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## **PART ONE**

### **1.0 INTRODUCTION OF THE COURT SYSTEM IN ZANZIBAR**

#### **1.1 Court System in Zanzibar:**

Court system “is the arrangement of courts and how they work in the name of the state, it administer justice and constitute the judicial branch, Also it provides mechanism for the resolution of disputes.”<sup>1</sup> The court system of Zanzibar applies the same as the courts of Tanzania mainland, as “Zanzibar is an integral part of the united Republic of Tanzania.”<sup>2</sup>

Court system in Zanzibar applies the same as the courts of Tanzania except to the Kadhi’s courts which deals with “matters of Islamic law, interpretation of Zanzibar constitution and matters enacted by the House of Representatives.”<sup>3</sup>, and court of Appeal of Tanzania as the top or final court of appeal to both, Tanzania mainland and Zanzibar.

Under the Union Constitution, the judiciary is not a union matter within the union between former Tanganyika and Zanzibar. Therefore, each part of the Union has its own judicial system, the only Union Court is the Court of appeal. This Court was established in 1979 after the collapse of East African Community (EAC) 1977 which resulted in the winding up of the activities of the former East African Court of Appeal (EACA).<sup>4</sup>

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<sup>1</sup> <http://www.thefreedictionary.com>.01thJune,2016,Wednesday,09:11am.

<sup>2</sup> Article 1 of the Constitution of Zanzibar 1984.

<sup>3</sup> Article 99(1) (a), (b) and (c) of the constitution of Zanzibar.

<sup>4</sup> Shivji I.G. et al, (2004), Constitution and legal system of Tanzania, Dar es salaam: Mkuki na Nyota Publishers. page 221.

## **PART TWO**

### **2.0 HISTORICAL BACKGROUND OF COURT SYSTEM IN ZANZIBAR**

Court system of Zanzibar officially started in 1964. After the 1964 revolution of Zanzibar, Zanzibar government abolished the court system which was in place, which was a two tier high system.<sup>5</sup>

The two tier courts included;

- (i) His highness high court, which was the subject of sultan.
- (ii) Her majesty High court, which dealt with British subjects.

This two tier court system were abolished and there was establishment of a single uniform high court of Zanzibar, which is the present high court called High court of Zanzibar Established under the constitution of Zanzibar.

“----There shall be a High court of Zanzibar which shall be a superior court of record and which shall have unlimited Jurisdiction on criminal and civil cases -----.”<sup>6</sup>

#### **2.1 Subordinate Courts in Zanzibar**

Before the Revolution of Zanzibar of 1964, there were subordinate courts, which were abolished immediately after the Revolution and there was establishment of new subordinate courts called people's court of Zanzibar (Mahakama za Wananchi) in Swahili.<sup>7</sup>

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<sup>5</sup>[http:// www.judiciaryzanzibar.com](http://www.judiciaryzanzibar.com).01thjune2016,Wednesday,

<sup>6</sup> Article 93(1) of the constitution of Zanzibar.

<sup>7</sup>Nyanduga.B.T.&Manning.C.(2006). Guide to Tanzania legal system and legal research, New York University school of law Press.

These subordinate courts existed till 1985, which were abolished and the present subordinate courts put in place are;

- (i) Primary court
- (ii) Kadhi's courts
- (iii) Kadhi's Appeal courts
- (iv) Regional court.

As established under the Magistrate Court Act of 1985.

## **2.2 The Structure of Court System of Zanzibar**

The structure of the Courts of Zanzibar according to the hierarchy, is comprised of the Court of Appeal of Tanzania as established under the constitution of the United Republic of Tanzania of 1977 as amended.<sup>8</sup>, which has appellant jurisdiction of all matters resulting from subordinate court, with some exception as follows,<sup>9</sup>

- (i) Matters of Islamic law.
- (ii) Interpretation of the constitution of Zanzibar.
- (iii) Any other law enacted by the House of Representatives.

It is followed by the high court as the highest court in Zanzibar judicial system, established under Article 93(1) of the constitution of Zanzibar of 1984 and shall be specified in the laws applicable

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<sup>8</sup> Cap 2 of the laws of Tanzania Article 117(1)

<sup>9</sup> Article 99(1), *ibid*.

in Zanzibar<sup>10</sup>, followed by subordinate Courts which include Kadhi's court, Primary Courts, and the Regional Court.

