulting from devaluation and depreciation of the Tanzania shilling was valid since the issue had not been referred to the Engineer as required by clause 67, and THA had raised objection timely; there was therefore no waiver by THA;

(vii) As the two judges of the High Court, dealt with different aspects of the case the question of *res judicata* did not arise and there were therefore no conflicting decisions or violations of the principle of *stare decisis;*

(viii) The Notice of Affirmation was incompetent since it was made under an inapplicable provision of the law;

(ix) ***Obiter:*** A Notice of Affirmation should contain grounds upon which a party requires the Court of Appeal to affirm the decision of the High Court; to ask the Court to vary such a decision is to contradict the purpose of the Notice of Affirmation.

Appeal allowed in part

Cases referred to:

(1) *Ng'unda v. Ng'unda* [1995] T.L.R. 155

(2) *Allarakhia v. Aga Khan* [1969] EA 613

(3) *Frank M. Marrealle v. Paul Kyauka Njau* [1982] T.L.R. 32

(4) *Westminister Chemicals and Produce Limited v. Ecchholz and Loeser* [1954] 1 Llyod's List Law Reports 99 at 105

(5) *National Bank of Commerce v. Perma Shoe Company* [1988] T.L.R. 222

(6) *Zuberi Augustino v. Anicet Mugabe* [1992] T.L.R. 137

(7) *National Bank of Commerce v. Sadrudin Meghji,* [1998] T.L.R. 503

(8) *Almas Iddie Mwinyi v. National Bank of Commerce and Another,* Civil Application number 88 of 1998 [2001] T.L.R.

(9) *Citibank Tanzania Ltd. v. Tanzania Telecommunications Co. Ltd. and Five Others,* Civil Application number 64 of 2003 (unreported).

Statutory provisions referred to:

(1) The Advocates' Ordinance Chapter 344 of the Laws of Tanzania sections 8(1), 39(2)

(2) The Court of Appeal Rules, 1979; Rules 2(1), 31(3)

(3) The appellant Jurisdiction Act, 1979

(4) The Appellate Jurisdiction (Amendment Act, 1984)

(5) The Constitution of the United Republic of Tanzania Article 108(1) and 114

Mr. M.J.A. Lukwaro, Mr. Pherose Erukch Nowrojee and *Mr Dalipsingh Obhrai* for the appellant Company

Mr. Kibuta, Mr. Lamb, QC, Dr. Mapunda and *Mr. Sikila* for the respondent Authority

JUDGEMENT OF THE COURT

(Dated 18 August 2005)

Mroso, JA: In this appeal the appellant company was represented at the hearing by Mr. M.J.A. Lukwaro together with Mr. Pheroze Eruch Nowrojee and Mr. Dilip Singh Obhrai, learned advocates. The respondent authority was represented by Mr. Kibuta together with Mr. Tim Lamb, QC, Dr. Mapunda and Mr. Sikila, learned advocates. A question arose whether Mr. Nowrojee and Mr. Obhrai who are both advocates on the Rolls of Kenya and Zanzibar, had a right of audience before us.

Three days before the appeal was to come for hearing Mr. Lukwaro had sent petitions to the Chief Justice for special licence in respect of those two advocates from Kenya. It was the prayer of Mr. Lukwaro that considering that the two advocates had been enrolled in Zanzibar and held current practicing certificates there, they did not need any special licence under section 39(2) of the Advocates Ordinance, Chapter 341 of the Laws of Tanzania.

Section 39 of the Advocates Ordinance has provisions on the conditions for acting as an advocate and sub-section (2) thereof says:

> (2) Notwithstanding anything to the contrary contained in this Part, the Chief Justice may upon payment to the High Court of the prescribed fee admit to practice as an advocate for the purpose of any case any of the persons mentioned in subsection (1) of section 8 who has come or intends to come to Tanzania for the purpose of appearing in such case.

Subsection (1) of section 8 of the Ordinance lists the qualifications of a person who applied to the Chief Justice to be admitted as an advocate.

According to Mr. Lukwaro, the Chief Justice said that there might be merit in the proposal he (Lukwaro) gave but to avoid delay in the hearing of the appeal granted a special licence to the two advocates pending clarification on the legal position.

Mr. Kibuta was of the view that although Zanzibar advocates have a right of audience before the Court of Appeal in Zanzibar, they do not have an automatic right of audience before the Court on the Mainland. So, although the Chief Justice granted the two advocates special licence to appear before the Court they had to pay the necessary fees. The advocates for the parties agreed that the hearing of the appeal could proceed and, in the meantime, they would undertake legal research on whether an advocate of the High Court of Zanzibar has an automatic right of audience in this Court whether it sits on the Mainland or in Zanzibar. Following from that undertaking the Court proceeded to hear the appeal and written submissions on the right of audience before the Court followed thereafter.

In his written submissions Mr. Lukwaro referred to Rule 31(3) of the Court of Appeal Rules, 1979 where it is provided:

> Every advocate who is for the time being entitled to practice before the High Court shall have the right of audience before the Court.

And argued that from 1984, by Act number 16 of 1984, the definition of "High Court" was broadened to include the High Court of Zanzibar. So, under the Appellate Jurisdiction Act, 1979 as amended, an advocate of the High Court of Zanzibar is as well an advocate of the High Court of Tanzania for purposes of the right of audience before the Court of Appeal. To quote Mr. Lukwaro from his written submissions he said:

> In other words any reference to the High Court under the Appellate Jurisdiction Act, 1979 and the Rules made thereunder – the Tanzania Court of Appeal

> Rules – is reference to both the High Court of Tanzania and the High Court of Zanzibar.

He concluded that it followed that every advocate who for the time being was entitled to practice before the High Court had a right of audience before the Court of Appeal of Tanzania under Rule 31 (3) of the Court Rules. Mr. Nowrojee and Mr. Obhrai were therefore entitled to be head by the Court without the need to pay fees for a special practicing licence.

