THE HIGH COURT OF TANZANIA
AT DAR ES SALAAM
(MAIN REGISTRY)

(CORAM: KIMARO, J; MASSATI, J AND MIHAYO, J)

MISCELLANEOUS CIVIL CAUSE NO. 77 OF 2005

IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA, 1977

AND

IN THE MATTER OF A PETITION TO ENFORCE A CONSTITUTIONAL BASIC RIGHT UNDER THE BASIC RIGHTS AND DUTIES ENFORCEMENT ACT, 1994

AND

IN THE MATTER OF THE ELECTIONS ACT, NO.1 OF 1995

AND

IN THE MATTER OF A PETITION TO CHALLENGE AS UNCONSTITUTIONAL SECTIONS 98(2) AND 98(3) OF THE ELECTORAL LAW (MISCELLANEOUS AMENDMENT) ACT 4/2000

BETWEEN

LEGAL AND HUMAN RIGHTS CENTRE (LHRC) – 1ST PETITIONER

LAWYERS' ENVIRONMENTAL ACTION TEAM (LEAT) - 2ND PETITIONER

NATIONAL ORGANIZATION FOR LEGAL ASSISTANCE (NOLA) - 3rd PETITIONER

VERSUS

THE ATTORNEY GENERAL - RESPONDENT

JUDGMENT

KIMARO, J.

This is a petition by originating summons filed under sections 4 and 5 of the Basic Rights and Duties Enforcement Act (Cap 3 R.E. 2002), Art. 64(5) of the Constitution of the United Republic of Tanzania, 1977 as well as section 95 of the Civil Procedure Code 1966.

The Legal and Human Rights Centre (LHRC), Lawyers' Environmental Action Team (LEAT) and the National Organization Legal Assistance (NOLA) filed the petition. All the petitioners are charitable, voluntary, and non-partisan human rights interested non-governmental organisations dully registered in terms of the provisions of the Companies Ordinance Cap.212. The originating summons is supported by a joint affidavit sworn by Helen Kijo Bisimba, Julius Clement Mashamba and Antipath Lissu, the Executive Directors of the petitioners' organizations. Learned Advocates Mr. Alex Mgongolwa, Mr. Kiwangoma and Mr. Issa Maige represent the petitioners in their respective order.

The Respondent is the Attorney General and Mr. Mwaimu, learned Principal State Attorney, represents him and Mr. Nikson Ntimbwa, learned State Attorney, assisted him.

The petition challenges the constitutionality of the provisions of section 98(2) and 98(3) of the Elections Act, 1985 as amended by the Electoral Law (Miscellaneous Amendments) Act, No.4 of 2000. The

petitioners aver that the provisions are violative of Articles 13, 21 and 29 of the Constitution of the United Republic of Tanzania, 1977.

Before we proceed, we take judicial notice under section 58(1)(a) of the Law of Evidence Act (Cap.6 R.E. 2002) that we now have a revised edition of Laws of Tanzania. The revised edition is for the year 2002 and it was prepared on the authority of The Laws Revision Act (Act No.7 of 1994), which was made operative retrospectively by Government Notice No.124 published on 6/5/2005. The Act provided for the preparation and publication of a revised edition of the Laws of Tanzania and for continuous revision and maintenance up to date. The Elections Act is now known as The National Elections Act, (Cap 343 R.E. 2002). It incorporates all amendments up to 2001. In 2005, Act No.3 of 2005 amended it again.

This petition was filed in September, 2005 and it appears obvious that the petitioners were not aware of the existence of Government Notice No.124 of 6/5/2005 because they would have quoted the proper number of the provisions which appear in the revised edition of The National Elections Act, (Cap.343 R.E. 2002). We do not consider the omission to be fatal and we would ignore it in line with Article 107 A (2)(e) of the Constitution of the United Republic of Tanzania, 1977 which requires the court to focus on substantial justice and do away with technicalities which defeat justice. We are aware that there are a lot of problems in printing the government notices. The date which appears on the Government

Notice as a printing date may not reflect the reality. At times the government notices are printed months after the dates which appear as the printing dates and this court cannot shut its eyes at real situations.

In terms of the revised edition of The National Elections Act, (Cap 343 R.E. 2002) the provisions which are being challenged by the petitioners are now sections 119(2) and 119(3). It is this prevailing position of the law that will be referred to.

The grounds for filing this petition as pleaded by the petitioners are that:

The Constitution of the United Republic of Tanzania guarantees fundamental basic rights. Among them is equality before the law and the right to participate in governance by voting or being voted for in fair and free elections. Given these guaranteed rights, the Parliament is prohibited from enactment of acts which discriminate the citizens of Tanzania on grounds of age, gender, race and the status of the beneficiaries. The petitioners contend that these guaranteed rights are in tandem with various International Human Rights instruments to which Tanzania is a party.

Now the petitioners' grievances are based on the amendments which were made to the National Elections Act by Act No. 4 of 2000. Through the amendments, section 98 (2) (now 119(2) of the 2002 revised edition), was deleted and replaced, and a new subsection 3

was added. The petitioners aver that the amendments introduced provisions which legalized the offering, by a candidate in election campaigns of anything done in good faith as an act of hospitality to the candidate's electorate or voters. The introduced amendments are popularly known as "takrima" and we will be referring to the provisions by their popular name ("takrima" provisions).

