THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

IN THE HIGH COURT OF TANZANIA

AT MBEYA

MISC. CIVIL CITATION NO.6 OF 2019

IN THE MATTER OF THE CONSTITUTION OF THE

UNITED REPUBLIC OF TANZANIA

AND

IN THE MATTER OF THE PROFESSIONAL CAREER AND

BIDDING FAREWELL

TO THE HONOURABLE JUDGE ROBERT VINCENT MAKARAMBA

JUDGE OF THE HIGH COURT OF TANZANIA (RETIRED)

VALEDICTORY SPEECH

OF

JUDGE ROBERT VINCENT MAKARAMBA (RETIRED)

My Lord, Honourable Judge Doctor Eliezer Mbuki Feleshi, the Principal Judge and Presiding Judge;

Honourable Lady Judge Sekela Cyril Moshi, Judge-in-Charge, High Court of Tanzania at Songea;

Honourable Judge Doctor John Kulimba Utamwa, Judge-in-Charge, High Court of Tanzania at Mbeya;

Honourable Judge Penterine Muliisa Kente, Judge-in-Charge, High Court of Tanzania at Iringa;

Honourable Judge David Eliadi Mrango, Judge-in-Charge, High Court of Tanzania at Sumbawanga;

Honourable Judge Doctor Adam Juma Mambi, Judge of the High Court of Tanzania at Mbeya;

Honourable Judge Dunstan Beda Ndunguru, Judge of the High Court of Tanzania at Mbeya;

Honourable Lady Judge Doctor Lilian Mihayo Mongella, Judge of the High Court at Mbeya;

Honourable Mr. Albert Chalamila, the Regional Commissioner for Mbeya Region;

Honourable Brigadier General (Rtd) Nicodemus Elias Mwangela, the Regional Commissioner for Songwe Region;

My beloved wife Daria Mujengi Makaramba;

Mr. George Herbert, Honourable Deputy Registrar-in-Charge, High Court of Tanzania, Mbeya;

Mr. William Mutaki, Honourable Deputy Registrar, High Court of Tanzania, Mbeya;

Mr. Venance Mlingi, Honourable Acting Resident Magistrate-in-Charge of Mbeya and District Magistrate-in-Charge for Mbeya District;

Mr. Kassim Mkwawa, Honourable Resident Magistrate-in-Charge of Songwe;

M/s Zawadi Laizer, Honourable Resident Magistrate, Juvenile Court of Mbeya;

All Honourable District Resident Magistrates-in-Charge in Mbeya and Songwe Regions;

All Honourable Resident Magistrates at all levels of Courts in Mbeya and Songwe Regions;

Mr. Francis Rogers Massawe, Learned State Attorney-in-Charge,

Attorney General Chambers and Office of the National Prosecution Services, Mbeya;

Dr. Tasco Romanus Luambano, Chapter Convener, Tanganyika Law Society, Mbeya Chapter;

All Learned State Attorneys in Mbeya;

All Learned Advocates Mbeya;

Mr. Moses Mwidete, Court Administrator, High Court Mbeya and All Human Resource Officers;

Mr. Octavian Mapunda; Court Administrator, Songwe Region;

All Members of Staff of the Judiciary, High Court of Tanzania,

Mbeya Zone;

Print and Electronic Media;

All Invited Guests;

Ladies and Gentlemen.

Hanging up Judicial Boots

First of all, I thank Almighty God for continuing to endow us with good health, which enabled us to be present here today.

About two months ago, on 30 April 2019, to be exact, I hang up my boots at the Judiciary, upon attaining the compulsory retirement age of 60 years for a Judge of the High Court in Tanzania.

I stand here before you today humble and in awe that all of you considered my valedictory ceremony worthy of your time.

I am deeply touched and overwhelmed by the very kind and elating words that you have all expressed for me. I am grateful for and humbled by the remarks of each speaker.

I am particularly touched by the presence amidst us of the Honourable Principal Judge, Dr. Eliezer Mbuki Feleshi, for coming and presiding over these valedictory proceedings. I feel greatly honoured and highly indebted to you. Thank you so very much My Lord, Principal Judge.