Subordinate Courts are established by the Kadhi's Court Act of 1985 and Magistrate Court Act of 1985. Subordinate Courts like Primary Court, Regional Court, and district Court are established under the Constitution of Zanzibar, for example Article 3, states

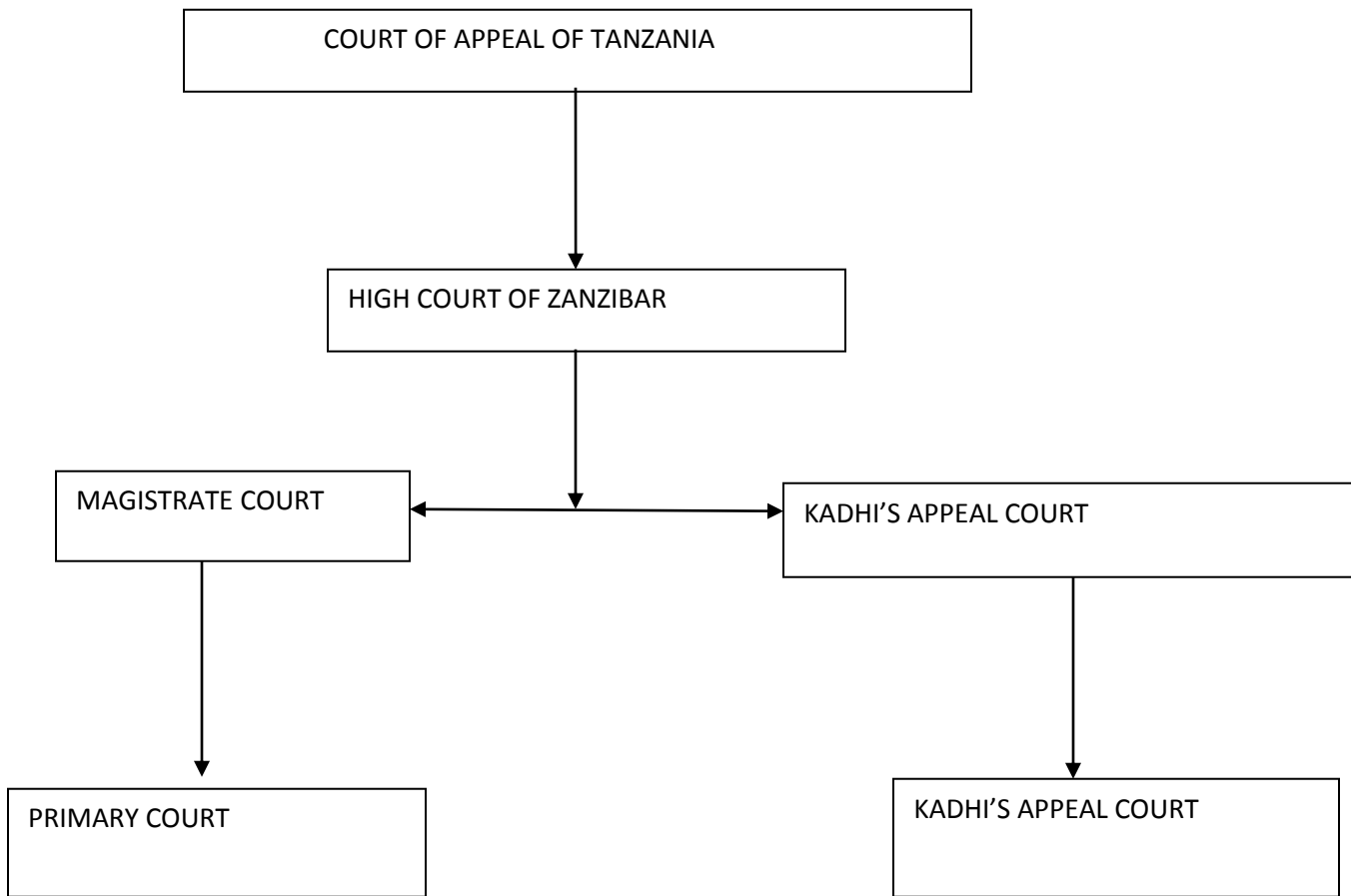
“--- there are hereby established in every district primary court which shall be subject to the provisions of any law for the time being in force, exercise jurisdiction within the respective districts in which they are established---.”<sup>11</sup>

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<sup>10</sup> Article 115(1), *ibid*.

