



Role of court of appeal of Tanzania in dispensing justice and its adherence to legal technicalities

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Abstract

Human beings in their co-existence in groups called societies have conflicting interests. Due to those conflicting interests and their resultant disputes, human societies have formed institutions to adjudicate upon disputes that are bound to occur. Those adjudicatory institutions are called courts, tribunals, councils and so forth. Their main function is to administer justice in line with the expectations of the members of a particular society. Those expectations are controlled by customs, material conditions and shared values. Thus, when courts or similar institutions decide disputes contrary to such expectations, “injustice” or “failure of justice” are said to have been occasioned. This paper is concerned with the way the Court of Appeal of Tanzania has been deciding cases. The Court has been blamed for being technical, that is, it has been strict in requiring compliance with procedural rules even if that would result in injustice. In short, the Court is blamed for not doing justice to the parties by not going to the merit of the case where by the pay too much attention on legal technicalities.

Keywords: Justice, legal technicalities, court of appeal

Introduction

The word justice means fairness, fair and just administration of law. This administration results what is commonly known as dispensation of justice. In every legal system, it is required to have specific machinery empowered by the law to dispense justice in the civil and criminal matters brought before it. The Judiciary has been the main organ for dispensing justice in the several jurisdictions in the world, the other one being tribunals that exercise quasi-judicial functions.

Since the dispensation of justice is crucial, it requires effective and efficient system that can make people satisfied by the entire process of administration of justice.

There are two common ways used to make the Judiciary effective and efficient in dispensing justice. Firstly, to ensure the independence of the Judiciary, so that judges and magistrates can work competently, ethically and impartially. Secondly, to set up judicial hierarchy in order to enable the people to seek justice in stage wise, that is, from lower courts to upper courts.

Taking the second aspect in Zanzibar jurisdiction, there is established court system under relevant laws of Zanzibar. In the present court system of Zanzibar, there are Primary Courts, District Courts, Regional Courts, High Court of Zanzibar and the Court of Appeal of Tanzania. In such court structure, the Court of Appeal of Tanzania is the highest court operating both in Mainland Tanzania and Zanzibar. It is the highest and last court in the process of justice dispensation in Tanzania Mainland and Zanzibar.

Being the highest court in the country, the Court of Appeal of Tanzania is expected to be the highest justice dispensing machinery. Any person who seeks justice before such court should realize that it is really the highest court. Therefore, this study will be conducted in order to examine the extent to which dispensation of justice by the Court of Appeal of Tanzania is effective in reaching substantive justice.

Background

Tanzania is a United Republic since 1964 where Tanganyika and Zanzibar united to form the Union

Government. At the time of union, the highest court was the East African Court of Appeal that was working as an appellate court in the entire East African region. The Court was under the umbrella of East African Community from 1967. When the East African Community collapsed in 1977, the East African Court of Appeal also demised. In 1979 through the Constitution of the union court which was intended to operate both Mainland Tanzania and Zanzibar.

The jurisdiction of the Court of Appeal of Tanzania on the part of Zanzibar is to hear and determine appeals for matters arising from the High Court of Zanzibar or Regional Courts with extended jurisdiction. It can also hear and determine applications and exercising powers of revision for matters arising from High Court of Zanzibar or Regional Courts with extended jurisdiction. The Court of Appeal of Tanzania sittings are presided over by three justice of appeal or five in case of full bench. In the simple and ordinary matters like applications, it presided over by one justice of appeal. Therefore, this is the court which is expected to deliver justice at maximum level something which is inquired into by this paper.

Research methodology

This study is qualitative because it shows the guiding principles on dispensation of justice by the Court of Appeal of Tanzania when sitting in Zanzibar. The guiding principles are found in the constitution, several pieces of legislation, judicial decisions and writings of different prominent legal authors. It also assessed the views of respondents as collected using relevant methods as discussed herein.

1. Principles Applicable in the Dispensation of Justice

The principles which courts are required to apply when dispensing justice. On the side of literatures, the following principles were found in article titled *My Dream to an Ideal Justice Dispensation System* by Justice Y.K. Sabharwal, Chief Justice of India:

Speedy and Affordable Quality Justice: When we talk of 'delay' in the context of justice, it denotes the time consumed in the disposal of case, in excess of the time within which a case can be reasonably expected to be decided by the Court. An expected life span of a case is an inherent part of the system. No one expects a case to be decided overnight. However, difficulty arises when the actual time taken for disposal of the case far exceeds its expected life span and that is when we say there is delay in dispensation of justice.

