IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: RAMADHANI, C. J.; MUNUO, J. A.; MSOFFE, J. A.; KIMARO, J. A.; MBAROUK, J. A.; LUANDA, J. A.; And MJASIRI, J. A.)

CIVIL APPEAL NO. 45 OF 2009

THE HONOURABLE ATTORNEY GENERAL..... APPELLANT
Versus
REVEREND CHRISTOPHER MTIKILA.....RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania at Dar es Salaam,)

(Manento, J. K.; Massati, J. And Mihayo, J.)

dated the 5th day of May , 2006
in
Misc. Civil Cause No. 10 of 2005

JUDGMENT OF THE COURT

9th April & 17th June 2010

RAMADHANI, C. J.:

For the ease of reference and to avoid a possible mix-up and confusion, we shall refer to the parties simply as Rev. Mtikila for Reverend Christopher Mtikila, the respondent/petitioner, on the one hand, and the A. G. for the Attorney General, the appellant/respondent, on the other hand. Also to appreciate mostfully what is at stake in this appeal we have to preface this judgment with a brief background.

Way back in 1993 Rev. Mtikila filed Misc. Civil Cause No. 5 of 1993, challenging, among other matters, the prohibition of independent candidates for presidential, parliamentary and civic elections which was

introduced by the Eighth Constitutional Amendment Act, 1992. That Act amended Art. 39 which previously provided as follows:

> *"No person shall be eligible for election to the office of President of the United Republic unless he -*
>
> *(a) has attained the age of forty years; and*
>
> *(b) is otherwise qualified for election as a Member of the National Assembly or of the (Zanzibar) House of Representatives."*

The Eighth Amendment retained the above paragraphs but re-numbered them as (b) and (d) respectively and added new paragraphs (a) and (c) which state:

> *"(a) is a citizen of the United Republic by birth;*
>
> *(c) is a member of and sponsored by a political party."*

That requirement for membership of and sponsorship by a political party applies also to parliamentary elections under Articles 67 and 77 and to local council elections under s. 39 of the Local Authorities (Elections) Act, 1979, as amended by the Local Authorities (Elections) (Amendment) Act, 1992, (Act No 7 of 1992).

Rev. Mtikila's contention before LUGAKINGIRA, J. (as he then was) was that the requirement for membership of and sponsorship by a political party abridged the right to participate in national public affairs under Art. 21(1) of the Constitution which provides:-

"Every citizen of the United Republic is entitled to take part in matters pertaining to the governance of the country, either directly or through representatives freely elected by the people in conformity with procedures laid down by, or in accordance with, the law."

LUGAKINGIRA, J. poignantly summed up his dilemma as we shall see later and concluded that:

"For everything I have endeavored to state and notwithstanding the exclusionary elements to that effect in arts 39, 67 and 77 of the Constitution as well as s 39 of the Local Authorities (Elections) Act 1979, ***I declare and direct that it shall be lawful for independent candidates, along with candidates sponsored by political parties, to contest presidential, parliamentary and local council elections.*** *This will not apply to the council elections due in a few days."*

(Emphasis is ours.)

The learned judge restrained himself not to declare the various constitutional provisions to be unconstitutional though he had been invited to do so. We shall revert to this at an appropriate stage.

However, soon after that judgment the A. G. reacted in two simultaneous ways: he filed an appeal in this Court and sent to Parliament the Eleventh Constitutional Amendment, Act No. 34 of 1994, whose effect

was to nullify the declaration and the direction of LUGAKINGIRA, J. and to maintain the constitutional position which had been before the decision of Misc. Civil Cause No. 5 of 1993.

We have already reproduced Article 21(1) in English version but for the sake of clarity we shall recite it again in Kiswahili, both as it was before its amendment by Act 34 of 1994, and as it reads now after the amendment. Before the amendment, it reads as follows:

> *"Kila raia wa Jamhuri ya Muungano anayo haki ya kushiriki katika shughuli za utawala wa nchi, ama moja kwa moja au kwa kupitia wawakilishi waliochaguliwa na wananchi kwa hiari yao, kwa kuzingatia utaratibu uliowekwa na sheria au kwa mujibu wa sheria."*

After the amendment that sub-Article reads the same way but it is prefaced by the following formulation:

> *"Bila ya kuathiri masharti ya Ibara ya 39, ya 47 na ya 67 ya Katiba hii na ya sheria za nchi kuhusiana na masharti ya kuchaguwa na kuchaguliwa, au kuteua na kuteuliwa kushiriki katika shughuli za utawala wa nchi, ..."*

That reads in English as follows:

> *"Subject to the provisions of Articles 39, 47 and 67 of this Constitution and of the laws of the land in connection with the conditions for electing and being*

elected or for appointing and being appointed to take part in matters related to governance of the country, ..."

In the petition, Misc. Civil Cause **No. 10 of 2005**, the subject matter of this appeal, Rev. Mtikila challenged the Eighth Amendment and asked the High Court of Tanzania to grant the following four prayers:

(a) A declaration that the constitutional amendment to Articles 39 and 67 of the Constitution of the United Republic of Tanzania as introduced by amendments contained in Act No. 34 of 1994 is unconstitutional.

(b) A declaration that the petitioner has a constitutional right under Article 21 (1) of the Constitution of the United Republic of Tanzania to contest for the post of the seat of a member of parliament of the United Republic of Tanzania as a private candidate.

(c) Costs of this petition be borne by the Respondent.

(d) Any other remedy and/or relief the honourable Court will deem equitable to grant.

Three judges of the High Court of Tanzania, MANENTO, J. K., MASSATI, J., and MIHAYO, J. (all three Judges as they then were) granted the prayers except for costs which they ordered each party to bear its own. We better let the High Court speak for itself:

"We thus proceed to declare the alleged amendments unconstitutional and contrary to the International Covenants to which Tanzania is a party."