The petitioners aver further that the "takrima" provisions are silent on the amount and timing of the hospitality to be provided to the electorate. Candidates who contested in the said elections and the survey which was carried out showed that they first practiced them in the 2000 general elections and the election campaigns were marred by corrupt loopholes in the said law to influence the electorate to vote in their favour.

It is their contention that the "takrima" provisions are offensive and encourage corruption in the electoral process because they violate the right against discrimination, the right to equality before the law and the right of the citizens of Tanzania to participate in fair and free elections. They say that these rights aim at promoting integrity, transparency, good governance and democracy.

The petitioners plead that the petition is specifically based on Part III of the Constitution. They allege that the enforcement of the "takrima" provisions breach Articles 13(1) which guarantee the right to equality, Article 21(1) and (2) which guarantee the right of citizens to participate in governance of the United Republic of Tanzania,

including equal participation in free and fair elections, and the right of citizens to participate in governance of public affairs as well as the right of citizens to enjoy fundamental rights under Article 29(1).

The petitioners have also given particulars of contravention of articles of the constitution. They are Articles 13(1) which prohibits discrimination and Article 13(2) which prohibits enactment of any law that directly or by implication discriminates citizens of Tanzania. Others are Articles 21(1) and 21(2) which guarantee among others the right of enfranchisement to citizens of Tanzania.

The petition in general challenges the "takrima" provisions to the extent that they infringe the right of every citizen to vote and be voted for in a fair and free elections as well as the right to equality before the law. They are also being challenged in as much as they contravene the provisions of the constitution that prohibit any law enacted by the Parliament to contain provisions that discriminate citizens of the country as guaranteed for under Article 29(1) of the Constitution of the United Republic of Tanzania 1977.

The petitioners pray for declaratory orders to the effect that the "takrima" provisions are unconstitutional, null and void. They also pray for costs of this petition.

The Attorney General does not deny the basic rights which the petitioners aver that they are guaranteed by the Constitution. What he denies is the allegations by the petitioners that the "takrima"

provisions are violative of the Constitution. He asserts that the provisions are clear, self-explanatory and with no violation of the Constitution of the United Republic of Tanzania. He prays that the petition be dismissed with costs.

The Attorney General also gave a notice of preliminary objection raising two points. The first point of objection is that the petitioners have no locus standi to challenge the "takrima" provisions and the second one is that the petition does not disclose a cause of action.

From the nature of the petition itself, we did not consider it worthwhile calling witnesses. We were satisfied that the issue which is involved is one of law and could fairly be disposed of by written submissions from the parties under Order XV rule 3(1) of the Civil Procedure Code 1966. To save time and costs the hearing of both the preliminary objections and the petition proceeded by written submissions and simultaneously.

The arguments raised to support the first point of preliminary objection by the Attorney General is that Article 30(3) of the Constitution and section 4 of the Basic Rights and Duties Enforcement Act (Cap 3 R.E. 2002) are the enabling provisions of the law for filing this petition. The said provisions give locus standi to natural persons only. The petitioners being registered institutions are legal persons. They are not the persons envisaged by the law to file a petition to complain about infringement of human rights. The learned

State Attorney argued strongly that the infringement of human rights could only be against natural persons and not legal persons. His view is that the petitioners have come up with a hypothetical case because human rights violation cannot be against a company or an institution.

The counter argument by the petitioners is that the argument by the learned State Attorney is not supported by any authority.

The petitioners concede that the Constitution does not give a definition of the term "person" but they argued that short of a definition in the Constitution, guidance must be sought from the definition given by the Interpretation of Laws And General Clauses Act, (Cap 1 R.E.2002) which defines the word person as –

> *"... a public body, company or association of persons, corporate or incorporate."*

The petitioners' firm view is that since the definition of a person given by the said law is not restricted to natural persons but extends to legal entities, the enabling provisions of the law to file this petition cover them.

The petitioners argued further that as Activists Human Rights Organizations, they are vested with a duo capacity; the capacity as an individual and the capacity as a member of the community and this is the Scheme of Part III, Chapter one of the Constitution. The petitioners contend that as members of the community, they are

vested with the capacity to seek and protect the communities' rights enshrined in the Constitution. They argued that this scheme reflects the modern trend in Constitutionalism which recognizes the pre-eminence of the community in the formulation of the Constitution. They submitted that the gate to access the courts for Constitutional declaratory orders is wide enough to accommodate legal persons as well. The court was referred to a Nigeria case of ***Attorney General of Bendel State v Attorney General of Mzevia*** [1982] 3 NCLR 188 where in interpreting an article in pari materia to our Article 30(3) the court held that the article opened the gate to the courts for persons who do not want to be governed by laws not enacted in accordance with the Constitution.

It was argued further by the petitioners that Article 30(3) of the Constitution caters for both personal and public interest litigations and so the argument by the learned State Attorney on who has locus standi is devoid of any merit. The petitioners said Article 26(2) is an additional source for locus standi for them. Their argument is that the provision falls under the sub-title; Duties to the Society and therefore the doctrine of public interest litigation is embodied in the Constitution and it is not something which has to be imported from other jurisdictions. The petitioners made reference to decisions from other jurisdictions which are ***Inland Revenue Comrs VS National Federation of Self Employed and Small Businesses Ltd (1981) 2 All ER 93, Minister for Justice Vs Borowski (1981) 2 SCR 375, Adesanya V President of Nigeria & Another (1981) NLR I and Peoples Union for***

Democratic Rights V Minister of Home Affairs AIR 1985 Delhi 268. They argued that in all the decisions the issue of locus standi was raised and the court adopted a liberal interpretation arguing that the petitions were based on public interest and in public interest litigations all that the petitioner is required to show is bona fide claim for public interest.