In his written submissions Mr. Kibuta agrees that the answer lies on whether the words "High Court" in Rule 31(3) of the Court Rules include every advocate who is entitled to practice before the High Court of Zanzibar. He submits, however, that an advocate referred to in Rule 31(3) in the Court of Appeal Rules must be one whose name has been entered by the Registrar of the High Court on the Roll of Advocates. The High Court envisaged here would be the High Court of the United Republic of Tanzania and not the High Court of Zanzibar. He argues that that is so considering the definition of "the High Court" in Rule 2(1) of the Court Rules which reads –

> The High Court" means the High Court of the United Republic of Tanzania established by the Constitution.

The High Court of the United Republic is provided for under Article 108(1) of the Constitution of the United Republic of Tanzania whereas Article 114 provides for the High Court of Zanzibar. Mr. Kibuta submits, therefore, that an advocate of the High Court of Zanzibar does not have automatic right of audience before the Court of Appeal when sitting on Mainland Tanzania.

We think Mr. Kibuta is correct to say that an advocate of the High Court of Zanzibar does not have automatic right of audience before the Court of Appeal on Mainland Tanzania, because the right to practice is territorial. Such an advocate will have a right of audience before the Court on Mainland Tanzania either if his name has been entered on the Roll of Advocates by the Registrar of the High Court on the Mainland and has paid the necessary fees for a practicing

certificate, subject to the five year practice requirement, or if he has a special licence under section 39(2) of Chapter 341 of the Laws. It must also be noted that although the definition of "High Court" in the Appellate Jurisdiction Act, 1979 has been broadened by Act number 16 of 1984 to mean the High Court of Tanzania or the High Court of Zanzibar "as the case may be", that definition must be read bearing the context in mind, that is to say, to provide for the jurisdiction of the Court of Appeal to hear appeals, revisions and applications from both the High Court of Tanzania and the High Court of Zanzibar. However, the Tanzania Court of Appeal Rules, 1979 have their own definition of "the High Court" in Rule 2 which was not amended to conform with the amended definition in the Appellate Jurisdiction Act. As mentioned earlier, for the purposes of Rule 31(3) of the Court Rules, the words "the High Court" have remained to mean "the High Court of the United Republic of Tanzania established by the Constitution", that is to say by Article 108 of the Constitution. Undoubtedly, that is an anomaly because the Court Rules are subsidiary legislation made under the Appellate Jurisdiction Act, 1979 and, normally, should not provide for a definition of the words "the High Court" which is inconsistent with the definition in the principal legislation.

But even if the definition of "High Court" in the Rules were the same as the definition in the Appellate Jurisdiction Act, 1979, as amended, so that the words "High Court" whenever they appear in the Rules meant "the High Court of Tanzania or the High Court of Zanzibar, as the case may be", for purposes of Rule 31(3) of the Court Rules, 1979 it could only mean that advocates who are entitled to practice before the High Court of Zanzibar, like their counterparts on the Mainland, have a right of audience before the Court of Appeal. In fact, in the absence of such a definition the appearance of advocates from Zanzibar before the Court was of questionable validity. Even so, the fact that an advocate of the High Court of Zanzibar is entitled to appear before the Court does not necessarily mean that such an advocate has automatic right of audience before the Court on the Mainland or that an advocate from the Mainland has automatic right

of audience before the Court in Zanzibar. Such advocates have to comply with the conditions in legislation relating to advocates for practicing on the Mainland and in Zanzibar.

In the case before us the two foreign advocates from Kenya were granted temporary admission and special practicing licence by the Chief Justice. All they needed to do thereafter was to pay the necessary fees. We now order that necessary fees in respect of both Mr. Nowrojee and Mr. Obhrai be paid to the Registrar within two days of this judgment. Now to the appeal.

About 28 years ago, in August 1977, the parties in this appeal entered into a written contract under which the appellant, a marine contractor, was to undertake certain civil engineering works at the Port of Dar es Salaam. The project was known as the Port Modernisation of Lighter Wharf Project, Phase II. Among other things the contract contained provisions for the settlement of disputes between the parties by arbitration.

The appellant, henceforth to be referred to simply as Mvita, embarked on the construction work at the port between September, 1977 and 6 March 1980 when the respondent, which for convenience will henceforth be referred to only as THA, entered upon the site and the works and took over Mvita's construction plant, temporary works and materials. Those acts gave rise to disputes between the parties. In accordance with Clause 67 of the Contract a sole Arbitrator, one Geoffrey Fort Hawker based in London, was appointed. The parties had entered into a written "Agreement to Refer" which, among other things, authorized the Arbitrator to determine:

> All questions and matters in difference between the parties hereto touching their respective rights and duties and obligations under the said agreement and all other matters in difference between the parties arising out of or relative to the said agreement on the subject matter thereof ....

A schedule identified the matters in dispute in difference. Arbitration started on 15 April 1985 and by 22 August 1985 the First Interim Award was given and this related to the expulsion of Mvita from the

construction site. Upon invitation of the parties the Arbitrator stated a special case for the opinion of the High Court. That was in accordance with the provisions of section 10(b) of the Arbitration Ordinance, Chapter 15 of the Revised Laws of Tanzania.

On 23 July 1986 Mapigano, J., gave his decision on the case stated, reversing the Arbitrator's provisional award. Both Mvita and THA were aggrieved by the High Court opinion resulting in an appeal and a cross-appeal to the Court of Appeal of Tanzania. The Court of Appeal partly concurred with Mapigano, J., and partly reversed him. That was on 26 February 1988 and arbitration proceedings resumed on 11 July 1988.