The A. G. has preferred this appeal in which he was represented by Mr. George Masaju, the learned Deputy Attorney General, assisted by Mr. Matthew Mwaimu, learned Principal State Attorney. The respondent, on the other hand, had the services of Mr. Richard Rweyongeza, learned advocate, assisted by Mr. Mpale Mpoki, learned counsel.

The Chief Justice decided that the appeal be heard by a Full Bench of seven Justices of Appeal. He also invited four friends of the Court: Mr. Othman Masoud, the Director of Public Prosecutions, Zanzibar; Prof. Palamagamba Kabudi; Prof. Jwan Mwaikusa and the Chairman of the National Electoral Commission, who was represented by the Director of Elections, Mr. Rajabu Kiravu. We are extremely grateful to all.

First and foremost let us take the opportunity to correct one thing: There is nothing like "a private candidate". That is a direct translation from Kiswahili "mgombea binafsi". But the right terminology is "an independent candidate", as Prof. Kabudi, properly pointed out, and in this judgment we shall use that terminology.

The A. G. had seven grounds of appeal but at the hearing he dropped grounds three and five and consolidated grounds one and two. However, in this judgment we are going to deal with grounds one and two separately. Otherwise, we are going to follow the order in which Mr. Masaju argued the remaining five grounds which will, necessarily, be renumbered.

Mr. Masaju started with the last ground, ground number 7, which is now ground number 5, and which avers as follows:

> *"That the High Court erred in law in proceeding with the determination of the petition without framing issues."*

Admittedly, the High Court did not frame issues and we agree with Mr. Masaju that that offends O XIV R 1(5) of the Civil Procedure Code [Cap. 33 R. E. 2002] which provides as follows:

> *"(5) At the first hearing of the suit the court shall, after reading the plaint and the written statements, if any, and after such examination of the parties as may appear necessary, ascertain upon what material proposition of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend."*

The High Court itself said in its judgment:

> *"Although the court did not formulate the issues to be tried, the petitioner has framed and both parties have fully argued on the following issues:*
>
> *(i) Whether the sections, namely Article 39 (1) (c) and 39 (2) and Article 67 (b) and 67 (2) (e) are unconstitutional.*
>
> *(ii) Whether the said sections meet the proportionality test.*

(iii) Whether the said amendment introduced by Act No. 34 of 1994 contravenes the International Instruments signed, ratified and deposited by the Government of the United Republic of Tanzania."

The court was thus fully aware of the provisions of the CPC but was also cognizant of the fact that the petitioner had suggested three issues which were adopted by the A. G. hook, line and sinker as is apparent in his reply to the written submissions of Rev. Mtikila:

"As long as the issues were not agreed upon between the parties yet our submissions will discuss them as nearest as possible."

This Court in **Abel Edson Mwakanyamale v. N. B. C. (1997) Ltd.** Civil Appeal No. 63 of 2003 (unreported) cited with approval the observation of Sir BARCLAY NIHIL, P. in **Janmohamed Umerdin v. Hussein Amarshi and Three Others** (1953) 20 EACA 41 at p. 42 that:

"It may be that where, as here, neither party asked for issues, the validity could not be successfully attacked on the ground that the court should have framed issues, nevertheless, in my view neither the court nor the counsel are entitled to leave out the requirements of Order 14 Rule 5, this being a rule governing the conduct of a civil proceeding."

This Court in that same appeal, referred also to MULLA on **The Code of Civil Procedure**, 15th edition, p. 1421:

> *"The answer depends on the following considerations. If, though no issue is framed on the fact, the parties adduce evidence on the fact and discuss it before the Court decides the point, as if there was an issue framed on it, the decision will not be set aside in the appeal on the ground merely that no issue was framed ... The reason is that mere omission to frame an issue is not fatal to the trial of a suit unless the omission has affected the disposal of the case on the merits ..,"*

The mere omission, on the part of the trial court, to frame an issue in a matter of controversy between the parties, cannot be regarded as fatal unless, upon examination of the record, it is found that the failure to frame the issue had resulted in the parties (i) having gone to the trial without knowing that the said question was in issue between them, and (ii) having therefore failed to adduce evidence on the point.

After reviewing those two authorities this Court said:

> *"In view of the unorthodox procedure followed by the learned trial judge, we are not certain that the parties had gone to trial knowing what was the real question between them, non-payment of the debt or the purported invalidity of the Mortgage Deed! As we have*

explained before, the parties did not adduce any evidence at the trial and so the decision of the learned trial judge was not based on evidence".

Their Lordships then set aside the relevant parts of the proceedings that were affected and ordered a retrial before another judge.

This appeal is a totally different scenario from that of **Abel Edson Mwakanyamale** and so we cannot take a leaf from that appeal and order a retrial. We are of the decided opinion that even if issues were not framed, since the parties being *ad idem* as to what was at stake, had fully addressed the points in dispute, and since the court made its decision based on their submissions, then no injustice was occasioned and this appellate Court will not interfere solely on that score.

In fact, we are just being consistent with a recent decision of this Court in **Jaffari Sanya Jussa and Another v. Salehe Sadiq Osman**, Civil Appeal No. 51 of 2009 (unreported) citing 17th Edition of Mulla at p. 719 which is *in pari materia* with page 1421 of the 15th Edition.

We, therefore, dismiss this ground of appeal.

Then Mr. Masaju tackled what had been ground six reading as follows:

That the High Court erred in law and in fact by subjecting the Constitution to International Instruments.