I express my sincere gratitude to all of you and also for my time spent here in the High Court of Tanzania, Mbeya Zone, along with you. I am privileged and honoured by the overwhelming presence at this event of all high functionaries, including the two Regional Commissioners, the Hon. Mr Albert Chalamila, the Regional Commissioner for Mbeya Region, and the Hon. Brigadier General (Rtd.), Nicodemus Elias Mwangele, the Regional Commissioner for Songwe Region, who have been associated with me during my tenure as Judge and Judge-in-Charge at this last duty station. I thank them for respecting the independence of the Judiciary and for ensuring a cordial working relationship existed between the Executive and the Judicature at the regional level. I also thank them for helping me successfully accomplish my tasks.

It has been a privilege and a pleasure to serve on the Bench of the High Court of Tanzania, first at the Dar es Salaam Zone, which comprises the regions of Dar es Salaam, Coast and Morogoro, then as Judge-in-Charge at the Commercial Division at Dar es Salaam, with its two registries of Arusha and Mwanza, later on at the Mwanza Zone, which comprises the regions of Mwanza, Mara and Geita, and finally at the Mbeya Zone, which consists of Mbeya and Songwe Regions. This surely has been a judicial journey well travelled, a journey which took me across nine administrative regions in Mainland Tanzania.

I have travelled the breadth and length of the large part of the districts in the regions I have served as Judge and Judge-in-

Charge, respectively, from the Islands of Ukerewe and Ukara across the mighty Lake Victoria to Kamsamba near the River Momba. I have met and talked with members of the judicial staff of various cadres – a crop of dedicated men and women – as well as groups of citizens with thirst and hunger for knowledge about their rights. I have shared both their frustrations and expectations and resolved some of their challenges, which were within my power and capacity.

During my tenure of office, I have improved myself. I have become more enthusiastic about and learnt not only judicial work but also the nitty-gritty of judicial and court administration. Thanks to all those who made me what I am today. That diverse judicial career has been both fascinating and challenging, but together we have managed to sail through safely to the shore.

There are too many people to thank personally and by name, and my nominal aphasia would guarantee that some people went wrongly unacknowledged. I wish to thank my many talented associates for the support, friendship and education they have given me in technology, as well as in Kiswahili and English

I am grateful to my sister and brother Judges from near and far, some of whom are present here today, and in particular to my successor in office, the Hon. Dr. John Harold Kulimba Utamwa, and his colleagues, the Hon. Dr. Adam Juma Mambi, the Hon. Mr. Dunstan Beda Ndunguru and the Hon. Lady Dr. Lilian Mihayo Mongella, and all other colleagues on the High Court Bench at the Dar es Salaam High Court Zone, famously known as "*Mwembeni*", the Commercial Division, and the Mwanza High Court Zone, who stood by me and who were always the pillar of strength for me.

We shared talks, cheers and cups of coffee. It was truly a spirit of collegiality lived.

I still have fond memories of my *Nzengo* Family at the Mwanza Zone, the Dean, the Hon. Agnes Enos Bukuku J. (Rtd.), the Hon. Mohamed Rashid Gwae J., now with the Arusha High Court Registry, the Hon. Joacquine De Mello J., now with the Dar es Salaam Registry of the High Court, the Hon. Rose Ally Ebrahim J., now with the Shinyanga High Court Registry, the Hon. Sirilius Betran M. G. Matupa J., now with the Economic and Anti-Corruption Division and, last but not least, the Hon. Issa Maige J., now Judge-in-Charge of the Land Division. We worked as a team and in the true spirit of a judicial family. We went through thin and thick together. We shared at times some sorrows, some frustrations, a measure of hope and quite some cheerful moments.

I cannot but vouchsafe that sitting Judges, much as they are servants of justice, should also find time to rest, exercise, eat well, care for their health and wellness and, above all, take time off their busy schedules to cool off. They should always bear in mind that, they alone are the true owners of their personal lives. And nobody else, be it family members, relatives, friends or the institution they serve, will take good care of their personal lives.

I am equally grateful to all the Judges from the neighbouring High Court Registries, the Hon. Lady Judge Sekela Cyril Moshi, the Hon. Judge Penterine Muliisa Kente and the Hon. Judge David Eliad Mrango, who are present here today and all former Judges of the High Court of Tanzania, who have at times reminded me of my duty in the peculiar settings of this institution. It is my sincere hope and expectation that they will do their best to realize the vision of working as a team, particularly in the area of Continuing

Judicial Education, by making full use of the facilities available at the Mbeya Integrated Judiciary Centre and other similarly situated institutions.