Four days after the resumption of arbitral hearing the Arbitrator made a second Interim Award which related to the proper identity of the Mvita contracting party. Subsequent to the award arbitral proceedings continued until on 25 May 1989 when the Arbitrator made and published a Third Interim award on certain questions of liability.

THA was aggrieved by the second and third interim awards and petitioned the High Court to set them aside for the reason that the Arbitrator lacked jurisdiction and was allegedly guilty of misconduct. So, in Miscellaneous Civil Cause number 35 of 1992 Kyando, J. heard the petition and dismissed it on 4 June 1993. He upheld the Arbitrator in his award that the expulsion of Mvita from the site was unlawful; that the Notice of Expulsion which had been served on Mvita was null and void and that a certificate of the Supervising Engineers – Messrs Berlin and Partners (Tanzania) Limited of 20 December 1979 on which forfeiture of assets and expulsion of Mvita was based, was null and void. Kyando, J. then directed the Arbitrator to proceed with the hearing and determination of quantum of damages.

THA sought to challenge Kyando, J.'s decision in the Court of Appeal by filing Civil Appeal number 9 of 1994. This appeal was struck out on 14 October 1994 for the reason that it was time barred. An application for extension of time to apply for leave to appeal was dismissed by Bubeshi, J. on 31 March 1995.

THA again raised the issue of the jurisdiction of the Arbitrator and this led to the fourth Interim award by way of case stated. The Arbitrator stated 11 (eleven) questions on which the opinion of the High Court was sought. Misc. Civil Cause number 138 of 1999 was opened in the High Court and was heard by Msumi, Principal Judge who delivered his opinion on 23 January 2001. On the whole, the High Court held against Mvita which, feeling aggrieved, has appealed to this Court, listing 46 grounds of appeal. THA has also cross-appealed, raising five substantive grounds although it later abandoned the fourth ground. It also filed a Notice of Affirmation purportedly under Rule 87(1) of the Court of Appeal Rules, 1979, setting out three substantive grounds on which it is desired the High Court Opinion should be varied, which sounds contradictory!

Although the appellant filed 46 grounds of appeal its advocates did not argue each one of them but divided them into nine convenient groups. Arguments and submissions therefore were made in respect of the nine groups of appeal. It may also be said that some of the points which were listed as grounds of appeal are not in reality grounds of appeal at all but arguments or submissions in disguise. Such are, for example, listed grounds 15D, 18, 24, 25 and 25A. Ground 15D reads:

> 15D The statute (section 67) does not require the details on the text of the statement of Claim/Plaint to be part of the notice or to be served separately on the THA Act. (*sic*) Had Parliament required this it would have and could have, so prescribed, as it has done under the Government Proceedings Act.

Ground 18 reads:

> (18) The foregoing issues were all *res judicata*

Ground 24 reads:

> (24) The Learned Principal Judge ought to have found and opined that the issue of jurisdiction of the arbitrator was *res judicata* (*sic*) as the new grounds thereon now being urged before him, could have been, and should have been, taken on the aforesaid previous proceedings.

Ground 25:

> This is so regardless of whether these "new" grounds are "defences" or "legal issues" touching the Legal Competence of the Arbitrator to determined (*sic*) them.

Ground 25A:

> The respondents" "new" points on jurisdiction were not new points coming into existence, or being discovered, 18 years later. They were, if they have any merit (which is expressly denied), in existence from the very beginning of this arbitration, and were available to the respondent long prior to the High Court and had already been dealt with and determined between the parties by Courts of competent jurisdiction aforesaid proceedings in the High Court and in the Court of Appeal.

There are several more such "grounds" and we think it is unnecessary to cite them all. It is apparent, therefore, that the proper grounds of appeal are not as many as were listed by counsel for the appellant. Besides grounds 36A, 36B and 36C were abandoned.

The nine groups which summarize the grounds of appeal relate to jurisdiction of the Arbitrator, estoppel and waiver on jurisdiction, pleadings before the Arbitrator, *res judicata*, limitation period, the application or otherwise of section 67 of the Tanzania Harbours Authority Act, 1977 and clause 67 of the conditions of the Contract between the parties, conflicting decisions of the High Court, alleged violation of the principle of precedent and *stare decisis* and Damages, costs and compensation resulting from devaluation and depreciation of the Tanzania Shilling.

It seems to us that the issue of jurisdiction of the Arbitrator was central to the 11 (eleven) matters or questions which the Arbitrator referred to the High Court for its opinion. The questions which were referred to the High Court are the following:

> 1. Whether the claimant's pleaded claim made in these proceedings is a single cause of action for damages for the alleged wrongful repudiation of the contract.

2. Whether the claimant's claim is not one single comprehensive claim for damages at common law but a series of discrete claims under clause 67 and or under other provisions of the contract.

3. Whether, if there be one cause of action and one claim only, that claim is within the jurisdiction of the Arbitrator because the claimants have complied with section 67 of the Conditions of Contract, and have referred to Arbitration their claim and their proceedings in respect of that claim, is encompassed within the Agreement to Refer, and has been pleaded by the claimant and/or is otherwise within the jurisdiction of the Arbitrator and/or because the respondents have waived any objection to the Arbitrator's jurisdiction and/or are estopped from denying that the Arbitrator has jurisdiction to determine the said claim.

4. In the light of:

   (i) Section 67 THA Act 1977; and

   (ii) Clause 67 of the Contract between the parties

   what procedural and pleading requirements were to be fulfilled in order that any given matter of complaint in the Claimant's Schedule of damages and document C3 (Appendix 1) might be adjudicated upon and has the Claimant complied with those procedural and pleading requirements.

5. Whether the four documents referred to in the narrative are capable of fulfilling any appropriate procedural requirements in respect of the matters of complaint raised in C3.