Mr. Masaju pointed out that the United Republic of Tanzania has not surrendered its sovereignty in any way and that is why Article 177 B requires courts, when dealing with disputes, to take into account only the provisions of the Constitution and laws of the country.

However, we agree with Mr. Rweyongeza that International Instruments were not the conclusive factor in the judgment so even if they were to be ignored the judgment will remain intact. The learned judges said:

> *"In the event, we agree with the learned counsel for the petitioner, that the amendments to Articles 21(1), 39(1)(c) and 67(1)(b) of the Constitution* ***also*** *contravenes the International Conventions. So we answer the third issue also in the affirmative."*
>
> (The emphasis is ours.)

It is clear to us that the word "also" used in the above paragraph meant "in addition to". Thus the International Conventions were considered in addition to the position that had already been taken by the court.

This Court in **D. P. P. v. Daudi Pete** [1993] T. L. R. 22 ruled that reference to International Instruments is in order when interpreting the Bill of Rights of our Constitution. This Court said at p. 34:

> *"Tanzania signed the [African Charter on Human and Peoples' Rights] on 31 May 1982 and ratified it on 18 February 1984. Since our Bill of rights and Duties was*

introduced into the Constitution under the Fifth Amendment in February 1985, that is, slightly over three years after Tanzania signed the Charter, and about a year after ratification, ***account must be taken of that Charter in interpreting our Bill of Rights and Duties."***

(Emphasis is ours.)

So, we are at one with Mr. Rweyongeza in his reply that reference to International Human Rights Instruments has been ordained by this Court. We, therefore, cannot fault their lordships in any way and this ground of appeal is dismissed, too.

In what had been ground 4 the appellant averred:

That the High Court erred in law by assuming legislative powers.

To beef up this ground Mr. Masaju referred us to what the High Court said:

"We shall also declare in the present case that In principle it shall be lawful for private candidates to contest for the post of President and Member of Parliament along with candidates nominated by political parties. However, unlike [LUGAKINGIRA, J.] the learned late judge we will not just leave it at that. Exercising our powers under any other relief as prayed in the petition and cognizant of the fact that a vacuum might give birth to chaos and political pandemonium we shall proceed to order that the respondent in the true spirit of the

original Article 21(1) and guided by the Fundamental Objectives and Principles of State Policy contained in Part II of the Constitution between now and the next general elections, put in place, a legislative mechanism that will regulate the activities of private candidates. So as to let the will of the people prevail as to whether or not such candidates are suitable."

Mr. Rweyongeza replied that the High Court merely used its powers under Article 26 and directed that the articles be dealt with by Parliament. The learned advocate concluded by saying that "the High Court might have possibly erred but it certainly did not usurp parliamentary powers".

We are a shade unsure as to what Mr. Rweyongeza meant that "the High Court might have possibly" erred.

LUGAKINGIRA, J. stated in his judgment "I declare and direct that it shall be lawful for independent candidates, along with candidates sponsored by political parties, to contest presidential, parliamentary and local council elections". Did he strike out the articles which require a prospecting candidate for election as a President, a Member of Parliament or a Local Government Councilor to belong to and be sponsored by a political party, that is, Articles 39, 47 and 67? If he did not do that his declaration and direction that independent candidates are lawful is an empty statement. Anyway, we are not sitting on appeal against the

judgment of LUGAKINGIRA, J. The A. G. miscalculated in denying this Court that opportunity in 1994.

But even in this appeal when travelling through what their Lordships said, as quoted below, we are left speculating:

> *"So in conclusion on the above two issues, we wish to make it very plain that in our view Act 34 of 1994 which amended Article 21(1) so as to cross refer it to Articles 5, 39 and 67 which introduced into the Constitution, restrictions on participation of public affairs and the running of the government to party members only was an infringement on the fundamental right and that the restriction was unnecessary and unreasonable, and so did not meet the test of proportionality.* ***We thus proceed to declare that the said amendments to Articles 21(1), 39(1)(c) and 67(1)(b) are unconstitutional."***
>
> (Emphasis is ours.)

One thing which is crystal clear to us is that their Lordships "declared the said amendments" to be unconstitutional. Did they strike down those amendments? We think not. They categorically stated that "we shall proceed to order that the [A. G.] ... between now and the next general elections, **put in place, a legislative mechanism that will regulate the activities of private candidates**".

The A. G., the chief legal advisor of the Executive was to take the necessary steps to amend the laws and the Constitution so that independent candidates could be permitted. We are, therefore, of the settled view that the learned judges did not clothe themselves with legislative powers. This ground fails, too.

As already said earlier we are going to address grounds one and two separately despite the consolidation by Mr. Masaju. Ground one provided as follows:

> That the High Court wrongly assumed jurisdiction in entertaining the Petition.

Mr. Masaju submitted that since the dispute is on articles of the Constitution of the United Republic then the High Court of Tanzania had no jurisdiction to construe it. With all due respect to the learned Deputy Attorney General, we do not think that he seriously contended that. He failed to tell us which court in the whole of the United Republic has the jurisdiction to construe the Constitution of the United Republic of Tanzania.

We agree with Mr. Rweyongeza that where the jurisdiction of the High Court or any court, for that matter, is ousted there has to be an express provision to that effect. The learned advocate referred us to Article 7 (2) which states:

> *"The provisions of this Part of this Chapter* ***are not enforceable by any court. No court shall be competent to determine the question*** *whether or*

not any action or omission by any person or any court, or any law or judgment complies with the provisions of this Part of this Chapter."

(Emphasis is ours).