Delay in disposal of cases not only creates disillusionment amongst the litigants, but also undermines the very capability of the system to impart justice in an efficient and effective manner. Long delay also has the effect of defeating justice in quite a number of cases. The problem is much more acute in criminal cases, as compared to civil cases. Speedy trial of a criminal case considered to be an essential feature of right of a fair trial has remained a distant reality. A procedure which does not provide trial and disposal within a reasonable period cannot be said to be just, fair and reasonable.

If the accused is acquitted after such long delay one can imagine the unnecessary suffering he was subjected to. Many times such inordinate delay contributes to acquittal of guilty persons either because of fading memory or death of witnesses or the evidence is lost or the witnesses do not come forward to give true evidence due to threats, inducement or sympathy. Whatever may be the reason, it is justice that becomes a casualty.

It is high time we make a scientific and rational analysis of the factors behind accumulation of arrears and devise specific plan to at least bring them within acceptable limit, within a reasonable timeframe. The real problem is that the institution of cases in the Courts far exceeds their disposal. Though there is a considerable increase in the disposal of cases in various courts, the institution has increased more rapidly. One of the main solutions is increasing the strength of judges in various courts.

The existing strength is inadequate even to dispose of the annual institution. The backlog cannot be wiped out without additional strength, particularly when the institution is likely to increase and not come down in coming years. Other measures necessary are - augmenting of infrastructure, introducing shift systems as an experiment in some Magisterial Courts, granting at least limited financial autonomy to the judiciary, concept of Judicial Impact Assessment, introducing Case Management and Court Management, classification and assignment of cases in a scientific manner, more thrust on ADR Methods including LokAdalats, and modernization & computerization of courts.

Video conferencing is a convenient, secure and less expensive option, for recording evidence of the witnesses who are not local residents or who are afraid of giving evidence in open court, particularly in trial of gangsters and hardened criminals. This is in addition to savings of time and expenses of traveling. Recently, Code of Criminal Procedure has been amended in some States to allow use of Video Conferencing for the purpose of giving remand of accused persons thereby eliminating need for their physical presence before the Magistrate. We need to make extensive use of this facility.

Legal Assistance: A large majority of people still live below the poverty line and are hardly able to afford two square

meals and a shelter on their head. It would be unrealistic to expect them to afford the services of a competent advocate. Efforts have been made by governments from time to time to address the issue of granting legal aid to the poor but, enough has not been done and the system requires further augmentation and strengthening, particularly on giving such people services of good and competent lawyers and not just lawyers.

Unless the advocates provided (by legal services authority) are competent and hardworking, no useful purpose is served by making their services available to the poor litigants. Legal Service Authorities have to take suitable steps to ensure that they empanel only reputed counsel of proven ability and integrity, in whom the poor litigants may repose trust. There is reluctance on the part of senior counsel to come forward, to provide legal aid to the needy persons. They have to be persuaded to acknowledge their social obligations and provide their service to the weaker sections, without expecting any remuneration either from them or from the Legal Service Authorities.

It must nevertheless pay reasonable compensation, so as to attract talented and reasonably experienced advocates to legal aid panels. Legal services authorities should ensure that such panels are manned only by service oriented advocates and are not used for the purpose of doling out favors to the kiths and kins of the powers that be or to advocates who do not want to work hard and join such panels merely for the purpose of earning their livelihood.

Independent Judiciary: An independent judiciary is the backbone of a good judicial governance. Rule of Law and judicial review are the basic features of Indian constitution and independence of judiciary is an essential attribute of Rule of Law. Administration of justice requires judiciary committed to the constitution and law of the land. Judiciary must, therefore, be free from pressures or influence from any quarter. The oath which Judge takes before he enters upon his office, requires him to perform the duties of his office without fear or favour, affection or ill-will. This solemn affirmation is the bedrock of the faith of litigants in the judiciary. The ultimate saviour of an independent judiciary is a brave and fearless judge who truthfully discharges the duties of his office without in any manner being influenced from any quarter.

A judiciary manned by judges with vision, wisdom and compassion can do more justice and the welfare to the underprivileged than all the laws and policies we can think of. Sir Harry Gibbs, Chief Justice of Australia defined an independent judge as: "That Judge who has nothing to hope for, nothing to fear, in respect of anything done in the performance of his judicial functions, that Judge who is able successfully to resist pressures of any kind." The concept of judicial independence, takes within its sweep, independent from any pressure or prejudice. It has many dimensions including fearlessness of other centres, whether economic or political and freedom from prejudice acquired and nourished by the class by which the judge belongs.