6. Whether the matters complained of in the Claimant's Schedule of Damages and C3 constitute but one "act, neglect or default" for the purposes of section 67 of the THA Act, 1977 or are they and/or have they conventionally become a number of separate "disputes or differences" and if so, how many?

7. Whether if there be more than one cause of action and several Claims, the Claims or elements of Claim as set out in the Schedule of Damages and "C3" are within the jurisdiction of the Arbitrator because the Claimant has complied with the aforesaid section 67 of the THA Act and Clause 67, and have referred to arbitration their claims and proceedings have been commenced in time and these claims are encompassed within the Agreement to Refer, or are otherwise within the jurisdiction of the Arbitrator and/or because the respondents have waived any objection to the Arbitrator's jurisdiction and/or are estopped from denying that the Arbitrator has jurisdiction to determine the said claims.

8. Whether as a matter of construction the Agreement to Refer embraces and/or provides the Arbitrator within sufficient jurisdiction to determine all the matters complained of in the Schedule of Damages and 'C3' (Appendix 2).

9. Whether the Agreement to Refer provides the Arbitrator with sufficient jurisdiction to determine in any final award whether as a matter of fact and/or law that the respondent's contentions as to whether the Claimant has complied with section 67 of the THA Act and/or Clause 67 are effective defences to the claim or claims or whether compliance with section 67 of the THA Act and/or Clause 67 is a condition precedent to the exercise of the jurisdiction referred to in Question 8 and that such compliance is determinable only by the Courts.

10. Whether the Arbitrator has jurisdiction as a matter of Tanzania law to compensate, if appropriate in the circumstances, the claim for the effects of the devaluation of the shilling since the Claimant's wrongful expulsion from the site.

11. Whether the Arbitrator has jurisdiction as a matter of Tanzania law to award if appropriate in the circumstances, either simple or compound interest.

To begin with, under the law in Tanzania, an arbitrator's authority, power and jurisdiction are founded on the agreement of parties to a contract to submit present or future differences to arbitration. The other source of the authority, power and jurisdiction of an arbitrator in Tanzania are the provisions to be implied in submissions found in

the First Schedule to the Arbitration Ordinance, Chapter 15 of the Laws. Indeed, the parties, Mvita and THA, agreed as regards the power of the arbitrator whom they chose to be, *inter alia*, as follows:

> The Arbitrator shall have all the powers given to arbitrators by the Arbitration Ordinance, (Chapter 15 of the Laws of Tanzania) or any statutory modifications or re-enactment thereof and shall make and publish his award in writing within three (3) months of the effective date of entering of this reference ...:

But in settling disputes between the parties in this appeal the Arbitrator had to have recourse to Clause 67 of the Contract between them. A dispute which did not come under the terms of clause 67 would be outside the jurisdiction of the Arbitrator.

Clause 67 says in part:

> If any dispute or difference of any kind whatsoever shall arise between the employer or the Engineer and the Contractor in connection with or arising out of the Contract or the carrying out of the works (whether during the progress of the works or after their completion and whether before or after the termination abandonment or breach of the Contract) it shall in the first place be referred to and settled by the Engineer .... All disputes or differences in respect of which the decision (if any) of the Engineer has not become final and binding ... shall be finally settled by arbitration in Tanzania in accordance with the Tanzania arbitration law .... The Arbitrator shall have the power conferred on him as such by any statutory enactment or amendment thereof from time to time in force and shall be competent to enter upon the references without any further or formal submission than is contained in the contract. The award of the Arbitrator shall be final and binding the parties.

One of the questions before the High Court, Msumi, Principal Judge, was whether the pleaded matters in dispute were within the jurisdiction of the Arbitrator. Such matters, eight in number, were listed in the Opinion which was rendered by the High Court and we think it is not necessary to repeat them here. But we wish first to dispose of

the question whether section 67 of the Tanzania Harbours Authority Act, number 12 of 1977, was relevant to Mvita's claims which were before the Arbitrator.

Section 67 of the THA Act relates to where "any action or other legal proceeding is commenced against the Authority for any act done in pursuance or execution or intended execution, of this Act ...." We are of the considered opinion that the matters which were before the Arbitrator were not "any action or other legal proceeding" within the meaning and purport of the section.

The THA Act does not define the term "action" or the phrase "legal proceeding" but the term "action" in its legal sense normally means "a civil proceeding as may be prescribed by the rules of Court..." See "a **Concise Law Dictionary**" by P. G. Osborn, (5 ed). **Black's Law Dictionary**, (7 ed) defines "action" in its legal sense as "a civil or criminal juridical proceeding". Non-legal dictionaries like **Chambers Twentieth Century Dictionary** defines "action", among other meanings, as "a law suit, or proceedings in Court." As for the phrase "other legal proceeding", it must be read *ejusdem generis* with the term "action". **Black's Law Dictionary** defines "legal proceedings" as "any proceeding authorized by law and instituted in a Court or tribunal to acquire a right or to enforce a remedy". The **Oxford Advanced Learners Dictionary**, which is a layman's dictionary, defines "proceeding" as "the process of using a Court of law to settle a dispute or to deal with a complaint". Section 67 of the THA Act, therefore, envisages a situation in which Court action is taken against the THA to settle a dispute or to enforce a remedy.

The High Court, Msumi, Principal Judge, said regarding section 67 of the THA Act:

> ... the jurisdiction of the Arbitrator in the present case is prescribed by section 67 of THA Act and Clause 67 of the Contract. In order for the Arbitrator to be seized with jurisdiction on any matter the party making the reference must have complied with the requirements of these provisions

> ... His (Arbitrator) jurisdiction is limited to only those matters which have been brought before him in compliance with, among other requirements, the provisions of section 67 of THA Act ....