Now, "this Chapter" mentioned in that sub-article refers to Chapter One of the Constitution and "this Part" refers to Part II. Chapter I is titled "The United Republic, Political Parties, The People and The Policy of Socialism and Self-Reliance" and Part II is titled "Fundamental Objectives and Directive Principles of State Policy". Now, those are statements of policy. What is of crucial importance for our purposes in this appeal is that if Parliament had intended that all the provisions of the Constitution were not justiciable, as contended by Mr. Masaju, then there would have been an express provision in line with Art. 7(2). Since there is no such provision then the High Court had jurisdiction to entertain the petition. ???

Where there are such express provisions ousting jurisdiction the courts observe them and restrain from adjudicating. This Court did just that in **Seif Shariff Hamad v. Serikali ya Mapinduzi ya Zanzibar,** Criminal Appeal No 171 of 1992, (unreported) because, though the Court is for the whole Union, Article 99(2)(a) of the Constitution of Zanzibar, 1984, denies this Court jurisdiction of interpreting that Constitution in the following terms:

Mahakama ya Rufaa haitakuwa na uwezo wa kusikiliza kesi zozote zinazohusiana na:-

(a) Tafsiri ya Katiba hii;

We may as well reiterate what we had said in that judgment on 24th February, 1993, over 17 years ago now:

> *Tunapendekeza kuwa mamlaka zinazohusika katika pande zote mbili za Muungano zichukue hatua zipasazo kusawazisha vifungu hivi na vingine vyenye utata ama uwezekano wa kuleta utata baina ya hizi Katiba mbili.*

That can be translated as follows:

> We recommend to the relevant authorities on both sides of the Union, to take necessary steps to harmonize these conflicting articles and other articles of the two constitutions which are potentially irreconcilable.

This is the second time we recite that passage in **Seif Shariff Hamad**. The first time was in **S. M. Z. v. Machano Khamis Ali & 18 Others**, Criminal Application No. 8 of 2000 (CAT unreported), where we said:

> *"In that appeal we reserved constitutional matters for political solutions and we disposed the appeal on a procedural ground. But it is time to look at such provisions and take remedial steps.* ***The Court will not throw in the towel but will keep on drawing the attention of the Powers that be. That is our role."***

We should not be taken to be prophets of doom but it is an undisputed fact that this Court of Appeal contains part of the cream of

legal minds in this United Republic and, therefore, their opinion should be accorded the weight it deserves. Unfortunately, the Attorney General's Chambers is oblivious to that naked fact or does not read such important decisions even in cases where that Chambers is actively involved.

To return to the first ground of appeal, apart from the absence of such prohibition the High Court had jurisdiction to adjudicate the petition because of the constitutional set up of the United Republic of Tanzania which, according to Art. 2(1), consists of Mainland Tanzania (or what was formerly Tanganyika Territory) and Tanzania Zanzibar (or what was formerly Zanzibar Protectorate). In political parlance Tanzania Zanzibar is simply referred to in Kiswahili as Tanzania Visiwani (Tanzania Islands).

The constitutional set up is that, whereas there is a Constitution and organs of Tanzania Zanzibar, there is no such Constitution and organs for Mainland Tanzania. The Constitution of the United Republic of Tanzania and its organs, which are referred to as of the United Republic, are for both the Union and for Mainland Tanzania. Thus the High Court of Tanzania is both for the Mainland Tanzania and for the Union on matters pertaining to the Constitution, such as the one that is the subject matter of this appeal.

So, the High Court had jurisdiction to entertain the petition and ground one is dismissed in its entirety.

Ground 2 was formulated in the following way:

That the High Court erred in law in nullifying the provisions of the Constitution.

May be we start by saying that it is doubtful whether their Lordships nullified the provisions of the Constitution. As we have already said they certainly declared them unconstitutional. Their Lordships, after the declaration, did not take the next step to nullify or strike out the articles they found to be objectionable.

So, the issue then is whether the High Court of Tanzania or this Court has jurisdiction to declare a provision or provisions of an article or articles of the Constitution to be unconstitutional. Here is where we summoned the assistance of three friends of the Court: Mr. Othman Masoud, the Director of Public Prosecutions, Zanzibar; Prof. Palamagamba Kabudi; and Prof. Jwan Mwaikusa.

Mr. Masaju started by pointing out that courts are entrusted with the protection of the constitution and that their chambers get worried when the court strikes out an article of the Constitution. He specifically criticized their Lordships when they said:

> *"Our Constitution consists of 10 chapters, and some chapters have several parts. Chapter One has three parts. Part Three of chapter One has 32 Articles. So Article 30(3) of the Constitution is only applicable to the enforcement of Part III of Chapter One of the*

Constitution. So this court may indeed declare some provisions of the Constitution, unconstitutional."

May be we pause here for a while and digest this bit. Article 30 is about "Limitations upon, and enforcement and preservation of basic rights, freedoms and duties", now sub-Article (3) provides:

"Any person claiming that any provision in this Part of this Chapter or in any law concerning his right or duty owed to him has been, is being or is likely to be violated by any person anywhere in the United Republic, may institute proceedings for redress in the High Court."

With all due respect, we fail to see how the provisions of Article 30(3) led their Lordships to conclude that "this court may indeed declare some provisions of the Constitution, unconstitutional".

On the contrary Mr. Rweyongeza's view is that a constitutional amendment Act is not exempted from review by the courts under Art. 30(3). He referred us to Art. 368 (1) of the Indian Constitution, which is in *pari materia* with our Art. 98 (1). He pointed out that it has been held that the Indian Parliament cannot use Art 368(1) to amend the basic structure of the Constitution. He concluded that their Lordships were right to declare the amendments by Act No. 34 of 1994 to have been unconstitutional as they meddled with the basic structure of the Constitution, that is, franchise.

