**Kaganda v Mzumbe**

[2000] 2 EA 389 (HCT)

**Division:** High Court of Tanzania at Dar-Es-Salaam

**Date of judgment:** 4 September 1998

**Case Number:** 121/97

**Before:** Mackanja J

**Sourced by:** A Bade

**Summarised by:** H K Mutai

*[1] Appeal – Industrial dispute – Appeal from the Industrial Court – Procedure to be followed –*

*Jurisdiction to hear appeal – Whether the Civil Procedure Code applies to appeals from the Industrial*

*Court – Whether a single judge of the High Court has the jurisdiction to hear an appeal from the*

*Industrial Court – Section 27(I)C – Industrial Court Act.*

**Editor’s Summary**

The decision of the High Court in *OTTU (on behalf of PP Magasha) v Attorney-General* that section

27(I)C of the Industrial Court Act was unconstitutional to the extent that it deprived a person of his basic

right of appeal except on grounds of jurisdiction, left a lacuna in the appeal procedure by failing to

provide for the proper procedure to be followed in appeals from the Industrial Court. The responsibility

for filling this void lay with Parliament, which had the power to legislate an appropriate appellate

procedure. In the absence of such legislation, there was nothing in any statute to justify the hearing by a

single judge of the High Court of an appeal from the Industrial Court, especially in view of the fact that

the Industrial Court did not fall within the definition of the words “subordinate court”. Accordingly, until

Parliament legislated otherwise, appeals from the Industrial Court should lie to the High Court sitting as a

full Bench as was the case with references to the High Court for revisions of Industrial Court proceedings

under the remaining part of section 27(I)C.

**Cases referred to in judgment**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

*Harman Singh Bhogal v Jadva Karsan* [1953] EACA 17

*OTTU (on behalf of PP Magasha) v The Attorney-General and another* civil case number 53 of 1994

*R v Industrial Court, Ex parte Aeronautical Engineering Association* [1953] 1 Lloyd’s Report 597

**Judgment**

**MACKANJA J:** This appeal arises from the decision of the Deputy Chairman of the Industries Court in

trade dispute number 18 of 1994. The Appellants lodged the trade dispute to challenge the Respondent’s

decision to terminate their contracts of employment. At the end of the trial the Industrial Court found for

them. They could not execute the award under which they were to

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be re-instated because the Respondent successfully applied for stay of execution. It is this stay of

execution that the appeal is all about. The memorandum of appeal is accompanied only by the ruling, but

the drawn order staying the execution and from which it is appealed, does not accompany the

memorandum of appeal. When I noticed that omission I invited the parties to argue, *inter alia*, whether or

not Order XXXIX, Rule I as read with Order XL, Rule 2 apply to the memorandum of appeal in these

proceedings.

The Appellants have made a spirited argument regarding procedures that should govern their appeal.

They contend, with considerable verve, that there is no law under which appeals to this Court are to be

pursued. They argue Civil Procedure Code is meant for civil cases, unless so specifically stated within

the Code itself or in any other statute of relevance to a case such as this one. The force in the Appellants’

arguments the Respondents with the unenviable task of rebutting those arguments, for indeed there is no

statute at the moment that provides for appeals from the Industrial Court to this Court.

Mr *Kisusi*, learned counsel for the Respondent, tackled his task with great clarity. As is obvious from

his arguments, he also believes that this Court is not a proper forum for appeals from the Industrial Court

because there is no statute which has created such a procedure. It is his contention that a right to appeal

can only be founded on a statute. He cites two cases as authority for this: *Harman Singh Bhogal v Jadva*

*Karsan* [1953] EACA 17 at 18 and *R v Industrial Court, Ex parte Aeronautical Engineering Association*

[1953] I Lloyd’s Report 597 at 601.

Learned counsel has made the point that even though this Court has declared as unconstitutional

section 27(I)C of the Industrial Court Act of 1967 to the extent it deprives a person of his basic right of

appeal except on grounds of jurisdiction in terms of civil case number 53 of 1994, the Court stopped

short of saying:

(a) to which court a person aggrieved by a decision of the Industrial Court on grounds other than lack

of jurisdiction may appeal;

(b) in what form the appeal should be;

(c) who should sit to determine the appeal;

(d) in how many days the appeal should be made, and

(e) the powers which the appellate court should have when determining appeals from the Industrial

Court on matters other than lack of jurisdiction.