The judiciary stands between the citizen and the state as a bulwark against executive pressure, excesses and misuse of power by the executive. It is, therefore, absolutely essential that it should be free from executive pressure or influence and our constitution contains elaborate provisions to secure this requirement.

Ethics and Honesty in Governance: Integrity, impartiality and fairness of judiciary are the main sources of public

acceptance of its authority. The very existence of judicial institutions depends upon the judges, who constitute the system. They should never forget that they hold the office of a judge as a public trust and therefore, should continuously strive to retain the confidence reposed in them by the people. No system of justice can rise above the ethics of those who administer it. Lord Denning has stated "when a judge sits to try the case he himself is on trial before his fellow countrymen. It is on his behaviour that they will form their opinion of our system of justice." Judges do not have the power of sword or purse. They only have the moral authority based upon the confidence of the public in them and so long as they maintain that authority their orders will be respected and complied. It is necessary to maintain highest standards of integrity, rectitude and impartiality, so as to maintain that confidence.

A Judge should be conscientious, just, impartial, indifferent to private, political or partisan influences, indifferent to public praise and fearless of public clamour. He is expected to administer justice according to law and not allow other affairs of his private interest to interfere with the due performance of his duty, nor should he administer the office for the purpose of advancing his personal aims or increasing his personal popularity. Our courts have, to a very large extent, justified the confidence reposed in them by the common man. Unlike members of other services, only occasionally complaints are heard against the members of judiciary.

2. Application of legal technicalities by the court of appeal of Tanzania

The Court of Appeal of Tanzania for long time has been blamed by those for burying substantive justice in the course of determining appeals or applications brought before it. Being the highest fountain of justice in the country, the Court is always expected it would decide the disputes substantially and in a just and fair manner. Contrary to that expectation, the Court of Appeal keeps much attention on procedural regularities and other legal technicalities. This tendency is contributed by the conservative nature of the Court and its practice of strictly adhering to principles of law regardless of any results it could produce.

It has been observed that the Court decides cases on legal technicalities even if the subject matter of a particular case involves millions of shillings. The Court's practice to follow strictly the procedural provisions which in most cases lead to the defeat of substantive justice is more serious in the Court of Appeal than in other courts in Zanzibar court system. Article 107A (2) (e) of the Constitution of the United Republic of Tanzania, 1977 (as amended) call for courts while exercising their function of dispensing justice to do so without being tied up with technical provisions. However, the Court of Appeal still decides cases on technical grounds contrary to that constitutional requirement. For example, in the case of *Director of Public Prosecutions v Said Abdalla Kinyanyite and 11 Others*, the appeal was lodged before the Court of Appeal of Tanzania at Zanzibar. When the appeal was called for hearing, the advocate of appellants raised concern that the first appellant had never entered appearance before the trial court something that causes doubt on whether it is possible for him to be respondent in the appeal. The prosecution side (appellant) prayed the court to remove him from the list of respondents. The Court refused on the ground that he was

named as the first respondent hence the whole appeal is incompetent. Thus, the appeal was strike out.

Likewise, in the case of *Director of Public Prosecutions v Farid Had Ahmed and 9 other*, the appeal was called on for hearing before the Court of Appeal of Tanzania at Zanzibar. Before the hearing to commence, the advocate for respondent raised Preliminary Objection that the Notice of Appeal is defective as it contains two different dates between the preliminary part and the content part. The appellants side replied that it is a minor defect as there are other documents supporting the appeal showing the correct date hence they can help to cure the defect.

The Court rejected the concern of the appellants and decided to strike out the appeal on the ground that an appeal has been lodged by defective Notice of Appeal hence the entire appeal is incompetent. Therefore, the main problem is that, the highest court of justice in the country is not mainly concerned with substantive justice (merit of the cases) but dwells much on legal technicalities which results to large number of appeals and applications before it to be summarily struck out without considering their merits. Some of the reasons for application of legal technicalities re as follows

Legal technicalities are the results of interpretation of statute and legal procedure that legal profession involves interpretation of statutes and in interpretation of statutes people may come out with conflicting views. So, every word in a statute should be clearly defined to avoid these conflicting views. Legal technicalities are a result of the way laws are drafted. The way the laws are drafted allows technicalities and legal technicalities depend on the perspective of a judge, a thing can be technical to one judge but not the other.