We admit two factual positions: One, Art 98(1) provides for the procedure of altering the Constitution and does so in the following terms:

> *"Parliament may enact law for altering **any** provision of this Constitution in accordance with the following principles:"*
>
> (Emphasis is ours.)

Those principles are not relevant for this judgment.

This Court said in **Daudi Pete** (*supra*) that the Kiswahili version of the Constitution is the authentic one. The Kiswahili version of Art 98(1) (a) and (b) provide: "kubadilisha masharti yoyote ya Katiba hii".

So, the Parliament can alter "any provision" of the Constitution. We wish to emphasize "any provision" of the Constitution. Altering has been defined by Art 98(2) to include:

> *"... modification or correction of those provisions or repeal and replacement of those provisions or the re-enactment or modification of the application of the provisions."*

We have no doubt in our minds that what the Eleventh Amendment did was altering Art 21 as explained above.

The second matter is that Art 30(5) provides for the review of any Act of Parliament in these words:

"Where in any proceedings it is alleged that any law enacted or any action taken by the Government or any other authority abrogates or abridges any of the basic rights, freedoms and duties set out in Articles 12 to 29 of this Constitution, and the High Court is satisfied that the law or action concerned, to the extent that it conflicts with this Constitution, is void or is inconsistent with this Constitution, then the High Court, if it deems fit, or if the circumstances or public interest so requires, instead of declaring that such law or action is void, shall have the power to decide to afford the Government or other authority concerned an opportunity to rectify the defect found in the law or action concerned within such a period and such manner as the High Court shall determine, and such law or action shall be deemed to be valid until such time the defect is rectified or the period determined by the High Court lapses, whichever is the earlier."

The question which arises is whether a law affecting a constitutional amendment according to Art 98(1) is like any other law passed by Parliament.

Mr. Masaju contended that a constitutional amendment law is not like any other law and that it is above ordinary law. That view was opposed by Mr. Rweyongeza who was supported by Prof Mwaikusa. However, both the

DPP of Zanzibar and Prof Kabudi are of the same opinion as Mr. Masaju that a constitutional amendment law is not like any other law.

The case of **Kesavananda Bharati v. State of Kerala**, A. I. R. 1973 SC 1461 has been heavily relied upon in the High Court. We are grateful to Prof Kabudi who pointed out that Justice KHANNA at p. 1903 stated:

> *"The word 'law' in Art 13(2) does not include amendment of the Constitution. It has reference to ordinary pieces of legislation."*

We are of the decided opinion that that is so. We say so because an ordinary legislation can be enacted by a simple majority of parliamentarians. That is not so with a constitutional amendment law whose enactment requires a specific number of votes. Art 98(1)(a) is loud and clear that:

> *"A Bill for an Act to alter any provisions of this Constitution (other than those relating to paragraphs (b) of this subarticle) or any provisions of any law specified in List One of the Second Schedule to this Constitution shall be supported by the votes of not less than two thirds of all the Members of Parliament."*

That paragraph speaks for itself but we have to point out that it is two-thirds of all the Members of Parliament and not just those sitting and voting. An ordinary law is not subjected to that stringent requirement.

The second question that follows is whether such a constitutional amendment can be reviewed by a court like any other law.

Mr. Othman Masoud and Prof Kabudi were again at one with Mr. Masaju, that s. 27 of the Interpretation of Laws Act, Cap 1 [RE 2002] provides that an amending Act is to be construed as one with the amended Act and so Act No 34 of 1994 should be construed as one with the Constitution.

According to them the cardinal principle of Constitutional interpretation is to read the entire Constitution as an entity. This Court said so in **Julius I.F. Ndyanabo v. A. G.**, Civil Appeal No. 64 of 2001. There is, therefore, a need to harmonize the various articles of the constitution. This means that an article of a constitution cannot be struck out or declared unconstitutional.

We agree with LUGAKINGIRA, J., as he then was, when he stated in **Rev. Christopher Mtikila v. Attorney General** [1995] TLR 31 at p. 66, that:

> *"What happens when a provision of the constitution enacting*
> *fundamental right appears to be in conflict with another provision in the Constitution? In that case the principle of harmonization has to be called in aid. The principle holds that the entire Constitution has to be read as*

integrated whole, no one particular provision destroying the other but
each sustaining the other..."

The learned judge went further:

"If the balancing act should succeed, the Court is enjoined to give effect to all the contenting provisions. Otherwise, the court is enjoined to incline to the realisation of the fundamental rights and may for that purpose disregard even the clear words of a provision if the application will result in gross injustice."

However, we do not subscribe to his last sentence. The court can never ever disregard the clear words of a provision of the Constitution. That will cause anarchy.

As Prof. Kabudi submitted there are two exceptions to the general principle. The first exception is where there is a specific constitutional provision prohibiting the amendment of certain articles of the constitution or what are called entrenched provisions which are subject to immutable principles.

We were given a number of examples of such provisions: Article 89 of the Constitution of France of 1958, Article 139 of the Constitution of Italy of 1947, Article 288 of the Constitution of Portugal of 1975, and Article 4 of the Constitution of Turkey of 1982. On the African soil there are

Articles 174 to 178 of the Constitution of Algeria, Article 124 of the Constitution of Chad of 31st March 2006, and also the Constitutions of Malawi, Namibia and South Africa.