We think the learned Principal Judge erred in so holding. The reference or submission to arbitration was not, we are satisfied, "action or other legal proceeding" under section 67 of the THA Act, 1977. The section was, therefore, irrelevant to the proceedings before the Arbitrator.

Having found that section 67 of the THA Act, 1977 was inapplicable to the matters which were before the Arbitrator we now reiterate that his jurisdiction was founded on the agreement to submit, Clause 67 of the Contract and any implied or express authority under the Arbitration Ordinance, Chapter 15 of the Tanzania Revised Laws.

We, also, at this juncture and for the avoidance of doubt, wish to highlight the distinction and similarities between the jurisdiction of Courts of law and that of an arbitrator. In the case of a Court of law, a decision reached by a Court without jurisdiction is null and void because jurisdiction goes to the very root of the authority of the Court to adjudicate upon the case. See *Ng'unda v. Ng'unda* (1). Also, in a Court case parties cannot by mutual consent confer jurisdiction on a Court which does not have jurisdiction to adjudicate on the matter. See *Allarakhia v. Aga Khan* (2) and *Frank M. Marealle v. Paul Kyauka Njau* (3).

In arbitration, like in a Court of law, want of jurisdiction renders a decision and an award a nullity. Also, both in Court cases and in arbitration objection to jurisdiction can be raised at any stage of the proceedings. In a civil case objection to jurisdiction can be raised even at the final appeal state and, in an arbitration, objection can be raised even after publication of an award. However, in arbitration, a party can waive objection to the jurisdiction of the arbitrator. According to Sir Michael J. Mustill and Steward C. Boyd on The **Law and Practice of Commercial Arbitration in England**, Butterworths 1982 Edition at page 522, irregularities of procedure in arbitration can be readily

waived "but the jurisdiction of the arbitrator must always depend on an agreement by the parties to abide by his award." For example, a party who appoints an unqualified arbitrator cannot afterwards complain that the arbitrator had no jurisdiction. Also, a party who relies on an arbitration agreement to have an action stayed and the claim referred to arbitration cannot later assert that the claim is outside the scope of the agreement. These examples though they relate to waiver, are more in the nature of estoppel. What seems to come out of these examples is that waiver of objection to the jurisdiction of the arbitrator is in quite limited circumstances, either in relation to mere irregularities or in estoppel situations.

We now wish to go to the question whether the pleaded matters in dispute were within the jurisdiction of the Arbitrator. The High Court found that since Mvita had not complied with section 67 of the THA Act, 1977 and also had not complied with Clause 67 of the Contract, the pleaded matters in dispute were not within the jurisdiction of the Arbitrator.

We already found that section 67 of the THA Act, 1977 was inapplicable to the arbitration proceedings, and the High Court erred to the extent that it found section 67 applicable. But it was correct to say that Clause 67 of the Contract was applicable. The question, however, is whether all the pleaded matters in dispute were outside the parameters of Clause 67 of the Contract as held by the High Court.

Clause 67 provides the prerequisites for a matter to go to arbitration. There are the conditions such as that a matter must first be referred to and settled by the Engineer within a given period of 90 days after reference to him. The Engineer too is expected to give a written notice of his decision to the parties. If a party is dissatisfied with the Engineer's decision he may within 90 days after receiving notice of such decision require that the matter be referred to arbitration.

It is not in dispute that some of the matters which were referred to arbitration and had formed part of the pleaded matters in dispute

did not comply with Clause 67. Mr. Nowrojee has argued very forcefully that the THA had willingly submitted to arbitration on all those matters and that for a whole period of eighteen years they appeared to accept that the Arbitrator had jurisdiction notwithstanding the non-compliance with Clause 67. Furthermore, that if parties appear before an arbitrator and participate in the proceedings until an award is given, such conduct is sufficient proof that the parties agreed to be bound by the award and should not be heard to complain later that the arbitrator lacked jurisdiction. In the alternative, Mr. Nowrojee was arguing that THA had waived objection to jurisdiction or had acquiesced or ratified the process and was estopped from questioning it later.

Mr. Lamb, QC does not concede that they had not raised objection to jurisdiction for a whole 18 years and referred the Court to paragraph 4.1 of the Points of Defence in which it was said:

> 4.1 In so far as averments under this section constitute the basis of the Claims under section 5 of the Points of Claim the respondent raises a preliminary objection to the effect that the following averments in this section and the corresponding claims in section 5 are incompetent and therefore inadmissible because they have not been in dispute between the parties that is to say:
>
> (a) Averments and Claims which relate to matters that have not been the subject of the Engineer's Decision.
>
> (b) Averments and Claims which relate to matters that have been the subject of Engineer's Decision No. 12 but decision of the Engineer has not been disputed in time ....
>
> (c) Averments and Claim which relate to matters that have been the subject of Engineer's decision No. 12 but which have not been set out in Agreement to Refer ....

On 16 December 1983, the late Mkude, then of the Tanzania Legal Corporation, acting as counsel for THA, wrote to the lawyers of Mvita to indicate that THA was abandoning the above preliminary objection. However, later in a so-called Re-Re-Amended Points of

Defence, THA retracted the abandonment of the Preliminary Objection. In other words, the preliminary objection was reinstated. It was said in paragraph 4.1:A – as follows:

> 4.1: A For the avoidance of doubt the respondent withdraws the concession contained in the letter of 16 December 1983 written on its behalf by the Tanzania Legal Corporation (i.e. Mr. Tom Mkude).

The pleadings were still being filed by way of amendments and the so-called Re-Re-Amendments. We think it was legitimate for THA to restore their preliminary objection and, therefore, it would not be correct to say that THA had not at all raised objection to jurisdiction, not to mention that even before Kyando, J. there was objection to jurisdiction. It must be said, however, that the instances of objection were limited in scope (to claims under section 5 of the Points of Claim) and were not all – encompassing.