The petitioners also supported their argument by the celebrated case of ***Rev. Christopher Mtikila Vs Attorney General [1995] TLR 31***. They prayed that the objection on locus standi be dismissed for being devoid of any merit.

It was unfortunate that we could not get hold of some of the authorities cited by the Advocates for the petitioners; particularly the Nigerian cases and copies were not supplied. After a thorough scrutiny of the submissions made by the learned State Attorney and the Advocates for the petitioners we agree with the learned Advocates that the petitioners have locus standi. It is not true as submitted by the learned State Attorney that natural persons only can bring violations against human rights to court. There is nothing in Article 30 which confines the definition of a person to natural persons. As correctly submitted by the learned Advocates for the petitioners the definition of the term person in the Interpretation of Laws Act [Cap I R. E. 2002] includes corporate bodies like the petitioners.

In the case of **Rev. Christopher Mtikila V Attorney General** [1995] TLR 31 the Hon. Justice Lugakingira (as he then

was) discussed at length the principle of locus standi and how locus standi is vested under our Constitution. It is vested in every person in the capacity of an individual by virtue of Articles 12 to 24 of the Constitution and in the capacity of a member of the Community by virtue of Articles 25 to 28 of the Constitution. The petitioners are members of the Community who have constituted themselves to corporate bodies for purposes of carrying out human rights activities for the benefit of the community. It is the community which is the beneficiary of those activities. The nature of the activities for which the petitioners have constituted themselves is a determinant factor of their locus standi in the petition which they have filed. It is a public interest petition. We are therefore in all fours with Hon. Lugakingira J (as he then was) who observed in ***Rev. Christopher Mtikila Vs Attorney General*** 1995 (supra) that if a public spirited individual (and we add a corporation like the petitioners) springs up in search of the court's intervention against legislation or actions that pervert the Constitution, the court as guardian and trustee of the Constitution, must grant him (her/it) a standing.

The same issue arose in the case of **Julius Ishengoma Francis Ndyanabo vs The Attorney General** Civil Appeal No 64 of 2001(unreported). The Court of Appeal equally discussed the issue at length and it held that in an appropriate case a juristic person might complain before the High Court of a violation of the equality before the law. This is an appropriate case for the petitioners to complain of violation of human rights. We dismiss the first

preliminary objection on the petitioners lacking standing for being devoid of any merit.

The second preliminary point of objection is cause of action. It was submitted for the Attorney General that the petitioners have not shown who is being discriminated by the "takrima" provisions and the nature of the discrimination. The learned State Attorney argued that in order to challenge the constitutionality of any provision, a person must clearly specify an act which constitutes a breach or violation of his right. The learned State Attorney argued further that the "takrima" provisions have been made in accordance with Article 30(2) of the Constitution. He went on to give analysis of the provisions and arrived at a conclusion that the term good faith used in the "takrima" provisions was intended to differentiate those acts done and expenses incurred in providing food, drink and entertainment with provisions offered for the purpose of inducing or influencing any person to vote or refrain from voting a candidate in elections.

The response by the Advocates for the petitioners is that the issue which is involved is the constitutionality of the "takrima" provisions. What the court has to look at is the law and how it works. We were referred to the case of ***Rev. Christopher Mtikila V Attorney General*** (supra) which quoted with approval a passage from Chitaly & Rao, the Constitution of India (1970:686), citing ***Prahad Jena V State*** AIR 1950 Orissa 157 where it was held that:

" In order to determine whether a particular law is repugnant or inconsistent with the fundamental rights it is the provisions of the act that must be looked at and not the manner in which the power under the provisions is actually exercised. Inconsistency or repugnancy does not depend upon the exercise of the power by virtue of the provisions in the Act but on the nature of the provisions themselves."

The petitioners argued further that since it is the validity of the "takrima" provisions which are in dispute, on the face of it, the necessary cause of action is established and the question of proving the allegations comes at the stage of hearing. The petitioners also prayed for the dismissal of the preliminary objection.

It is easy for us to dispose of this point of preliminary objection. We need not detain ourselves on this matter. Firstly, in the case of ***John M. Byombalirwa v Agency Maritime Internationale (Tanzania) Ltd*** 1983 TLR I the Court of Appeal held that for purposes of deciding whether or not a plaint discloses a cause of action, it is the plaint that must be looked at. Looking at what is pleaded in the petition it discloses cause of action.

Secondly, this being a petition in which the validity of the "takrima" provisions are being questioned, what this court has to look at are the provisions themselves vis-à-vis the articles of the Constitution which are alleged to have been breached. As correctly submitted by the Advocates for the petitioners, the question of how

those articles have been breached has to be dealt with in the course of the hearing of the petition itself. The case of **Mukisa *Biscuits Manufacturing Co. Ltd V West End Distributor Ltd*** (1966) EA 696 sets out a criteria of matters which can be argued as preliminary objections.

> *" They must be point of law pleaded or arise as a clear implication from the pleadings."*

For this objection the learned State Attorney crossed the borders of the preliminary objection when he submitted that the petitioners have not shown acts of contravention. That is a matter of evidence.