I was particularly delighted to know well in advance of my retirement hour, the identity of my successor, the Hon Dr John Harold Kulimba Utamwa, Judge-in-Charge, and to share in the universal approval and pleasure which has heralded his appointment and smooth office handover on my very final day in the Office of Judge-in-Charge.

I also thank all the dedicated Court and the Land Tribunals' staff with whom I have had the privilege of working, and my Judge's Assistants over the years, Mr. Moses Betwel Ndelwa and M/s Anna Mmpesa, who have recently been appointed Resident Magistrates. I wish them all the best of luck in their new task of administering justice in the lower bench.

From the bottom of my heart, I sincerely express my thanks to all of you for support, care and concern in my entire tenure and for enriching my life. You have been my second family.

The two Deputy Registrars, Mr. George Herbert and Mr. William Mutaki, and all the members of staff of this Court and the entire Mbeya High Court Zone always considered me as head of this family and also helped me to perform my constitutional duty well and successfully. I thank them all.

Members of the Bar, both public and private, and other judicial sector stakeholders have been equally cooperative and extremely cordial to me and to the functioning of the Court. At times, in the course of discharging my duty I might have been a bit harsh but I

must make it clear that my intention was always clear and this was only for the sole purpose of betterment of the institution.

I am extremely proud of what we have achieved together and I will never ever forget. We have achieved a lot by working in cordial cooperation and harmony. My professional responsibility was both challenging and rewarding. I have been put in well reward by the love and affection shown by you all. Today, I can't thank you enough, especially the Honourable Judges, Registry Officers and Staff for supporting and encouraging me TO DO WHAT? With your support, kindness, friendship and appreciation I achieved this.

I will miss this institutional as well as climatic environment and also my colleagues who always stood by me. I trust that this great institution will continue to grow and enrich itself constitutionally, legally and academically.

I came here as a Judge on transfer from the High Court, Mwanza Zone, on 15 August 2018. Within the short span of my stay here, I interacted with you, learnt your legal knowledge, benefitted from your legal wisdom, moved as a friend and now I am parting as your brother.

We have worked together to demystify the Court and make it a more acceptable place for the litigant public. We were not marking time. We have made a difference.

I am particularly enthused by the fact that I am parting at a time when the highest Court of the land has resolved to do away with unwarranted procedural technicalities and align itself more with substantive justice by giving life to the recently adopted "*overriding principle*" (the oxygen principle), brought by the *Written Laws (Miscellaneous Amendments) (No.3) Act, 2018 [Act No.8 of 2018*],

the *Appellate Jurisdiction Act*, (Cap.141 R.E. 2002) and the Civil Procedure Code, (Cap.33 R.E. 2002) with a view "*to facilitat[ing] the just, expeditious, proportionate and affordable resolution of civil disputes*." [See *Sec. 3A (1) of Cap.141 and Sec. 3A (1) of Cap.33*.] *In tandem*, the 2009 Tanzania Court of Appeal Rules have also been amended by the *Tanzania Court of Appeal (Amendments) Rules, 2019*, which came into force on 26 April 2019 vide G.N. No.344.

The amended Tanzania Court of Appeal Rules, which befittingly came into force on Zanzibar's Revolution Day, revolutionary as they are, are quite transformative in many procedural aspects and futuristic and forward looking, since they have taken on board, among other things, the oxygen principle, which requires the Court to avoid technicalities in the dispensation of justice.

In its very first decision on the overriding objective principle, the Court of Appeal of Tanzania in *Yakobo Magoiga Gichere v Peninah Yusuph Civil Appeal No. 55 of 2017* (CAT) (Mwanza) (unreported), the Chief Justice of Tanzania, the Honourable Prof Dr. Ibrahim Hamis Juma, who sat on the panel of three Justices of Appeal in that case observed as follows:

> With the advent of the principle of Overriding Objective brought by the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2018 [Act No. 8 of 2018] which now requires the courts to deal with cases justly, and to have regard to substantive justice;...

I am alive to the apt and near prophetic warning words of the Hon Samatta, C. J. (as he then was) in *VIP Engineering and Marketing Ltd. v Said Salim Bakhresa*, Civil Application No. 47 of 1996 which

has been echoed in *PSRC, Impala Hotel Ltd.*, Civil Application No. 100 of 2004, His Lordship observed as follows:

> Consumers of justice losing confidence in judicial officers obsessed more with strict compliance with procedural rules than with the merits of the dispute before them thus aiding the judicature's grave diggers.