<sup>11</sup> Article 3 of the Constitution of Zanzibar of 1984

### 2.3 The Structure of the Judiciary in Zanzibar.



Therefore, Zanzibar Court system begins with the Court of Appeal of Tanzania, which is the highest Court of Tanzania. It determines all appeals from Tanzania mainland and Zanzibar, except with the matters dealt by Kadhi's courts, matters concerning setting the interpretation of the Constitution of Zanzibar and any other law enacted by House of Representatives as provided under the constitution of the United Republic of Tanzania Article 117.<sup>12</sup>

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<sup>12</sup> Shivji I.G et al, (2004), constitution and legal system of Tanzania. Dar es salaam: Mkuki na nyota publishers.

#### **2.4 General Roles of Courts in Zanzibar.**

- To interpret or make interpretation of law
- Setting disputes among people and any opponent parties
- Administering Justice by applying laws accordingly
- Dispensation of Justice in accordance with the Country's law
- To decide in civil as well as criminal cases
- Upholding constitution principles
- Guarantee of security of the Public and protection of individual rights.



## **PART THREE**

### **3.0 THE COURTS**

#### **3.1 Primary Court in Zanzibar:**

Primary Courts are established in every district and have jurisdiction in the Court in which they are established. They are the lowest Courts in the judicial hierarchy established under magistrate Court Act. In criminal matters, the primary Court has jurisdiction to try certain specified offences. The primary court magistrates must be holders of certificate in law or equivalent qualification and are appointed by the judicial service commission.<sup>13</sup>

Primary court magistrates are appointed by judicial service commission and a person shall qualify to be appointed as a primary court magistrate if he holds a certificate in law or any other equivalent certificate recognized as such.

In proceeding conducted by primary courts there are two assessors and their role is to give opinion over the case. Their opinion is binding to the magistrate.<sup>14</sup> All matters in the primary court including a finding in any issue, question of adjourning the hearing, an application for bail, a question of guilt or innocence of any accused person, the determination of sentence, the assessment of any monetary award and all questions and issues whatsoever shall be decided by the votes of the majority.<sup>15</sup>

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<sup>13</sup> Ibid, page 232

<sup>14</sup> Section 7(1) of the Magistrate Court Act Of 1985.

<sup>15</sup> Section 7(2) *ibid*.

### **3.1.1 Jurisdiction of Primary Court.**

The geographical jurisdiction of the primary court covers the district in which the court is located. It is the court of first instance in matrimonial, inheritance and civil matters which rises out of customs. The primary court has jurisdiction in civil and criminal matters.<sup>16</sup>

Its jurisdiction in criminal matters:

To impose a sentence of imprisonment not exceeding one year or to impose a fine not exceeding two thousand shilling. To impose corporal punishment not exceeding six strokes or to impose both a fine and corporal punishment. Also to impose a restriction order for a convict to be at one's home area and to engage oneself in development project and other agriculture activities for a period not exceeding sixty days, if one fails to do so shall be liable for imprisonment for a period not exceeding 60 days.<sup>17</sup>

Its jurisdiction in civil matters;

In civil matters the Primary Court deals with proceedings whose subject matters shall be of any amount not exceeding Tsh 1,000,000/= in case of movable property and 5,000,000/= in case of immovable property.<sup>18</sup> Also the primary court may award any amount claimed, award compensation, order the restitution of any property, make order in nature of any injunction both mandatory and prohibitive, order the specific performance of any contract and make any other order which the Justice of the case may require.<sup>19</sup>

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<sup>16</sup> Shivji I.G. The constitution and legal system of Tanzania, Dar es salaam: Mkuki na Nyota Publishers. page 232.

<sup>17</sup> Magistrate court act of 1985.

<sup>18</sup> Shivji I.G. The Constitution and Legal system of Tanzania, Dar es salaam: Mkuki na Nyota Publishers. page 232.

<sup>19</sup> Ibid.

### **3.1.2 Language Used.**

The language used in primary court is Kiswahili.<sup>20</sup> Which is the language records and also the language of courts proceedings.