We share the Arbitrator's, and by implication the High Court's, categorization of Mvita's claims; that the first category comprised those claims which arose out of the contract as a whole and related to Mvita's carrying out of the works prior to expulsion. The second category of the claims which relate to the use, retention and or sale of Mvita's plant, materials and temporary works. The third category related to the claim for general and special damages following what was later adjudged unlawful expulsion.

Mvita argued before the High Court – Msumi, Principal Judge, that as regards the post-repudiation claims, the issue was *res judicata* because Kyando, J. had dealt with the issues of liability and had decided that the Arbitrator had jurisdiction to deal with all those issues.

The THA disputed that contention, maintaining that Kyando, J., had decided only on questions of *locus standi* and identity of Mvita; that the expulsion was unlawful; on the questions of mistake and misrepresentation and on alleged misconduct of the Arbitrator. The High Court (Msumi, Principal Judge) agreed with THA's contention and said:

> On the question whether all issues of liability have been finally determined by Kyando, J. I had the advantage of going through the records of the case in question. I am respectfully of the respondent's view that not all issues of liability have been determined in the case. Indeed this view is also shared by the Arbitrator and the Claimant (Mvita) ....
>
> The categories of liability which are relevant for the final determination of the parties' dispute have not bee exhausted by Kyando, J. in his ruling. This assertion is, respectfully, without prejudice to Kyando, J.'s direction that the Arbitrator should proceed to determine the quantum of damages. I am therefore of the considered view that the issues raised in this case are properly before the Court.

We agree with the High Court that Kyando, J. did not decide on all the issues of liability and that his decision is limited to the matters as explained by THA. We also reiterate that disputes could be referred to Arbitration only if the procedure in Clause 67 of the Contract was followed.

It could have been argued by Mvita that considering that it was the Engineer who initiated the purported repudiation of the contract and the unlawful expulsion of Mvita it would have been an exercise in futility to refer any disputes to the Engineer before further reference to arbitration. But it is apparent that Mvita was not inhibited. It in fact invoked the provisions of Clause 67 of the Contract to refer the dispute over its expulsion to the Engineer who gave his Decision number 11 in conformity with the clause. Subsequently Mvita included that decision among the matters to be referred to Arbitration under "Matters in Dispute in Difference" item 4. It must have treated the contract as still subsisting and could have done the same for all the other disputes. Therefore, subject to what we will say later on waiver, estoppel, acquiescence and ratification, failure by Mvita to follow the procedure under Clause 67 made the Arbitrator lack jurisdiction to deal with those matters. Furthermore, since Kyando, J. did not deal with all the issues of liability, there could not be a valid plea of *res judicata* when THA raised the complaints on jurisdiction.

Was there waiver or estoppel? Msumi, Principal Judge held the view that there was waiver and estoppel regarding Mvita's failure to comply with Clause 67. He said:

> So in the present case the waiver in question is only sustainable against challenge of the Arbitrator's Objection based on claimant's failure to comply with Clause 67 of the Contract and not on non-compliance of section 67 of the Act .... As for the alternative argument of estoppel, the Court is of the opinion that this plea is sustainable against preliminary objection based on non-compliance of Clause 67 of the Contract and not against non-compliance of section 67. Based on these findings the Court is of the opinion that the Arbitrator has no jurisdiction to entertain the pleaded claims.

We have already held that section 67 of the THA Act, 1977 is not relevant to proceedings in arbitration. Once section 67 of the THA Act is put out of the way the position as far as the High Court was concerned was that THA had waived the failure by Mvita to comply with the procedural requirements of Clause 67 of the Contract and from that perspective the Arbitrator would have jurisdiction to hear the dispute on the pleaded claims.

Although it is obvious to us as we have previously indicated that Kyando, J. did not deal with all aspects of objection to jurisdiction, we are of the considered view that THA had indeed, by conduct, waived objection to jurisdiction following Mvita's failure to comply with the procedural pre-conditions under Clause 67 to submission to Arbitration. In Mr. Lamb's letter dated 4 June 1997 to Mr. G. F. Hawker, the Arbitrator, he said:

> I have broad instructions to bring this matter to a conclusion expeditiously .... My clients are anxious to proceed and, indeed, a team from Dar es Salaam is arriving at the beginning of July .... We feel, with all due respect, that it is time for MVITA formally to plead its quantum claim. From that pleading and our response it should be possible to distill points of principle, the resolution of which will go a long way towards disposing of this matter.

With all respect to THA, we find it somewhat refractory for it to turn round to complain that the Arbitrator had no jurisdiction. It did

not say it was submitting to jurisdiction under protest or that it was reserving its right to raise objection to jurisdiction after an award. We take it therefore that Mr. Lamb, QC on behalf of THA, was by implication expressing willingness to participate in Arbitration when Mvita formally pleaded its quantum claim. The following passage from *Westminster Chemicals and Produce Ltd. v. Eichholz and Loeser* (4) at page 105, per Justice Devlin, is perhaps relevant:

> .... If there is an agreement and if one of the parties has studied before hand and thinks that the dispute is outside it, he can then go before the arbitrator, if he so wishes, and protest. If he protests against the jurisdiction of the arbitrator ... it is held that he can take part in the arbitration without losing his rights and what he is doing, in effect is that he is merely saying: "I will come before you, but I am not, by my conduct in coming before you and arguing the case, to be taken as agreeing to accept your award ....

All those fundamental doctrines flow from the principle, which I think is well established; that if a man does not protest, but if, as it is called, he submits to the jurisdiction of the arbitrator, he is then bound by the award.

Later at page 109 the Court said:

> The whole essence of the doctrine of this Court is that you must protest at once. If you take part in the arbitration you thereby, merely by taking part in it, *prima facie* make the agreement.

The agreement referred to here is the agreement to accept to be bound by the award.