May be we use the case of Turkey to drive home the point of what are entrenched provisions: Article 4 of the Constitution stipulates that:

> *"... the provisions of article 1 of the Constitution, establishing the form of the state as a Republic, the provisions of article 2 on the characteristics of the Republic, and the provisions of article 3 shall not be amended, nor shall their amendment be proposed."*

Then Article 2 provides as follows:

> *"The Republic of Turkey is a democratic, secular and social state governed by the rule of law; bearing in mind the concepts of public peace, national solidarity and justice; respecting human rights; loyal to the nationalism of Atatürk, and based on the fundamental tenets set forth in the Preamble."*

Article 3 reads as follows:

> *"The Turkish state, with its territory and nation, is an indivisible entity. Its language is Turkish. Its flag, the form of which is prescribed by the relevant law, is composed of a white crescent and star on a red background. Its national anthem is the "Independence March". Its capital is Ankara."*

Another illustration is Article 178 of The Constitution of Algeria which expressly prohibits constitutional amendments on:

(1) the republican nature of the State;

(2) the democratic order based on multi-party system;

(3) Islam as the religion of the State;

(4) Arabic as the national and official language;

(5) fundamental liberties, and citizens' rights;

(6) integrity of the national territory.

Article 131 of the Constitution of Namibia has an interesting proviso. The marginal note reads: "Entrenchment of Fundamental Rights and Freedoms".

> *"No repeal or amendment of any of the provisions of Chapter 3, in so far as such repeal or amendment diminishes or detracts from the fundamental rights and freedoms contained and defined in that Chapter, shall be permissible under this Constitution, and no such purported repeal or amendment shall be valid or have any force or effect."*

In such Constitutions if the Constituent Assembly or Parliament purports to amend such entrenched provisions the courts have power to declare the amendments to be unconstitutional and strike them out.

The second exception to the general rule is those jurisdictions where the courts claim to have implied powers to protect "basic structures". The argument is that the power of Parliament to amend the constitution is limited. Their lordships in their judgment which is the subject matter of this appeal said:

> *"The Respondent contends that the amendments were constitutional because they were duly enacted by Parliament who have such powers under Article 98 (1) of Constitution. We think that is not the issue here. We accept the proposition that although the Parliament has powers to enact legislation, such powers are not limitless. As Professor Issa Shivji in his article "Constitutional Limits of Parliamentary Powers" published in the special edition of THE TANZANIA LAWYER October, 2003 put it on p. 93: "... the power to amend the Constitution is also limited. While it is true that parliament acting in Constituent capacity can amend any provision of the Constitution, it cannot do in a manner that would alter the basic structure or essential features of the Constitution."*

Prof. Shivji cited his authority for that proposition as the decision of the Supreme Court of India in **Kesavananda v. State of Kerala** (*supra*) which, as already said, featured predominantly in the High Court.

Prof. Kabudi gave the historical background of the decision in **Kesavananda.** He said that it was a result of a struggle between the

Executive and Judiciary which started over the government's bid to effect land reforms soon after independence. Prof. Kabudi went on to cite pronouncements of Prime Minister Jawaharlal Nehru in parliament as evidence of the struggle. We do not think that it is necessary to delve into that for the purposes of this judgment except to say that at no time in the history of this country have we had sour relationship between the Executive and the Judiciary. That is extremely healthy and we wish to maintain it unless it is absolutely necessary to depart from it.

Prof. Kabudi went further to point out that the Indian Supreme Court was inspired by the lectures of a German scholar, Prof. Dietrich Conrad, titled "Implied Limitations of the Amending Power" delivered in 1965 at the Faculty of Law of the Banaras Hindu University. That is testified to by Prof. Mahendra.P. Singh, Professor of Law at the University of Delhi in an obituary article, "Bridging Legal Traditions: Professor Dietrich Conrad, 1932-2001", published in the Frontline, Vol. 18 – Issue 18, Sep, 01-14, 2001, and also A.G. Noorani in his article "Behind the 'basic structure' doctrine: On India's debt to a German jurist, Professor Dietrich Conrad".

We agree with Prof Kabudi that the doctrine is nebulous as there is no agreed yardstick of what constitutes basic structures of a constitution. In this regard Prof. Shivji himself proposed some instances in his article stated that the Parliament cannot:

> *"... amend the 1977 Union Constitution in any of its provisions, it cannot amend it to change the nature of the two government union or establish life presidency or abolish*

the judiciary or turn the Parliamentary Standing Committee on Powers, Privileges and Immunities into a court of law. Such constitutional amendments would be beyond the powers of the Parliament even in its constituent capacity and therefore liable to be struck down because they alter the basic structure of the Constitution."

We shall make our observations on this portion at a later stage. We may also point out that even Prof. Conrad himself conceded that there is no litmus test as to what constitutes basic structure. He wrote: in one of his essays carrying the title "Basic Structure of the Constitution and Constitutional Principles":

"Finally, a note of caution might not be out of place. The jurisprudence of principles has its own distinct dangers arising out of the flexibility and lack of precision of principles as well as their closeness to rhetorical flourish. This might invite a loosening of judicial discipline in interpreting the explicit provisions of the Constitution. ... Tightening of judicial scrutiny would be necessary in order to diminish the dangers of opportunistic use of such principles as mere political catchwords."

Let us now examine our Constitution of 1977. We have already seen that Art 98(1) provides for the alteration of any provision of the Constitution, that is, there is no article which cannot be amended. In short there are no basic structures. What are provided for are safeguards. Under

Art 98(1)(a) constitutional amendments require two-thirds vote of all Members of Parliament while Art 98(1)(b) goes further that:

> *"A Bill for an Act to alter any provisions of the Constitution or any provisions of any law relating to any of the matters specified in List Two of the Second Schedule to this Constitution shall be passed only if it is supported by the votes of not less than two-thirds of all Members of Parliament from Mainland Tanzania and not less than two-thirds of all Members of Parliament from Tanzania Zanzibar."*

List Two of the Second Schedule of the Constitution enumerates eight matters, to wit:

1. The existence of the United Republic
2. The existence of the Office of the President of the United Republic.
3. The Authority of the Government of the United Republic.
4. The existence of the Parliament of the United Republic.
5. The Authority of the Government of Zanzibar.
6. The High Court of Zanzibar.
7. The list of Union Matters.
8. The number of Members of Parliament from Zanzibar.