The same issue arose in the case of ***Rev. Christopher Mtikila V Attorney General*** (supra) *where* Hon. Justice Lugakingira J (as he then was) agreed with the decision of ***Prahalal Jena V State*** (supra), which is reproduced in Chitaley & Rao, the Constitution of India. This petition is similar to the case of ***Rev. Mtikila****(supra)* in that the constitutionality of the provisions which bar independent candidate from standing for elections was in question. In this petition the constitutionality of the "takrima" provisions are in question.

We hold as in the first preliminary point of objection that the second point of preliminary objection has no merit and it is equally dismissed.

Our next stage is the petition itself. The grounds for filing this petition as contained in paragraphs 5, 6 and 7 are mainly two.

The first ground is that section 119(2) and 119(3) of the National Elections Act (the "takrima" provisions) are inconsistent in substance with the provisions of Article 13(1) and (2) of the Constitution of the United Republic of Tanzania which prohibits enactment of any law or commission of any act which is directly discriminatory or discriminatory in effect.

A brief background to the petition given by the Advocates for the petitioners is that although the offences of corrupt practices were removed and transferred into the Prevention of Corruption Act in 1990, they were re-introduced again into the Elections Act in 1995. The effect of the reintroduction of the offences was felt soon after the first multiparty elections in 1995 by the big number of election petitions which were filed in the High Court challenging the election results on the ground of corrupt practices by the victorious candidates in the election process. Their view is that this reason led to the 2000 amendments which legalized the offering by a candidate in election campaigns of anything done in good faith as an act of normal or traditional hospitality "takrima" to the candidate's electorate or voters. They said, the provisions which were practiced for the first time in the 2000 general elections showed their true discriminatory effect because the campaigns were marred by corrupt tendencies because the "takrima" provisions were used by the candidates to influence the electorate to vote in their favour. They submitted

further that the trend repeated itself in the 2005 elections and there have been complaints all over the country that "takrima" is killing democracy and free elections.

The Advocates argued that by having the "takrima" provisions an act which would have amounted to treating, bribery or illegal practice under sections 115, 117 and 118 would not be illegal if done in good faith. Their opinion is that the provisions justify the giving and receiving of something of normal or traditional hospitality or incurring what is called normal or ordinary expenses in election process in good faith.

They referred to the interpretation of the definition of the expression "discrimination" in Article 13(5) of the Constitution as given by the Court of Appeal in the case of ***Julius Ndyanabo***(supra) and argued that the provisions are discriminatory in two ways;

One, the high-income political candidate is capable of offering the so called "takrima" hospitality to the voters because of his/her financial capability while a low-income political candidate may not have the financial capability to do so. The "takrima" provisions entail differential treatment of persons contesting the elections basing on their station of life. The wealth of the high-income political candidate will place him/her at an advantaged position of winning elections because of the popularity gained from offering "takrima" to the voters. This is a position which cannot be available to a low-income

political candidate who has nothing to offer as "takrima." Thus whereas the high-income political candidate stands at an advantageous position the low-income political candidate stands of a disadvantaged position. The Advocates said that this is the ultimate result of the "takrima" provisions despite of the fact that we have no law in Tanzania which provides for the candidate's level of wealth as a prerequisite condition or qualification to contest for any position in the election process.

Second, the advantage or the exception provided for in the "takrima" provision is only available as between political candidates and voters. It is not applicable in other instances like employer and an applicant for employment. In other words the "takrima" provisions have the effect of justifying some acts if done in the election campaigns while if they are done outside the election campaigns are offensive notwithstanding that the former might have the same or even more serious effect than the latter.

They said what determines the discrimination of an act in case of indirect discrimination is not necessarily the intention of the doer but the effect of his/her acts. Reference was made to the case of ***R Vs Birmingham City Council Exparte Equal Opportunities Commission*** 1989 2 W.L.R 520 at pp 523-6 which was given recognition in Tanzania by this court in ***A.A.Sisya and 35 Others Vs Principal Secretary Ministry of Finance & Another*** Civil Case No.5 of 1994 (unreported)

It is the argument of the learned Advocates that the "takrima" provisions are discriminatory in effect and this is a question of fact. This can be gathered from the framing of the provisions and its application in 2000 and 2005 general elections. They said that commonsense alone, without assistance of knowledge would suggest that as between a political candidate who has offered gifts to voters and another who has not, the one who has offered gifts stands a better chance to be voted for and this is in consonance with the Swahili proverb that says "Mkono mtupu haulambwi."

As for the counter affidavit sworn by Mr. Nixon Noege Ntimbwa where in he denied that the "takrima" provisions are unconstitutional because the wording does not suggest nor indicate that the constitutional rights has, will or is about to be infringed, nor does it encourage any infringement or breach of the Constitution, the Advocates said it is not the wording which matters but the implication. The Advocates referred again to the decision of ***A. A Sisya and 35 Others Vs Principal Secretary, Ministry of Finance*** (supra). The court was invited to hold that in as far as the "takrima" provisions discriminate a political candidate who offers "takrima" to a voter before elections and a plaintiff who offers "takrima" to a judge before decision, is discriminatory and therefore unconstitutional.

The learned State Attorney did not; in his reply deny what is provided by Articles 13 and 21 of the Constitution. He said the issue to

be addressed by the court is whether the "takrima" provisions infringe and abridge the constitutional rights cited by the petitioners.