While the uppermost Bench in the Country has embarked on doing away with procedural technicalities to accord more with substantive justice, overtime, we in the middle level Bench have tried to avoid "*aiding the judicature's grave diggers*" by ensuring that our Courts and justice are more accessible to the downtrodden and most vulnerable members of our society.

We have also gradually embraced information communication technologies (ICTs) in the administration of justice. We have also helped a multitude of litigants to understand our legal and court system through sustainable public education and training programmes.

The common complaint is that judges live in ivory towers. But I am sure, my colleagues on the Bench know better than this. Being a Judge is both a calling (noble volition) and a profession. I feel the urge to state here that Judges live in society and to a large extent most of our decisions impact greatly on the lives of the people who come to us in search of justice.

I must say that we on the High Court Bench have not done much by way of judicial activism (or being proactive for those among us who dredge the word 'activism'), particularly in the area of Sexual and Gender Based Violence (SGDBV), as witnessed in the many

cases of rape, domestic violence and child abuse, which come before us for determination.

I am enthused by the erudite words of Chief Justice Fraser of the Alberta Court of Appeal in her dissent quoted in R. V. Ewanchuk, 1998, ABCA 52:

> To tread a path to a better future, all actors in the judicial system must be able to walk in the shoes of women, must come to understand the real lives of women. Officials must not fantasize that women dream of being raped, that they are in a constant state of consent, or that they are not credible. (emphasis mine)

In its bid to "*walk in the shoes of women*", the Ontario Supreme Court in Canada, in its judgement of *Jane Doe v Metropolitan Toronto (Municipality) of Police (1998) [39 OR (3d) 487 (Ont. Ct. (Gen Div.)]*, infused some measure of judicial activism in its decision and did a great deal to achieve this goal of showing police, lawyers, judges, and other players women's lived realities.

In *Jane Doe v Metropolitan Toronto Commissioners of Police* (above), sexual assault survivor Jane Doe sued the Metropolitan Toronto Police for violating the *Canadian Charter of Rights and Freedoms* in failing to protect her from a serial rapist. In that case, Jane Doe was represented for many years by Mary Cornish, who worked closely with LEAF in developing arguments that led to a successful conclusion of the case. Jane Doe argued that, even though police had information about the man who became known as "*the balcony rapist*", they did not warn the women in the area of the danger.

The police argued that they withheld information about the rapist because they wanted to catch the rapist in the act. Jane Doe argued that her right to security and her equality rights under Section 15 of the Canadian Charter of Rights were violated. Doe argued that the police breached their duty of care in treating the women in the region as bait in their investigation and failed to take the crime of sexual assault seriously.

In 1998, the Ontario Supreme Court ruled that there was no evidence of Charter violations, but that Jane Doe's constitutional right to security had been violated and she was awarded $220,000 (Canadian Dollars) in damages.

Human beings never stop to learn and gain knowledge in new areas. For some of us interested in sharpening our legal knowledge and skills, especially with respect to gender and human rights, we can read the case of *Jane Doe v Metropolitan Toronto Commissioners of Police*, which is electronically available at http://canlii.ca/t/1w9kn. This case has also been a subject of extensive academic discourse in a book entitled *'Sexual Assault in Canada: Law, Legal Practice and Women's Activism*', edited by Elizabeth A. Sheehy. The book is also electronically available at file:///C:/Users/User/Downloads/530011.pdf.

Let me bring the knowledge about gender and human rights close to home. The *Canadian Charter of Rights and Freedoms* (the Charter) forms the first part of the *Canadian Constitution Act, 1982*. It was judicially considered in *Jane Doe v Metropolitan Toronto Commissioners of Police* (above). The Charter could be likened to our Bill of Rights and Duties, which was enshrined in the 1977 Constitution of the United Republic of Tanzania in 1984 and which entered into force some three years later. Let me explain a bit.

Article 15 of the *Canadian Charter* covers "*Equality before and under law and equal protection and benefit of law.*" It bears some semblance to Article 13 of our Constitution. Article 15 of the Canadian Charter says:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

On affirmative action programmes, the Charter says:

> (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.(emphasis mine).

Article 13 of our Constitution is also about "equality before the law." It provides, albeit in more words than its Canadian cousin, as follows:

> 13.-(1) All persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law.
>
> (2) No law enacted by any authority in the United Republic shall make any provision that is discriminatory either of itself or in its effect.