Legal technicalities are caused by errors in procedures, uncertainty or absurdity in law, loopholes in laws and failure of the court to comply with Article 107A of the Constitution. They are also a result of complex procedures on extension of time, statutes of limitations, rules of appellate procedures, stay of proceedings, conflicts of rules of procedures as well as professional misconduct. Legal technicalities are caused by ambiguity in facts of the case and interpretation of laws. They are the results of lack of awareness of legal techniques and procedures to laymen. Few justices of appeal compared to appeals lodged to the court also is among the complained factors. For example one of the respondents whom I have interviewed says that:

"It is true that there are few Justices of Appeal not only in The Court of Appeal of Tanzania but even in lower courts. This is due to insufficiency budget of the government as there are many experts who can do the work but are unemployed. It is a normal psychology when judges are overloaded may embark on technicalities rather than going to the merit of the case.

3. Legal Effect of Applying Legal Technicalities in Dispensation of Justice

It is found that they were of the view that legal technicalities bar justice. They cause justice not to be done hence people to lose their rights unjustly. Because most of the cases are being dismissed at the very early stage and some of the struck out which make the parties to come next year which make the justice to be delay and justice delay is justice denied.

Suggestions

1. Adherence to the Constitution on Avoidance of Legal Technicalities

The Court of Appeal of Tanzania should comply with constitutional requirements and guidelines while dispensing justice. The Constitution requires all courts in Tanzania to do justice without tying to legal technicalities. There should be focus to dispensation of justice and not undue technicalities. The technicalities can only be taken into account when they go to the fundament of the case in such a way that without considering them, there will be miscarriage of justice.

2. Consideration of Overriding Objectives

The Appellate Jurisdiction Act was amended in 2018 where it has now included overriding objectives. The overriding objectives is for the Court of Appeal to determine the finality of cases, to direct itself to substantive justice, to avoid legal technicalities and to make sure that it does not consider legal technicalities in its decisions. Therefore, the Court of Appeal of Tanzania should determine cases in accordance with such objectives and avoiding dealing with cases simply without going to the merits of such cases.

3. Parties to Cases before Court of Appeal to Consider Merit of Cases

It has been a common practice in Zanzibar that when the Court of Appeal of Tanzania sits for hearing of appeals, the parties raise Preliminary Objections unnecessarily to prevent the Court from going to the merit of appeals. When such parties are directed to overriding objectives, they still continue convincing the Court to consider the Objections as they touch the heart of the case. This tendency should be abolished and the parties to go to the merit of each case in order to be determined properly.

4. Court of Appeal to Communicate its Decisions and Actions to Zanzibar Specifically

There are several decisions of the Court of Appeal of Tanzania that guide issues of legal technicalities but they are not known in Zanzibar. The decisions are not well communicated in such a way that they are not known and their legal effects. Also, the governing laws of the Court of Appeal of Tanzania are sometimes amended but Zanzibar becomes unaware of such amendments. This causes difficulty in the application of such laws in Zanzibar side. For example; many lawyers in Zanzibar are not aware of overriding objectives of the Court of Appeal of Tanzania.

5. Introduction of Supreme Court in Tanzania

Because there are still some challenges relating to dispensation of justice by the Court of Appeal of Tanzania, it is now necessary to establish the Supreme Court of Tanzania which shall be above the Court of Appeal. The Supreme Court will help in reducing the gaps caused by the Court of Appeal in the dispensation of justice.

Conclusion

This paper made analysis of the Court of Appeal of Tanzania and application of legal technicalities in the dispensation of justice, taking Zanzibar as case study. The study examined various case laws decided by the Court of Appeal of Tanzania while sitting in Zanzibar in order to see whether the Court of Appeal applies legal technicalities or it

directs itself to substantive justice. The study started by examining constitutional and statutory provisions that guide the Court of Appeal and other courts while dispensing justice where it was noted that the Constitution of The United Republic of Tanzania and some other legal instruments require courts in Tanzania to do justice without tying themselves to legal technicalities.

The paper has found that the Court of Appeal of Tanzania is still binding itself to legal technicalities in spite of the Constitution and other laws to require it to do away from such technicalities and to direct itself to substantive justice. Various cases are not ended at their merits instead they are strikeout in the preliminary stages without disposing them properly something that causes jurisprudence to grow slowly following low contribution of the Court of Appeal of Tanzania. The tendency of the Court of Appeal of Tanzania to prefer legal technicalities causes parties to appeals and applications before it to rely much on such technicalities as well.

The paper has found further that for the Court of Appeal to rely on legal technicalities in the dispensation of justice results into negative effects in the administration of justice whereby such Court does not play its intended role. It causes many legal issues to remain unanswered hence the members of society to believe that the Court of Appeal is not proper court in the country. These findings have caused the researcher to give several recommendations with the view of improving the delivery of services by the Court of Appeal of Tanzania while sitting in Zanzibar and elsewhere in Tanzania.

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