It must be noted, however, as clarified by Mr. Lamb, QC for THA, that it was not its case that the Arbitrator had no jurisdiction at all. Indeed, THA could not in all sincerity advance such an argument. If we understand THA's stand correctly, it appears to us that THA is contending that matters of claim contained in the Re-Re-amended Points of Claim were not subject to arbitration first because requisite notice was not served under Clause 67 in respect of all the decisions

of the Engineer but only in respect of some of the decisions. Further that as regards the majority of the matters for which Mvita sought relief there was no reference at all to the Engineer for decision. We have already dealt with this complaint. Mvita did not dispute that there was non-compliance with Clause 67 regarding some of the matters taken to arbitration but claimed there had been waiver and or estoppel. Secondly, that Damage Elements 1 to 8 which contain a number of specific claims set out in Document "C3" did not meet threshold tests, that is to say that they were not time-barred under section 67 of the THA Act, 1977, that they complied with Clause 67 of the Contract; that they were referred under the terms of the Agreement to refer and that they had been properly pleaded. Unless they passed all those tests, then the Arbitrator had no jurisdiction.

Earlier in the judgment we disposed of the relevance of section 67 of the THA Act, 1977. So, the question whether the claims were time-barred under section 67 of the THA, 1977 is no longer an issue before us. The questions to explore are whether the claims were referred under the terms of the Agreement to Refer and had been pleaded.

We wish to make two general pronouncements. First, that objection to jurisdiction in respect of claims which had been made prior to the Third Interim Award and Kyando, J's ruling (of 4 June 1993) whether or not they complied with procedural requirements of Clause 67 of the Contract should be taken to have been waved. This is because there was no clear indication that participation in the arbitration was made without prejudice. Objection to jurisdiction had been made in a limited issue which did not encompass the objections which were made and which led to the fourth Interim Award and the subsequent Special Case Stated to the High Court. Secondly, certain claims or Damage elements were raised by Mvita after Kyando, J's Ruling. These included the Claim for Costs and for Compensation arising from Devaluation. We think THA was entitled to raise objection to jurisdiction of the Arbitrator on these later claims.

We think that once we take the view that THA's objection to jurisdiction regarding the "new" matters such as the claim for compensation resulting from devaluation and depreciation of the shilling was valid, we find no useful purpose to consider whether such claims had been properly pleaded. This time THA raised objection timely to the jurisdiction of the Arbitrator. Mvita had not complied with Clause 67 of the Contract regarding those "new" matters and the question of waiver on the part of THA could not be validly raised.

We do not accept the contention by Mvita that the opinion by Msumi, Principal Judge, conflicted with Kyando, J. We agree that Kyando, J. did not decide on all the issues of liability and that was what Msumi, P.J. said – "I am respectively of respondent's view that not all issues of liability were determined in that case (before Kyando, J.)" In that logic we find that there were no conflicting High Court decisions nor is *res judicata* a valid ground of complaint. To the extent that Kyando, J. ruled that the arbitrator should proceed to deal with quantum, that decision is intact. But the Arbitrator should deal with quantum to the extent only of the matters on which he had jurisdiction largely because THA had, as decided by this Court, waived its objection to jurisdiction. In other words, the Arbitrator had acquired jurisdiction because of the default on the part of THA.

But as regards the claims which were "new" and were pleaded by Mvita subsequent to the ruling by Kyando, J., and to which THA has timeously raised jurisdictional objection, we uphold the objection and the Arbitrator may not proceed to deal with any such claims.

It was indicated earlier in the judgment that THA had filed a Notice of Cross-Appeal containing five substantive grounds but at the hearing, the fourth ground was abandoned. Mr. Kabuta for THA argued the cross-appeal.

In the first ground of the cross-appeal the Principal Judge is criticized in giving the following opinion:

> As for the alternative argument of estoppel, the Court is of the opinion that this plea is sustainable against preliminary objection based on non-compliance of Clause 67 of the Contract and not against non-compliance of section 67.

THA thinks that the High Court should have held that:

(a) none of the matters relied upon by the appellant (Mvita) as founding the waiver/estoppel operated to circumvent the contractual requirements to refer disputes to the Engineer under Clause 67 of the Construction Contract;

(b) If there had been any such waiver or estoppel the Arbitrator in the exercise of his discretion had allowed the respondent to resile from it;

(c) the Court cannot substitute its opinion for that of the Arbitrator on a matter of discretion.

Mr. Nowrojee disputes that the Arbitrator had allowed THA to resile from general waiver or estoppel but had only allowed THA to resile in respect of Mkude's letter.

We think the High Court was correct in that opinion but as regards section 67 of the THA Act, we need not repeat our opinion that it was not relevant to the proceedings before the Arbitrator.

THA waived its objection to the non-compliance with Clause 67 of the Contract to the extent already explained earlier in this judgment. We uphold the view, however, that as a general rule the Court may not substitute its own opinion for that of the Arbitrator on a matter of discretion. Where discretion was not exercised judicially or was exercised wrongly the Court can only quash the opinion and direct the Arbitrator, where appropriate, to reconsider the matter in a judicious manner.

As regards the second ground in the cross-appeal the question of compensation for devaluation had not been decided by the Arbitrator. In any case, since it was one of the "new" claims which we considered should have complied, but did not comply, with Clause 67 of the Contract it is unnecessary for us to consider as an academic matter

whether or not the arbitrator could award compensation. The cases cited, that is to say, *National Bank of Commerce v. Perma Shoe Company* (5) and *Zuberi Agustino v. Anicet Mugabe* (6) are both authorities that compensation for devaluation is payable but these authorities are not helpful to either party in this appeal because of failure by Mvita to comply with the procedural pre-condition in Clause 67 of the Contract.