> (4) No person shall be discriminated against by any person or any authority acting under any law or in the discharge of the functions or business of any state office.
>
> (5) For the purposes of this Article the expression "discriminate" means to satisfy the needs, rights or other requirements of different persons on the basis of their nationality, tribe, place of origin, political opinion, colour, religion, sex or station in life such that certain categories of people are regarded as weak or inferior and are subjected to restrictions or conditions whereas persons of other categories are treated differently or are accorded opportunities or advantage outside the specified conditions or the prescribed necessary qualifications except that the word "discrimination" shall not be construed in a manner that will prohibit the Government from taking purposeful steps aimed at rectifying disabilities in the society. (emphasis mine)

Laws are to be interpreted and applied in context. We all agree. In interpreting constitutional provisions, adherence is to be had to the purposive approach. The business of Courts is to interpret and apply constitutionally guaranteed human rights provisions in determining cases on violations of human rights. There is nothing, however, that would prevent Judges from being persuaded by judicial authorities from other jurisdictions, particularly jurisdictions of such Commonwealth countries as Canada and Australia, when deciding human rights cases. But in order to fully embrace change, it requires some degree of judicial attitude to be changed. This can only be done by strengthening continued judicial

education by embarking on sustainable training programmes in international human rights standards and in other new legal areas.

All said and done, decisions from foreign jurisdictions such as the decision taken in *Jane Doe v Metropolitan Toronto Commissioners of Police* (above) can be of an extremely great persuasive value to a Judge who is facing a human rights case requiring an interpretation of a national law and international human rights standards as set out in Treaties and Conventions which the Government of Tanzania has ratified.

The Bar is the Judge of Judges. I have endeavoured during my tenure of office, whose success you will judge, to adhere to the Judge's Oath of Office, which is to render justice without "*fear, favour or ill will*." As you all may come to realize, in the administration of justice, it takes two to tangle between the Bar and the Bench. A smart Bar will definitely produce a smart Bench. The vice versa is also very true.

Let me at this juncture reflect briefly on Sir Robert Megarry's seminal talk, "*Temptations of the Bench*." In this work, which featured in the Alberta Law Review, Sir Robert Megarry made reference to the *Handbook for Judges* (1961) on Canons of Judicial Ethics. In his work, the late Sir Robert Megarry, who has authored some brilliant legal works, including a treatise on The Law of Mortgages, discusses Five Temptations of the Bench: temptation of the tongue, temptation of the Bar, temptation of brevity, temptation of the law and temptation of discovery. I shall share with you my reflections on the Bench within the background of these five temptations.

Let me take you through some discourse on the temptation of the tongue. Before my being appointed Judge of the High Court, I

served as Commissioner for Human Rights and Good Governance for more than five years in the newly established Commission for Human Rights and Good Governance (CHRAGG), under the Chairmanship of the late Dr. Robert Habbesh Kissanga. Previously, I had served as a Law Lecturer for more than twelve years at the first Law Faculty in East Africa, the Faculty of Law (now the School of Law) of the University of Dar es Salaam. As you may be aware, these two positions, Human Rights Commissioner and Lecturer, call for a lot of talking apart from researching, reading and writing.

Suddenly, upon being appointed Judge, I was expected to sit silently in Court, going through every case – civil or criminal – until rather overdrawn. This for me was a fatal change of my life – Judges are supposed to talk through their Judgements and Opinions, so we are told. I can assure you, and as all my Learned Judge Brothers and Sisters who are still on the Bench and those who are retired like myself will agree with me, holding one's tongue takes a lot of energy.

In his work, Sir Robert Megarry spoke of the great Christopher Pala, who was the Chief Baron of the Exchequer in Ireland for over 40 years, who in his resolve to live by the promise of holding one's tongue, put up a notice on his desk in Court which read "A Judge should keep his mouth shut and his mind open: When he opens his mouth he shuts his mind."

This self-warning notice might have worked so well for the great Christopher Palla, but judicial experience informs us that complete judicial silence inevitably lengthens the argument, since it makes learned counsel try and try in the hope that they may at the end manage to convince the unmoved umpire of justice to rule in their favour.

Much as complete judicial silence might be a welcome good judicial behaviour and practice, experience also teaches us that Judges should never indulge in an unrestrained intervention in Court while hearing litigants and their legal representatives, when they are battling out their case in court. I leave it to those of you who had the benefit of appearing before me to tell to what extent I managed to hold my tongue.