His submission is that the concept of treating as a corrupt act and therefore an offence existed since the enactment of the National Elections Act 1985. Section 119(1)(a) creates an offence against a person who gives, provides or pays expenses for food, drink or entertains another person with a view of corruptly influencing such other person to vote or refrain from voting at an election. Section 119(1)(b) deals with a receiver of those services. Section 119(1) prohibits the use of food, drinks and entertainment as an inducement to voters. It is not all acts of giving, providing or paying expenses for food, drinks or entertainment done during the elections period that amount to corrupt practices of treating. Section 119(1) covers those acts which in law are intended to influence voters – that is to do acts at the benefit of the giver, provider or payer. This influence is aimed at making the candidate win the elections.

The learned State Attorney conceded that section 119(2) and 119(3) were introduced after the big number of election petitions filed in court seeking for the nullification of the election results. In his opinion, the Parliament used its wisdom to curb the problem after taking into consideration the time consumed and the costs incurred. It was noted that during the elections period candidates incur expenses for food, drinks and transport. Candidates are natural persons and they live with voters. Therefore they are part and parcel

of the society. It is impossible for the election candidate to avoid voters' visits at their homes.

He paused a question whether in an African tradition it is possible to avoid hospitality to a person who visits an election(s) candidate's home as a neighbour or one who goes to discuss issues not related to the elections. He went on to pause another question whether it is possible for an election(s) candidate to campaign without a campaign team, dancing troupes or music bands and choirs given the fact that a candidate needs to travel in the constituency in order to advocate policies or election manifesto of his/her party and convince the would be voters to vote for him or her. The learned State Attorney is firm in his mind that by necessary implication there are expenses which cannot be avoided during the elections period. It was in the light of those circumstances that the Parliament decided to introduce the "takrima" provisions as an exception to the general rule of treating.

The court was referred to the cases of the Court of Appeal which held that facilitation of transport by an election candidate to a campaign team as well as provision of food and drinks to a campaign teams and ngoma dancers invited to perform at campaign rallies was lawful. These are the cases of ***Lutter Nelson V The Hon. Attorney General and Ibrahim Msabaha*** Civil appeal No. 24 of 1999(unreported), ***Peter Msikalile V Leonard Derefa*** Civil Appeal No.32 of 1997 (unreported) and ***Gilliard Joseph Mlaseko***

.and 2 Others Vs Coroma Faida Busongo and Another Civil Appeal No.57 of 1996 (unreported).

The learned State Attorney went on to submit that the "takrima" provisions were enacted subsequent to the decisions of the Court of Appeal because the Parliament found that there were genuine expenses for food, refreshments and entertainment incurred as genuine costs by an election candidate. The law was intended to justify those expenses and this was with the support of the decisions of the Court of Appeal. To that extent it cannot be claimed that the two subsections violate Article 13 of the Constitution. The normal or traditional hospitality and the normal or ordinary expenses spent are only those done in good faith and the good faith must be construed in line with the provisions of section 119(1) of The National Elections Act (Cap 343 R.E. 2002). By necessary implication if the expenses are incurred without good faith it means it is treating or a corrupt influence as provided for under section 119(1) and the candidate can be punished accordingly upon so finding by the court to that extent.

Mr. Mwaimu disagreed with the construction of the principle of good faith which the Petitioners' Advocates said could be extended to sections 115, 117 and 119 of the Act. He said the interpretation is wrong because sections 117 and 118 do not deal with treating and so the aspect of good faith invoked in the "takrima" provisions does not apply. His view is that the "takrima" provisions are only an exception to the general rule laid out in section 119(1) of the National Elections Act and the exception reflects the finding of some of the decisions of

the Court of Appeal cited. In his opinion the "takrima" provisions are meant to give courts of law a guide when deciding whether the act is done in good faith or otherwise. That the test which distinguishes between treating in section 119(1) and the exception in the proviso to sections 119(2) and (3)(the "takrima" provisions) is the mens rea. The process of making decision entails answering a lot of questions, such as what was the purpose of paying expenses or giving or providing food, drink, entertainment or provision? Was it intended to influence voters to vote for an election candidate? Was it intended to facilitate his/her campaign and other related questions?

The learned State Attorney denied that the "takrima" provisions are discriminatory. It was submitted that the "takrima" provisions are meant to serve situations where election(s) candidate incur expenses and costs in furthering election campaigns but not in circumstances where they are meant to inducing or influencing voters. Whatever is done with the intention of inducing or influencing voters in this regard is treating under section 119(1).

Mr. Mwaimu said having no express law which caters for elections costs and expenses should not be a warrant to expunge the "takrima" provisions. It was further opinion of Mr. Mwaimu that the "takrima" provisions do not discriminate elections candidate on basis of station of life. His belief is that in the nomination of candidates to vie the elections, there cannot be a weak candidate because the political parties would not stage such a candidate. The law treats all election candidates from political parties with equal status.

Further submission by the learned State Attorney was that the Advocates for the petitioners misinterpreted the law when they associated the "takrima" provisions with gift. He said section 118(1) (c) of the National Elections Act, which is not related to treating covers gift. Mr. Mwaimu is also of an opinion that the case of ***A. A Sisya*** (supra) is distinguishable from this case because the subject matter in that suit was the Motor Vehicle Surtax Act No.3 of 1994. The act singled out owners of saloon and or station wagon cars and left out persons who own other types of cars whereas the "takrima" provisions have not given a category of persons to be affected by it. The law is for all election candidates and therefore the case is not applicable in the circumstances of this case. The law was not meant to allow a certain class of people to use their class to influence people in order to win the elections. It has been meant to justify genuine expenses and costs used in conducting elections campaigns.