### **3.1.3 Representation in Primary Court.**

The advocates and state attorney are not supposed to appear or act for any party before a primary court but advocates may appear on behalf of the parties.<sup>21</sup>

### **3.1.4 Appeals.**

All appeals from Primary Court are heard by District court to which primary court is found.<sup>22</sup>

## **3.2 Kadhi's Court.**

Kadhi's courts are the courts in the Zanzibar court system which try cases over matters of inheritance, Islamic families and succession for Muslims. These are the lowest courts in Zanzibar which have adjudicate all Islamic family matters such as divorce distribution of matrimonial assets, inheritance but only with Muslim family.

In Zanzibar the Kadhi's court is established under the Kadhi's court Act of 1985 which came into operation from 12<sup>th</sup> January 1985. According to section 6 of the Act, the Kadhi's courts have jurisdiction in the determination question of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion.

### **3.2.1 Origin of Kadhi's court in Zanzibar**

Interactions among members of a community with outsiders, among other factors, have often influenced the nature, form and kind of dispute settlement mechanism and institutions

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<sup>20</sup> Shivji I.G et al, Constitution and legal system of Tanzania, Dar es salaam: Mkuki na Nyota Publishers. page 232.

<sup>21</sup>Ibid

<sup>22</sup> Section 13(1) of the Magistrates' court Act of 1986.

established. Although there is comparatively little recorded history on the evolution of communities in Zanzibar, it has been noted that the earlier inhabitant of the Island of Zanzibar were a Bantu- speaking people of the Hamidu ethic group. These invaded earlier intruders on the Island.<sup>23</sup> Apart from the Bantu speaking the other earliest known invaders along the coast were Assyrians and Sumerians from Iraq.

The Arabs later ventured out to sail the seas and fortunes and landed in Zanzibar after the Assyrians and Sumerians. When they landed to Zanzibar the Arabs spread their culture, one among them was Islamic Religion. Many of the inhabitants of the island adopted the religion and became Muslims. At the beginning before the influence of foreign traders the dispute settlement mechanism was guided by an informal traditional adjudication process which applied customary law. Later after the influence of foreign traders.<sup>24</sup> The Portuguese came they wanted to spread the religion of Christianity but they were unsuccessful because the Islamic religion was already spread and was practiced at that time. It is mainly due to the influence of Islam by the early Arab traders that informal Muslim Religious court were established along the East Africa coast by the advent of British colonial Rule.<sup>25</sup>

During the British colonial era, there was parallel court system where Islamic law was applied in tandem with the common law for different set of target groups. On one hand the king had authority to legislate for the British subjects, on the Isles via the order in council of 1884 and legislative enactments. The sultan on the other hand controlled his subject. British citizens appeared in the British courts where common law applied. Local folks appeared before the court of the Sultan where the law applicable was Islamic law and customary law as provided by

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<sup>23</sup> Grayi J, (1962) History of Zanzibar from the middle ages to 1856, London: Oxford University Press. page 9-10

<sup>24</sup> Majamba H.L. (2007). Perspective on the Kadhi's court in Zanzibar. Dar es salaam University Press. page 3

<sup>25</sup> Ibid, page 4

statute. This dual system was maintained until 1963 when it was terminated with the coming into force of the 1963 constitution and the court Decrees of the same year. In the changes that followed through the development of the legal history of Zanzibar, The Kadhi's court system was retained.<sup>26</sup>

If a person is not Satisfied by the decision of the Kadhi's court he/she can appeal to Kadhi's Appeal Court.

### **3.2.2 Persons Appointed to Work in Kadhi's Office.**

Senior Kadhi's are appointed by the judicial service commission and they have the Jurisdiction on Appeals from Kadhi's court.<sup>27</sup>

#### **3.2.2.1 Chief Kadhi's**

Chief Kadhi's is appointed by the President of Zanzibar.<sup>28</sup>

Qualification for one to be a chief Kadhi's

Section 4 (3) of the Kadhi's Court Act, provides for such qualification as follows;

“A person shall be qualified to be appointed to hold or to act in the office of chief Kadhi's if, and shall not be so qualified unless;

- a) He professes and follows the Muslim Religion
- b) He possesses such knowledge of the Muslim law which in the opinion of the President is qualified to be appointed as such.

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<sup>26</sup> The Kadhi's court system was not mentioned in the 1969 peoples court No 11 of 1969, but the court nevertheless proceeded to be in place, the “oversight” was rectified by the 1975 decree No 6 of 1975.