These eight matters could have been basic structures in the sense that Parliament cannot amend them. However, they are amendable once the procedure for amendment is followed. So, there is nothing like basic structures in our Constitution.

All the examples given by Prof Shivji as basic structures are not so. They are contained in List Two: The abolishing of two governments is covered in the authority of the Union Government and that of the Zanzibar Government. Then the abolishing of the Judiciary is covered in the existence of the High Court of Zanzibar and the designation of the Court of Appeal as a Union Matter. All these matters can be amended under Art 98(1)(b). So, the examples given by Prof. Shivji are not basic structures of the Constitution of Tanzania, 1977.

It is our considered opinion that the basic structures doctrine does not apply to Tanzania and we cannot apply those Indian authorities, which are in any case persuasive, when considering our Constitution.

After coming to that conclusion there is still an issue glaring at us: What does the Tanzanian court do when there are articles which cannot be harmonized?

LUGAKINGIRA, J. and later J. A., one of our judicial luminaries, confessed to have been in a dilemma. May be we let him soliloquy:

> *"The position, as I see it, is now this: By virtue of art 21(1) every citizen is entitled to participate in the government of the country, and by virtue of the provisions of art 20(4) such citizen does not have to be a member of any political party; yet by virtue of art 39(c) and others to that effect, no citizen can run for office unless he is a member of and*

sponsored by a political party. This is intriguing. I am aware that the exercise of the right under art 21(1) has to be 'in accordance with procedure provided by or under the law,' but I think that while participation through a political party is a procedure, the exercise of the right of participation through a political party only is not a procedure but an issue of substance. The message is: either you belong to a political party or you have no right to participate. There is additionally the dimension of free elections alluded to in art 21. A citizen may participate in the government 'either directly or through freely chosen representatives.' It is contrary to every notion of free elections if non-party citizens are compelled to vote for party candidates. In the midst of this unusual dilemma I had to turn to the canons of statutory and constitutional interpretation."

As we already pointed out at the beginning of this judgment, the learned judge concluded without declaring the Eighth Amendment to be unconstitutional. He said:

"I declare and direct that it shall be lawful for independent candidates, along with candidates sponsored by political parties, to contest presidential, parliamentary and local council elections."

This Court has already made its stand abundantly clear in **Attorney General v. W.K. Butambala,** [1993] T. L. R. 46 at p. 51 when it said:

"We need hardly say that our Constitution is a serious and solemn document. We think that invoking it and knocking down laws or portions of them should be reserved for appropriate and really momentous occasions."

In that appeal this Court was dealing with the Criminal Procedure Code. Here it is the Constitution itself. We have to be extra cautious.

That stand in Butambala was taken a step further in **Mbushuu @ Dominic Mnyaroje And Another v. R.** [1995] T.L.R. 97 at p 117:

"But the crucial question is whether or not the death penalty is reasonably necessary to protect the right to life. For this we say that it is the society which decides. The learned trial judge in the above quoted passage acknowledges that presently society deems the death penalty as reasonably necessary."

In that appeal the trial judge convicted the appellants of murder, did not sentence them to hang but used the occasion to strike out the death sentence as being unconstitutional. The Republic appealed and this Court conceding that death penalty was inherently inhuman, cruel and degrading punishment but observed that it was saved by Art 30(2). This Court was of the decided opinion that the issue of annulling death penalty was the responsibility of Parliament which is aware of public opinion.

In the judgment which is the subject matter of this appeal, their lordships said:

> *"So as to let the will of the people prevail as to whether or not such [independent] candidates are suitable."*

We are definite that the Courts are not the custodian of the will of the people. That is the property of elected Members of Parliament.

The High Court of Kenya has the same view as expressed in a very recent decision in **Jesse Kamau & 25 Others v. A.G.,** [2010] eKLR where 24 clergy men of various religious institutions challenged the inclusion of Kadhis' Courts in the Draft Constitution. In their final orders three judges of the High Court ruled:

> *"As regards paragraph 2 of the prayers we find and hold that sections 66 and 82 are inconsistent with each other, and that section 66 is superfluous but it is not the court's role to expunge it. It is the role of Parliament and the citizenry in a referendum."*

So, if there are two or more articles or portions of articles which cannot be harmonized, then it is Parliament which will deal with the matter and not the Court unless that power is expressly given by the Constitution, which, we have categorically said, it has not.

However, situations can arise where the High Court and this Court can nullify a constitutional provision on the ground that it is unconstitutional in the sense that it was not enacted as provided for by Art.

98. An example is where a constitutional amendment is challenged on the grounds that it did not obtain the prerequisite number of votes according to Art. 98(1)(a). We already pointed out earlier that generally a constitutional amendment requires the support of a two-thirds majority and under Art 98(1)(b) the support of two-thirds majority of all the Members of Parliament from Zanzibar and all Members of Parliament from the Mainland. If such a challenge is sustained then the court might have to find that the article has not been enacted in accordance with the constitutional provisions and is, therefore, unconstitutional.

In such a situation the courts will be performing its constitutional function of maintaining checks and balances. Otherwise, Tanzanian courts exercise calculated restraint to avoid meddling in constituencies of the other two pillars of the State. This has been amply demonstrated in numerous decisions. LUGAKINGIRA, J., himself in his ruling in Rev. Mtikila's case refused many prayers as being not justiciable. We agree with Prof Mwaikusa that it is a pity that that ruling has not been reported. We recommend to the Editorial Committee to report it.