The learned State Attorney also denied that the "takrima" provisions render it impossible to hold someone liable of the offence under section 119(1) because they are an exception to the general rule of treating.

His conclusion is that the "takrima" provisions were not aimed at embracing corruption, nor were they intended to form a disguised form of corruption. His firm view is that the petitioners are facing a problem of interpretation, just like many other persons who think that the "takrima" provisions have extended the normal or traditional

hospitality to other corrupt practice provisions of the law. He said the approach is wrong and misleading. The "takrima" provisions relate to section 119(1) only. They are important because it is obvious that during the elections candidates do expend and incur some running costs. Those genuinely incurred costs cannot be held as treating.

Mr. Mwaimu prayed for the dismissal of the petition with costs.

In reply the petitioners advocates denied that the "takrima provisions" are related only to section 119(1) of the National Elections Act. They said section 119(2) excludes from the offences of treating, bribery and illegal practices, what is called normal or ordinary expenses spent in good faith in elections campaigns or in the ordinary course of election process. Treating is found in section 119(1), bribery in 117 and illegal practices in section 118(1). Section 115 defines the offence of corrupt practice to include treating (under section 119(1)), bribery (under section 118) and illegal practice (under section 117).

They conceded that normal expenses incurred for food in elections campaigns team, drinks for member of campaign teams, fuel for motor vehicles used for campaign and bicycles for the members of the campaign team are justified during the election process. They added that they were justified even before the inclusion of the "takrima" provisions in the Elections Act. The problem is that the "takrima" provisions are broad enough to cover both justified and unjustified acts. Their view is that the expression "in the election campaign or in the ordinary course of election process" used in

section 119(2) broaden the traditional hospitality and ordinary expenses to include food, drinks, transport, clothes which are offered to members of the public who attend the election campaign or who are residing in the area where the campaign is being conducted. There is nothing in the provisions to exclude costs for offering food to audience attending the meeting or providing transport or transport allowances to people who attend an election campaign, from the exception. The problem is more entangled by the fact that the term traditional hospitality and normal or ordinary expenses have not been defined anywhere in the act. This leaves room for open interpretation and hence creates an opportunity for illegitimate practices which are for bidden under sections 117,118 and 119(1) of the Act.

It was their further submission that in as long as the cases of ***Luther Nelson V A.G and Ibrahim Msabaha*** (supra), ***Peter Msekalile V Leonard Derefa*** (supra) ***and Gillard Joseph Mlaseko and 2 Others V Corona Faida Busongo and Another*** (supra) only justified the serving of food, and expenses incurred for transport not to members of public but to members of the campaign team only, the cases are irrelevant and inapplicable in this case.

As regards the argument by the learned State Attorney that the "takrima" provisions were meant to assist the court in determining whether the act was done in good faith or not, the Learned advocates said this argument does not have any leg to stand on because bad

motive was one of the ingredients for the offence of corrupt practice even at the pre amendment era. It was from the same provisions that the Court of Appeal was able to put a demarcation line between expenses incurred for members of campaign teams and excluded expenses offered to cover other groups. It is their opinion that the "takrima" provisions were not necessary. They also denied that the cases of the Court of Appeal cited by the learned State Attorney will assist in the construction of the "takrima" provisions because the cases were decided before the "takrima" provisions were introduced into the law.

The Advocates said they are aware that it is one thing to give something in order to influence someone to vote for a candidate and it is another to give something to someone in good faith although the obvious result of the giver is to influence that person to vote for the candidate. They reiterated their earlier position on Article 13(2) of the Constitution which deals with both direct and indirect discrimination. They repeated their prayers in the petition.

Since this is a petition filed in public interest, it was felt that it was important to reproduce the long arguments advanced by each party to this petition. We felt it would be unfair to deal with the petition in a summary form.

Article 13(1) of the Constitution provides for equality before the Law, while Article 13(2) prohibits enactment of law which is discriminatory directly or dismininatory in effect.

The Advocates for the petitioners submitted correctly that the expression "discrimination" is defined in Article 13(5) and the Court of Appeal translated it in the case of ***Julius Ndyanabo*** (supra) as follows:

> *" (5) For the purpose of this article the expression "discriminate" means to satisfy the needs, rights or other requirements of the different persons on the basis of their nationality, tribe, place of origin, political opinion, colour, religion, station of life that certain categories of people are regarded as weak or inferior and being subjected to restrictions or conditions whereas persons of other categories are treated differently or are accorded opportunities or advantage outside the specified conditions or prescribed necessary condition, provided that the expression shall not be construes as to prevent the government from taking deliberate steps aimed at solving problems in society."*

The Advocates for the petitioners argued that the "takrima" provisions entail a differential treatment of the citizens basing on their station of life in two ways. Firstly, high-income political candidates are treated differently from the low in come political candidates in the election process because the former are placed in a better position to offer traditional hospitality because of their economic status whereas the latter may fail to do so. In this regard the high income candidate stands at a better position to win the

elections because of his/her advantageous position which is based on his/her economic status while the latter is likely to lose because of standing in a different position because of incapacities to offer the same. We agree with this position and we think this is a question of common sense alone.