Almost all the Canons of Judicial Conduct and Ethics in the Commonwealth countries insist on Judges being impartial. A large part of these Canons were adopted at a Meeting of the Members of the Judges and Magistrates Association of Tanzania (JMAT) held in Arusha in 1984. As many a Judge will agree with me, it is much easier for a Judge to be impartial between plaintiff or claimant/applicant and defendant or respondent, but more difficult to be impartial between counsel and counsel. This will be particularly noticeable when an extremely experienced and competent counsel and a paralytically bad and devastatingly good counsel present the case for their client before an impartial Judge.

I need not emphasize more here that, where an incoherent, rambling and seemingly confused counsel, with the ability to utter many words without ever really saying anything, sometimes making irrelevant and confusing submissions, appear before a supposedly impartial Judge, clearly the temptation of the Bar sets in, with the attendant risk of throwing the impartiality of the Judge through the window of patience.

I must state here, however, that most of the advocates who have appeared before me while I was on the Bench did not make the temptations of the Bar set in. However, the Tanganyika Law Society's Continued Legal Education Programme needs to be

overhauled so that practicing advocates may acquire more skills, particularly in the area of advocacy. Similarly, the Law School of Tanzania needs to have a second look at its courses so that this country can have more competent lawyers who can compete not only nationally but at the regional and global levels, and in many areas of specialized legal knowledge.

Insofar as the temptations of brevity go, we who sit at the Altar of the Temple of Justice know too well that being brief and concise in our decisions makes it easier for the parties to understand where they stand on the scales of justice. We are also time and again reminded that, at the end of a trial, a reasonable litigant would feel that he or she has had a fair crack of the whip or a fair day in Court. Courts should not therefore send away defeated litigants who feel no justifiable sense of justice in the judicial process.

Judges speak through their judgements. It is expected, therefore, that our judgements should be well written with reasons such that the urge to explain them through the press or otherwise to justify to the public why a certain matter was decided in the way it was decided does not arise. Our judgements should, therefore, speak for themselves. On this score, Continuing Judicial Education in Judgecraft and the Art of Judgment Writing cannot be overemphasized.

I have had a real and living experience of what it feels like for a defendant who has lost a case. This happened when after delivering my judgement in a probate matter, the claimant, a lady, who had come to receive her judgement, dumped the child she was carrying in my Secretary's Chamber upon losing her claim for a share in her late husband's estate.

I am still convinced to this day that, in that case I ensured that *justice was not only done, but was seen to be done* by applying

the law to the facts of the case. In the words of Lord Hewart in R. *v Sussex Justices, Ex parte McCarthy [1924] 1 KB 256; [1923[All ER Rep.233]*: "… it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

In our adversarial system of administration of justice, there has to be a winner and a loser. The possibility of a win-win situation does not therefore arise, unless the case ends with mediation.

On the temptation of the law, we are all oblivious of the fact that a case is determined either on the facts, the law or both. There arises a situation where a case may be decided only on the facts. In such a situation, whether it is the claimant or the respondent who is right on the law, the result will be the same. Similarly, where a case may be decided on the law, the decision will be the same whether it is the claimant or the respondent who is right on the facts.

However, as all those learned in the law gathered here know, Judges like learned counsel, may vary in the depth of their affection for the law. We are, by accident of our training in the Austinian-Kelsian legal tradition, the positivists who are products of the "*black letter law*" tradition. Our affection for the law is the main factor which may influence the way in which a Judge decides a case on the law. Sir Robert Megarry puts it in the following words: "If the Judge's heart is in the law, he may feel the temptation to decide an interesting point of law when there is no real need to do so."

We who grew up in the inherited Common Law tradition believe very strongly that Judges do not make the law. They only find it,

interpret it and apply it to the facts of the case as presented to them by the litigants through their pleadings.

Many of us gathered in this room today, who had the opportunity of studying law, may still have fond memories of the famous Master of the Rolls, the Rt. Honourable Lord Denning. This famous English Judge, aside from his occasional near racist outbursts, he was revered for his boldness in daring to live the temptation of the law by crafting new rules of law whenever the opportunity arose as a means of filling the gaps in the common law.