<sup>27</sup> Section 10 of Kadhi's court Act of 1985.

<sup>28</sup> Ibid.

### **3.2.2.2Kadhi**

Means a person who is appointed to act in the office of Kadhi, Kadhi's are always not less than 10 and not more than 15 in number and they are appointed by Judicial service commission in consultation with the chief Kadhi's.<sup>29</sup>

Qualification to be appointed as a Kadhi

Section (3) of Kadhi's court Act

“A person shall not be qualified to be appointed to hold or to act in the office of Kadhi unless;

- a) He professes and follow the Muslim; and
- b) He possesses such knowledge of the Muslim law applicable to any sector opinion of the commission to be a Kadhi's.
- c) He possesses such knowledge of the Muslim law applicable to any sector opinion of the commission to be a Kadhi.

The provision means that a person shall be Muslim and have Islamic knowledge to such an extent that can be able to solve any Islamic matter brought before him in Kadhi's court.

### **3.2.2.3 Jurisdiction of Kadhi's court in Zanzibar**

The jurisdiction of the Kadhi's court in Zanzibar is limited to family and personal status matters.

As in other Muslim populated countries, it is not the whole corpus of Islamic law that is applicable in Zanzibar. It is only under the constitution of Zanzibar, the Kadhi's court Act and other relevant and Applicable enactments on the subject.<sup>30</sup>, example of such legislation include

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<sup>29</sup> Shivji I.G. et al. (2004). Constitution and legal system of Tanzania, Dar es salaam: Mkuki na Nyota Publishers. Page 233.

<sup>30</sup> Majamba H.L. (2007). Perspective on the Kadhi's court of Zanzibar, Dar es salaam University Press. page 6

the commissioner for the Administration of trust property Decree No. 5 of 1980, the succession Decree, cap 21 and the Marriage and Divorce ( Muslim) Decree (cap 91).

The absence of security at the Kadhi's court is noticeable. This situation puts the court personal especially the Kadhi's and document at a great risk. The security situation is slightly better at the high court where the chief Kadhi's office is located.

The court proceedings are not open to the public. The official language in the court is Kiswahili.<sup>31</sup>

It is common to come across the judgment of the court written in Arabic script and cases are heard and determined in the poorly furnished chambers of the Kadhi's. In some cases, people summoned by the Kadhi's court blatantly refuse to sign the summons and at times even refuse to show up in court. This is due to the police forces corruption and political interferences among parties' line.<sup>32</sup>

### Protection of Kadhi's

The Kadhi's are protected by law from being sued in any of act ordered to be done in discharge of his judicial duty if he acts in good faith or believed in himself to have jurisdiction to do or to order the act complained.<sup>33</sup>

### **3.3 Kadhi's Court of Appeal**

The main role of the Kadhi's Appeal court of Zanzibar is to hear all appeals from the Kadhi's court which adjudicates on Islamic law. The Kadhi's Appeal's court has no original jurisdiction but appellant Jurisdiction for the decision of the Kadhi's court. Appeals from Chief Kadhi's

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<sup>31</sup> Majamba H.I. (2007). Perspective of Kadhi's Court.Dar es salaam: University of Dar es salaam Press. Page 8.

<sup>32</sup> Ibid.

<sup>33</sup> Section 18(1) of the Kadhi's court Act 1985.

court ( Kadhi's Appeal court) go to the high court of Zanzibar which is the highest institution to Appeal to as far as issues handled by the Kadhi's court are concerned.<sup>34</sup>

Each of Kadhi's court shall be a court subordinate to the high court and shall be duly constituted when held by the chief Kadhi, senior Kadhi or Kadhi. This provision explains about how the Kadhi's court of appeal, is subordinate to high court and the decision of the high court of Zanzibar are binding to the Kadhi's court of appeal.<sup>35</sup>

The decision from the court of appeal of United Republic of Tanzania are not binding to the Kadhi's court of appeal, this is because the court of appeal of Tanzania has no jurisdiction to hear any matter relating to the Kadhi's court of Zanzibar.<sup>36</sup>

### **3.4 Regional Court**

This court is established in every region and has jurisdiction over the area as prescribed by the chief justice in the order establishing it. A regional magistrate court has supervisory power over both district and primary court. The court may call for any record from a primary or district court and examine the same to satisfy itself of the legality and appropriateness of the decision made by the lower courts.