The second aspect of discrimination is that the "takrima" provisions only apply between voters and political candidates. It does not apply in another category of persons like an applicant of employment and the employer. The "takrima" provisions therefore have the effect of justifying some acts if done in elections campaigns while if done outside the election campaigns they are offensive.

The learned State Attorney stood firm and denied that this is the position.

With great respect to the learned State Attorney we disagree with him that the "takrima" provisions are not discriminatory. They are discriminatory as between high-income earner candidate and low-income earner candidate. The two cannot stand at the same position. The economic status of the high-income earner will place the candidate at an advantageous position to win the elections at the detriment of the low-income candidate who has very little or nothing at all to offer. This we have no doubt in our minds at all.

The "takrima" provisions are also discriminatory because they legalise actions done between a selected category of persons that is

political candidates and voters while if the same action is done by other categories of persons standing in a similar relations, those action become offensive. This case is similar to the case of ***Julius Ishengoma Francis Ndyanabo V A.G*** (supra). The Court of Appeal gave a thorough explanation on the discriminative nature of the provision of section 111(2) and 3 of the National Elections Act 1985. Act No.4 of 2000 amended the same provisions.

So long is the law is framed in a way which can result in a differential treatment between the citizens, there cannot be equality before the law in respect of that law. This is what comes out of the "takrima" provisions. Those who have, will be in a position to offer "takrima", those who have not, will not be able to offer "takrima". The resultant effect is a differential treatment between the haves and the have not.

The "takrima" provisions are discriminative in effect. The intention of the doer is therefore irrelevant. In ***A.A Sisya and 35 Others V The Principle Secretary Ministry of Finance***, (supra) our Brother – Mwalusanya J (as he was said) –

> *"In the case at hand, it is irrelevant that the government is arguing that the impugned law did not intend to discriminate against the affected group. What is relevant is the fact that the impugned law is discriminatory in effect (indirect discrimination). It is my finding that the said law is discriminatory of the affected group on*

account of their status of life, as the Republic has failed to show that the discrimination is on account of any other than on account of the status of life of the affected group."

Having found that the "takrima" provisions are discriminatory, the next stage is to examine the restrictions in order to ascertain whether they were necessary. In order words we have to test the proportions of the restrictions vis-à-vis the objects intended to be achieved by the restriction, that is the proportionality test.

The advocates for the petitioners submitted that they are aware that fundamental rights can be curtailed because of societal interest under Article 13(5) and 30(2) of the Constitution. However, their view is that the restriction imposed by the "takrima" provision is not proportionate to the object sought to be achieved.

They said they are aware of the restrictions which the government can impose on fundamental rights in public interest under Article 30(2) of the Constitution. Their understanding of the law is that after establishing that a certain law is invalid for violating a basic right, the burden of proof as to the necessity of the limitation for public interests shifts to the Government.

The court was referred to the cases of ***Julius Ndyanabo*** (supra) ***Kukutia Ole Pumbun and Another V Attorney General and Another*** [1993] T.L.R 159, ***Young and Webster***

UK (1982) 4E H.RR.38 and AA Sisya (supra) on the argument that so as to balance between the interests of the public and those of the individuals, various guiding legal mechanisms have been created both domestically and globally to guide the courts in determining whether or not the restrictions of the basic rights are justifiably necessary. The Advocates said that from the decisions cited, in order for the law tending to restrict the basic rights to be legally justifiable, the different treatment must have rationale or reasonable nexus to the object sought to be achieved and it should not be arbitrary.

An argument was advanced by the Advocates that the restrictions have no rational or reasonable nexus to the object sought to be achieved because of two reasons. The first one is that the mischief created by allowing some people to use their economic status influence to win elections is more serious than the object sought to be achieved. The second one is that it was not necessary whatsoever to enact the new provisions of subsection (2) and (3) because the provisions of section 119(1) excludes from corrupt offences anything done in good faith as an act of normal hospitality.

Their reasoning is based on the fact that what was offensive in terms of section 119(1) before it was amended was the payment or provisions of the expense of giving or providing food or entertainment with corrupt intention. The giving or receiving of something in good faith did not amount to an offence under section 119(1) of the Act. Corrupt intention, which is bad faith, could not be easily proved by direct evidence; it could in most cases be proved by

circumstantial evidence. The offering of gifts by political candidates to the expected voters before election sufficed to draw an inference that the giver thereof had in mind that the recipients of the gifts would vote for him.

Their further submission is that the addition of the new provisions renders it impossible to hold someone liable for the offence under section 119(1) because by expressly providing that subsection (1) will not catch a person who gives that which is prohibited therein, if the giving is done in good faith, it was another language of saying that the offence cannot be proved by circumstantial evidence. They noted that before the amendment the onus of proving that what was given by a candidate to the voters was a traditional hospitality given in good faith was on the candidate himself and not the Republic. The contrary is now the position because the amendments imposed the burden to prove that what was given by the candidate to the voters is not the normal or traditional hospitality to the Republic. Since the term traditional hospitality and the forms thereof are not defined by the Act, the "takrima" provisions become redundant. Thus the giving of something to the intended voters by a candidate is presumed to be traditional hospitality unless bad motive is proved.