Another example of such judicial restraint is **Mwalimu Paul John Mhozya v. Attorney General (No. 1)** [1996] TLR 130 (HC). The applicant sought an interlocutory injunction to restrain the President of the United Republic of Tanzania from discharging his functions pending a determination of the main case in which the applicant sought orders of declaration that: (a) the Constitution of the United Republic had been violated; (b) the President was guilty of having allowed or enabled the said

violation; and (c) the continued exercise of presidential powers by President Ali Hassan Mwinyi was unconstitutional and a potential danger to the well being of the country and its citizens. It was held, *inter alia*,:

> *(iii)* *"The principle that the functions of one branch of government should not encroach on the functions of another branch is an important one to ensure that the governing of a state is executed smoothly and peacefully;*
>
> *(iv)* *No provision of the Constitution or any other law authorises the High Court to hold that the President can be removed or suspended from office by a body other than that which the Constitution specifically provides for;*
>
> *(v)* *This Court has no jurisdiction to issue the order of injunction sought against the President."*

Ground one is, therefore, allowed: a court cannot declare an article of the Constitution to be unconstitutional except where the article has not been enacted in accordance with the procedure under Art 98(1)(a) and (b).

After saying all that it is obvious that we cannot legally say that independent candidates are allowed. That is the province of Parliament to amend the Constitution according to Art 98(1).

We may as well add that apart from the legal argument we have advanced there is a purely practical issue. Where will we stop? The

argument is that the provisions of Art 21 have been abridged since a candidate has to belong to and be sponsored by a political party. The next complaint will be why should a parliamentary candidate be required to be of the age of 21 years and a presidential candidate 40 years? Why not be the age of majority of 18 years? Also why should the presidential candidate be a citizen born in Tanzania? Why do we exclude those born outside the Republic simply because their parents were faithfully serving the Republic outside the country? Are all these not abridging Art 21?

Having said all this, and having made our conclusion obviously clear, we now turn to a litigation which is on all fours with this current appeal: the case before the Inter-American Court of Human Rights, **Jorge Castañeda Gutman *v.* México**. Briefly stated the facts in this case are as follows:

On 05/03/2004 Jorge applied to the General Council of Federal Electoral Institute to be registered as an independent presidential candidate claiming to exercise his rights under Art 35 (II) of the Mexican Constitution which reads as follows:

> "Article 35. The citizen shall have the following prerogatives:
>
> > *"II. To be able to be elected for **any** elected public office and appointed to any other employment or assignment, if he complies with the requirements established by law;"* (The emphasis is ours).

The application was refused because an Electoral Law provides:

"... only the national political parties have the right to request the registration of candidates to elected office."
(Emphasis is ours).

Jorge unsuccessfully exhausted local remedies so, on 12th October, 2005, he filed a petition with the Inter-American Commission on Human Rights which made certain recommendations to the Mexican Government and gave it two months to report on actions taken to implement them. As time lapsed and no progress was made, the Commission lodged before the Court an application against Mexico:

"... to claim the constitutionality of political rights and the consequent impediment for Jorge Castañeda Gutman ... to register his independent candidacy for the presidency of Mexico [in the elections held in July 2006]."

After disposing four preliminary objections and a lengthy deliberation covering 251 paragraphs and 61 pages, seven judges of the Court concluded its judgment in the following terms in relevant parts:

"DECLARES,

unanimously, that:

3. The State did not violate, to the detriment of Jorge Castañeda Gutman, the political right to be elected recognized in Article 23(1)(b) of the American Convention on Human Rights, in relation to Articles 1(1) and 2 thereof, in the terms of paragraphs 134 to 205 of this judgment."

Art 23 of the American Convention on Human Rights provides:

> *"Article 23. Right to participate in government*
>
> *1. Every citizen shall enjoy the following rights and opportunities:*
>
> *a. to take part in the conduct of public affairs, directly or through freely chosen representatives;*
>
> *b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and*
>
> *c. to have access, under general conditions of equality, to the public service of his country.*
>
> *2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings."*

Art 23 goes much further than our Art 21, yet the Electoral Law, and NOT the Constitution, as is in our case, was held not to violate it.

In our case, we say that the issue of independent candidates has to be settled by Parliament which has the jurisdiction to amend the

Constitution and not the Courts which, as we have found, do not have that jurisdiction.

The decision on whether or not to introduce independent candidates depends on the social needs of each State based on its historical reality. Thus the issue of independent candidates is political and not legal.

However, we give a word of advice to both the Attorney General and our Parliament: The United Nations Human Rights Committee, in paragraph 21 of its General Comment No. 25, of July 12, 1996, said as follows on Article 25 of the International Covenant on Civil and Political Rights, very similarly worded as Art 23 of the American Convention and our Art 21:

> *"The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members of parties or of specific parties."*

Tanzania is known for our good record on human rights and particularly our militancy for the right to self determination and hence our involvement in the liberation struggle. We should seriously ponder that comment from a Committee of the United Nations, that is, the whole world.

Each party is to bear its own costs both in this Court and below.

DATED at DAR ES SALAAM this 17th day of June, 2010.

A. S. L. RAMADHANI

CHIEF JUSTICE

E. N. MUNUO

JUSTICE OF APPEAL

J. H. MSOFFE

JUSTICE OF APPEAL

N. P. KIMARO

JUSTICE OF APPEAL

M. S. MBAROUK

JUSTICE OF APPEAL

B. M. LUANDA

JUSTICE OF APPEAL

S. MJASIRI

JUSTICE OF APPEAL

I certify that this is a true copy of the original.

J.S. MGETTA
DEPUTY REGISTRAR
COURT OF APPEAL