He /she must have a degree in law and must have experience of not less than three years.

The regional magistrate court also has criminal jurisdiction and its powers to impose sentence of imprisonment is limited to seven years.

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<sup>34</sup> Section 6(2) (I) of the Kadhi's court Act.1985.

<sup>35</sup> Ibid.

<sup>36</sup> Article 99(1) of the Constitution of the United Republic of Tanzania of 1977.



A regional magistrate court hears and determines appeals from district courts. Regional magistrate is also a chairperson of the juvenile<sup>37</sup> the decision of the high court of Zanzibar are bind to the Kadhi's court of appeal.

The decision from the court of appeal of United Republic of Tanzania are not binding to the Kadhi's court of appeal, this is because the court of appeal of Tanzania has no jurisdiction to hear any matter relating to the Kadhi's court in Zanzibar.<sup>38</sup>

### **3.5 High Court of Zanzibar**

The High Court of Zanzibar is the highest court in Zanzibar and matters from the court are referred to the Court of appeal of Tanzania if one is aggrieved with its decision. Matters concerning the Islamic are however not referred to the court of appeal of Tanzania like other matters. Such matters are handled by Kadhi's court and if there are further claims, the matters then move to the high court where the decision of the high court is final to the Kadhi's.<sup>39</sup>

### **3.5 Court of Appeal of Tanzania**

The court of appeal of the United Republic of Tanzania was established by the constitution under article 117(1).

Traditionally there has been seven judges of appeal. Appeals are heard and determined by the beach of three judges in special cases, the chief justice may order a matter to be heard by five

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<sup>37</sup> Shivji I.G. (2004). The constitution and legal system of Tanzania, Dar es salaam: Mkuki na Nyota Publishers. page 233.

<sup>38</sup> Article 99(1) (b) The constitution of Zanzibar of 1984.

<sup>39</sup> Section 6(2) of the Kadhi's court act of 1985.

judges and occasionally even seven judges.<sup>40</sup> A bench of seven judges has to sit in a matter which involves deciding whether the court's own previous decision was correct.

The head of the court of appeal is the chief justice. Also the chief justice is the head of judiciary, He is appointed by the President and other justice of appeal are also appointed by the President with consultation of the chief justice. The minimum qualifications for the appointment of a justice of appeal are the same as those for high court judges. The retired age of the judges of court of appeal is 65 years.

#### Function of the court of appeal

- i. To hear and determine all appeals arising from the high court.
- ii. Hear and determine appeals from the high court of Zanzibar, However, according to Zanzibar constitution.<sup>41</sup> The court of appeal has no jurisdiction to hear appeals from Zanzibar involving matters
  - (i) Interpretation of the constitution of Zanzibar
  - (ii) Islamic matters arising from Kadhi's court
  - (iii) Any matter prescribed in the Zanzibar constitution of law passed by the house of representative.

However, the Court of Appeal is not allowed to deal with matter relating to a dispute between the government of the united republic of Tanzania and the revolutionary government of Zanzibar, according to Article 117(2) matters of this nature handled by a special constitutional court.

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<sup>40</sup> Section 5(2) of Appellant Jurisdiction Act.

<sup>41</sup> Article 99(1) of the Constitution of Zanzibar of 1984.

## **PART FOUR**

### **4.0 COMPARISON BETWEEN COURT SYSTEM OF ZANZIBAR AND MAINLAND TANZANIA**

- In both parts of the union, subordinate courts are bound by the decision of a higher courts.
- Both share the Court of Appeal of Tanzania.

#### **4.1 Challenges Facing the Court System in Zanzibar**

- Budget /funds allocated to the courts in Zanzibar tend not to be enough hence the court face challenges in performing its functions.
- Security provided at the Kadhi's court is poor putting the Kadhi's personal and documents at risk.
- Elements of gender discrimination are clearly vivid at the Kadhi's court where all high posts are occupied by men and women occupy the lower posts.

## **5.CONCLUSION**

To understand the doctrine of precedent and stare decisis it is important to understand the court system of Zanzibar and its relation to the court system of Tanzania, understanding the structure of the court system and how it operates enables one to understand the union and its aim and field of operation since Tanzania in general is a hybrid system of unitary and federal governments.

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