On the third ground in the cross-appeal, we uphold the High Court on the law regarding the award of simple and compound interest. It is left to the Arbitrator to decide whether he will allow simple or compound interest taking into account, among other things, Clause 60(10) of the Contract of Construction.

If the fifth ground of the cross appeal is a summing up of the first, second and third grounds in the cross-appeal we will say that in some instances, like in the case whether or not an arbitrator can assess and award simple or compound interest, it is legitimate for the arbitrator to take a decision and make an award. In all the claims which the Court considers were properly before the Arbitrator either because the procedural pre-requisites were followed or because the THA had not raised objection to jurisdiction, it is competent for the Arbitrator to adjudicate and give awards. All-in-all, the cross-appeal is dismissed with costs.

The Notice of Affirmation is made under Rule 87(1) of the Court Rules, 1979. That provision does not relate to Notice of an Affirmation. Rule 87(1) is on Notice of Cross-appeal. The relevant provision should have been Rule 93(1) which provides for Notice of Grounds for Affirmation of a decision of the High Court.

In a number of cases this Court has held that it must be moved under the correct enabling provision of the law otherwise a prayer or application is incompetent and will not be considered. In *National Bank of Commerce v. Sadrudin Meghji*, (7) an application for revision which cited the wrong provision of the law was dismissed for incompetence on the ground that the Court had not been properly

moved. That view of the Court was followed in several subsequent decisions of the Court like *Almas Iddies Mwinyi v. National Bank of Commerce and Another,* (8) and *Citibank Tanzania Ltd. v. Tanzania Telecommunication Co. Ltd., and 5 others*, (9). In this last cited case, the Court said:

> It hardly needs to be emphasized that in a notice of motion an applicant must state the specific provision of the law under which an applicant wants to move the Court to exercise its jurisdiction.

In most of those cases an application was dismissed because either that no enabling provision was cited or a wrong provision was cited. The principle is that the Court will not consider prayers like the ones in the Notice of Affirmation where the wrong provision of the Rule of the Court was cited. The Notice is therefore dismissed for incompetence.

We wish to observe also as hinted earlier that in fact there is apparent contradiction in the Notice of Affirmation. It reads:

> TAKE NOTICE that on the hearing of this appeal, the above named respondent will contend that the above mentioned decision ought to be varied in part to the extent and in the manner and on the grounds hereinafter set out namely.

The Notice shows dissatisfaction with parts of the judgment sought to be affirmed.

We wish to summarize that the appeal partly succeeds. For example, because of estoppel against the respondent, the Arbitrator had jurisdiction on claims which were made prior to objection to jurisdiction being raised. The cross-appeal and the Notice of Affirmation are dismissed with costs.

The appellant will get half the costs to be taxed and we certify for two counsel.

FADHILI GUMBO alias MALOTA AND THREE OTHERS *v.* REPUBLIC

COURT OF APPEAL OF TANZANIA AT DAR ES SALAAM

(Munuo, Nsekela, and Msoffe, JJA)

CRIMINAL APPEAL No. 52 OF 2003

(Appeal from the decision of the High Court of Tanzania at Dar es Salaam, Kimaro, J., dated 11 December 2002, in Criminal Sessions Case number 8 of 1998)

Evidence – Identification – Identification by name – Whether identification by name is satisfactory where the witness knows the accused persons.

Criminal Law – Murder – Malice aforethought – Death caused by an unlawful act in the furtherance of an intention to commit on offence – whether murder is committed – section 200(c) of the Penal Code, Chapter 16.

The accused were charged with and convicted of murder before the High Court, Dar es Salaam. The killing was committed in the course of committing a robbery. During their appeal they argued that it was important for the prosecution witnesses to describe how exactly they identified them, say by height, dresses, etc.

Held: (i) Where the witnesses were close to allow proper identification and were not contradicted that they knew the appellants before the date of the incident, their identification by name cannot be faulted;

(ii) If death is caused by an unlawful act in the furtherance of an intention to commit an offence, malice aforethought is deemed to be established in terms of section 200(c) of the Penal Code, Chapter 16.

Appeal dismissed

Cases referred to:

(1) *Raymond v. R.* [1994] T.L.R. 100

(2) *Mohamed Alhui v. Rex* (1942) 9 E.A.C.A. 72

(3) *Olenja v. R.* [1973] EA 546

(4) *Sentali Lemandwa v. R.* (1953) 20 E.A.C.A. 230

(5) *Manazo Mandundu and Another v. R.* [1990] T.L.R. 92

Statutory provisions referred to:

(1) Penal Code, Chpater 16, section 200(c)

Mr. Ndolezi for the Appelants

Ms. C.S. Maganga for the respondent

JUDGMENT OF THE COURT

(Dated 1 September 2005)

Msoffe, JA: On the night of 19 January 1997 PW1 Abdallah Ngeleza and PW2 Mwanahamisi Hashimu, a husband and a wife respectively, were at their house which is situated somewhere at Mvumi Village, Kimamba Division, Kilosa District, Morogoro Region. At around 10.00pm they were ambushed by armed bandits. The bandits were wielding a gun, machetes and iron bars. As the bandits broke into the house, PW1 attempted to confront and stop them but to no success. In the course of time he (PW1) decided to jump through a window and seek refuge at his father's house which was a short distance away. His father was Rashid Lekaningo, the deceased in this case. As he ran to his father's house some of the bandits followed and beat him. The deceased came out in an attempt at rescuing his son, PW1. The deceased asked the bandits if they wanted to kill PW1. Apparently the bandits were not happy with the question asked by the deceased whereupon they left PW1, set out on the deceased, beat him up with the use of iron bars and machetes and eventually shot him to death. As the bandits left PW1 and began the assault on the deceased this was the time when PW1 identified Shaha, Malota, Salehe and Majuto, the appellants in this case.