This point, albeit in a lay way, has also been raised by the Appellants. In fact, they have gone further.

They argue, in effect, that a decision that decisions of the Industrial Court are appeallable is usurpation of

legislative functions which defeats the whole purpose of separation of powers. They argue, and the

argument is quite tempting, that the question of legislation belongs to Parliament. Mr *Kisusi* is at one

with the Appellants on the question of legislative functions when he argues that the power to enact laws

rests with Parliament. So once this Court declared section 27(I)C of the Industrial Court Act to be

unconstitutional, it remained for Parliament to enact provisions of law enabling persons aggrieved by

decisions of the Industrial Court on grounds other than lack of jurisdiction to appeal to whatever forum

Parliament was going to set up or to

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seek such other remedy as Parliament considered fit. That forum need not be this Court. I am persuaded

to accept this argument.

Learned counsel’s submissions remind me of the English system of industrial justice. In England they

have industrial tribunals which are headed by judges. Anyone aggrieved by their decisions may appeal to

the Employment Appeals Tribunal. So who knows, maybe Parliament may be inclined to emulate that

system. They say, and I am a believer in it, that Parliament has undoubted wisdom. It would not have

been impossible for that august body to come out with legislation which would take care of all the

complications which have been brought about by a decision of this Court which all fair-minded people

would say is a milestone in the development of our young jurisprudence in the field of human rights.

I admire the zeal with which Mr *Kisusi* has approached the problems which were created when, for

the first time in the history of this nation, workers and their employers have been given access to another

judicial institution in search of justice. He has taken up the issue with the Attorney-General to whom he

made very impressive proposals, stressing that the right of appeal is not governed by any general

principles. I agree. It must be conferred by statute. Mr *Kisusi* backed up his arguments with the

authoritative and scholarly works of SA de Smith in his *Administrative Law* (3 ed) at 14. This is in

addition to the two cases he has cited to me in this appeal. The suggestions he put to the

Attorney-General are very sound. Let me emphasise the fact that our country needs a dynamic law that

has to be abreast of changing circumstances. It will do a lot of good to this country, and particularly to

industrial justice, if the government took serious account of the need to take steps to streamline the

Industrial Court of Tanzania Act of 1967, with the decision of this Court in *OTTU (on behalf of PP*

*Magasha) v The Attorney-General and another* civil case number 53 of 1994.

The *Magasha* case has left a *lacuna* in the appeal procedure. What, then can be done before the

position is normalized? The answer is not easy to find.

It is public knowledge that the Industrial Court is headed by a judge of the High Court. I can find

nothing on the statute book which could justify an appeal from this Court to be heard by a single judge of

the same Court. That is probably why a reference to this Court for revision of revisional proceedings of

the Industrial Court under the remaining part of section 27(I)C is done by a full Bench of this Court. In

fact a full Bench sat to decide *Magasha*’s case.

I have not lost cognizance of the fact that the Industrial Court does not fall within the definition of the

words “subordinate court”. One would say, then, that the High Court is not seized of appellate

jurisdiction over decisions originating from the Industrial Court. On the same parity of reasoning the

Industrial Court, though headed by a judge, is not equivalent to the High Court, nor, unlike the Loans and

Realisation Trust Tribunal whose decisions are declared to be equivalent to those of this Court in terms

of the Loans and Advances Realisation Trust Act, do the decisions of the Industrial Court rank *pari passu*

with the decisions of this Court. In these circumstances the Industrial Court lies somewhere between

courts subordinate to this Court and this Court. This being the case, and in order to bring credence to our

judicial system, appeals from the Industrial Court should lie to the High Court sitting as a full Bench

unless and until Parliament, in its undoubted wisdom, deems it necessary to

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legislate on an appellate procedure or if the Court of Appeal, on an appeal to it, directs otherwise. That

being my view, I feel I will not act *intra vires* my powers if I go on to determine the appeal on the merits.

That should be done by this Court sitting as a full Bench. The appeal, therefore, remains intact.

Accordingly, the record of proceedings shall be remitted to the honourable the judge-In-charge to

re-assign it to a full Bench of this Court.

For the Appellant:

*Information not available*

For the Respondent:

*Mr Kisusi*