We all appreciate the fact that it is by way of developing the law that Courts in England, the mother country of the Common Law, managed to craft new legal doctrines. A living example is the doctrine of promissory estoppel which was crafted for the first time in the famous English case, The *High Trees Case – The Central London Property Ltd. v High House Trees Ltd [1947] K.B. 130*.

The nagging issue however, has always been whether a Judge is justified in deciding a question of law, which did not form the substantive part of the facts of the case as way of developing the law. We all know too well that, if a finding of the law not based on the facts of the case is made by a Judge, it becomes *Obiter Dictum*, which however may be of legal value in a future, similar factual situation.

It is a matter of good judicial practice that Judges ought to exercise self-restraint by being slow to put forth unpalatable decisions of law. However, Judges should also try, oblivious of exercise of self-restraint, as much as their mental capabilities may allow them, to venture in uncharted territory of the law by crafting new rules of law. That is the surest way of developing the law to

meet new social and economic demands. I tried to tread the path of crafting new rules to fill gaps, although not so many times.

Finally, a word on the temptation of discovery: this arises where a Judge has reserved a judgement and then discovers relevant authorities that have never been cited to him or her. The judge might decide to ignore such authorities and run the risk of being condemned by a higher court on appeal. Otherwise, the Judge may restore the case for further arguments on the discovered authorities or better still the Judge may use the authorities in his or her judgement without any further argument.

If the authorities appear to support the decision that the Judge would have reached without their aid, or if they do more than provide him or her with apt phrases, a useful illustration, then there is no reason for not including them in his or her decision without calling for further argument.

I found it worth the effort to explore, albeit briefly, the five temptations of the Bench according to Sir Robert Megarry, not because he is my namesake, but because I think they occupy the front-seat in every Judge's daily work of administering justice without "*fear, favour or ill will*."

Life, as we all too well know, is full of all sorts of temptations. For the Christians, the Holy Bible abounds with temptation stories – the "*Fruit and the Snake*" in the Garden of Eden, which saw its occupiers, Adam and Eve, being thrown out of the Garden. The *Thirty Pieces of Silver for Judas*, who betrayed Our Lord Jesus Christ. Judas successfully committed suicide. Otherwise if he had failed in his bid to take his life he would have faced the criminal charge of attempted suicide. All these and similar Biblical stories are but sins. The sins can be atoned by the sinner repenting and

mending his or her ways. Otherwise if not repented, sins may stand in the way of a person longing for the "Everlasting Life Hereafter." In the eyes of the law, the Judas of today would pass for the 'corrupt.' Different however from the Juda's era, if successfully charged and convicted, the corrupt will end up behind bars.

As Judges, in order to avoid some of the temptations of life, we should strive to always achieve the moral standard stated by Justice Bowen L. J. in *Leeson v General Council of Medical Education and Registration (1889) L. R. 43 C. D. 385*. He said: "*Judges, like Caesar's wife, should be above suspicion*."

Let me before parting, once again, record my sincere appreciation, thanks and gratitude to all of you who are gathered before this August Assembly, particularly to my Learned Sister and Brother Judges, who have extended their fullest support to me both on the administrative and judicial side of this institution.

I also wish to express my appreciation, once again, to the Deputy Registrars, all Registry Officers and Staff of the High Court of Tanzania, Mbeya Registry. I also owe much to my Personal Secretary, M/s Annatolia Leonard Ngwalija, here in Mbeya and M/s Winifrida Machanga in Mwanza, to my other personal staff, particularly M/s Esther and M/s Rukia Chang'a here in Mbeya and M/s Rhoda in Mwanza, my driver here in Mbeya, Mzee Tukai and Mr Lifa Tamambele in Mwanza, our health break caretaker, Mzee Thomas, and my two Personal Bodyguards, Mr Gilbert Malimo here in Mbeya and Mr Said in Mwanza and all Court Orderlies both here in Mbeya and Mwanza.

People ask how I feel about leaving, and the fact is, "parting is such sweet a sorrow." The sweet part of it is the Dar es Salaam High Court Zone, the Commercial Division of the High Court, Dar

es Salaam, Arusha and Mwanza and the Mbeya High Court Zone, the sorrow part – the goodbyes, of course, and leaving this beautiful place and its lovely people.

My wife Daria and I take home sweet memories of our stay here in Mbeya, although it was fairly short. We feel blessed by the love and affection showered on us, especially during the send-off some weeks back. We will cherish forever the many good presents you gave us. It is very hard for me to say goodbye to you.