The Advocates said it is not in public interest and it is irrational to justify the limitations of basic rights in the sweeping and controversial expressions as traditional hospitalities. The restrictions are arbitrary because they only justify the giving of something in good

faith only during election campaigns without a definition of what amounts to traditional hospitality and the forms thereof. Their opinion is that the law is widely woven as to catch every giving and receiving, not withstanding the influential effect of the same in the election process. Their understanding is that the arbitrariness is also felt by omission in the provision for a mechanism to protect or safeguard the affected. There is no line of demarcation between traditional hospitalities which have the direct effect of influencing the voters to vote for the giver and those that do not. Their conclusion on the first ground of the petition is that the "takrima" provisions do not meet the proportionality test as laid out in various judicial decisions which they cited. The limitation imposed by the "takrima" provisions was more than reasonably necessary to achieve the legitimate object.

Apparently the learned State Attorney did not like to address the issue of restrictions on fundamental rights.

The principle of proportionality is well explained by the Court of Appeal in the case of ***Kukutia Ole Pumbun Vs AG and Another*** (Supra) and ***Julius Ishengoma Francis Ndyanabo V A.G*** (supra). In the case of ***Kukutia Ole Pumbun*** the Court of Appeal held that –

> *" a law which seeks to limit or derogate from the basic right of individual on the ground of public interest, will be saved by Article 30(2) of the constitution of it satisfied two requirements. Firstly, such law must be lawful in the sense that*

it is not arbitrary. It should make adequate safeguards against arbitrary decisions and provide effective, controls against abuse of those in authority when using the law. Secondly, the limitation imposed must not be more than necessary to achieve the legitimate object. This is also known as the principle of proportionality."

In the case of ***Julius Ndyanabo***, the Court of Appeal added that;

"Fundamental rights are not illimitable. To treat them as being absolute is to invite anarchy in society. Those rights can be limited, but the limitation must not be arbitrary, unreasonable and disproportionate to any claim of state interest."

Similarly, in ***Director of Public Prosecution vs Daudi Pete*** [1993] TLR 22 the Court of Appeal held that a restriction on fundamental right must serve a legitimate purpose and has to be proportionate.

Our considered view is that the "takrima" provisions were not necessary at all and we entirely support the views expressed by the learned Advocates for the petitioners. The decisions of the Court of Appeal in the cases cited by the learned State Attorney also support our view. We do not see any lawful object which was intended to be achieved by the 'takrima" provisions apart from legalizing corruption in election campaigns. We do not consider this to be a societal

interest. As illustrated the "takrima" provisions discriminates between the high-income earner and low-income earner as well as between selected classes of persons with similar functions. We are highly convinced that the provisions of Articles 13(5) and 30(2) were not intended to be exercised in the manner in which they were exercised in amending The National Elections Act. The learned Advocates for the petitioners submitted correctly that the restrictions have no rationale or reasonable nexus to the object sought to be achieved. Instead, it has created a serious mischief by allowing high-income earner candidates to use their class to influence voters to win the elections. The "takrima" provisions do not meet the proportionality test.

The second ground of the petition is that's the sections 119(2) and (3) violate the provisions of Articles 21(1) and (2) of the Constitution which guarantee the right to vote and be voted in free and fair election.

It was submitted by the Advocates for the petitioners that the "takrima" provisions violate the provisions of Articles 21(1) and (2) of the Constitution which provide for the right to vote and be voted for in free and fair elections. The basis of their contention is that there cannot be a free and fair election with the "takrima" provisions which justify discrimination based on the candidate's station of life. They adopted their submission given in respect of the first ground. Their opinion is that there cannot be free and fair elections if some of the contestants are, because of their economic well being, afforded an

opportunity to win in the election process to the detriment of poor contestants.

They observed that the right to vote and be voted for in free and fair elections is one of the foundations of participatory domecracy. The Head of the Government and State as well as the Parliamentarians are elected through free and fair elections: It is dangerous to have the main law governing such a process to be framed in a way which creates a bush within it for corrupt political candidates to hide themselves. They said the trend in the Tanzania Judiciary just like in other Common Law Countries has been to interprete the Constitution as a living instrument in the light of the present day conditions.

They feel that it was irrational for the government to enact a law restricting the application of the provisions against corrupt practice in such a sweeping clause while corruption is one of the serious problems in Tanzania. In interpreting the "takrima" provisions in the light of Tanzanian environment it is impossible to avoid a conclusion that the "takrima" provisions legalise corruption in the election process.

Finally they said that although the rights conferred by a Articles 13 and 21 of the Constitution are not absolute but are subjected to the provisions of Article 30 of the Constitution, there was no reasonable necessity on the part of the Parliament to invoke the limitations under Article 30(2) of the Constitution because the object could be

achieved without necessarily enacting such a widely framed enactment which does not set demarcations on applicability.

The learned State Attorney was contented to mention only broadly that the "takrima" provisions are not violative of Article 21(1) of the Constitution. He did not prefer to give reasons.

The discriminative nature of the "takrima" provisions has been exhaustively covered when dealing with the first ground of the petition. It suffices for us to say that since the "takrima" provisions are discriminative they affect the elections in two ways. Firstly is among the contestants. The elections cannot be free and fair because the high income-earner contestant is the one who is likely to win because of his economic status. He/she stands a better chance to influence the voters. The low-income contestant stands to lose the elections because of his low income which does not allow him/her to influence the elections.

As for the voters their right to vote for a proper candidate of their choice cannot be freely exercised because they will lose that freedom because of being influenced by the "takrima". Their right to vote will be subjected to "takrima". This court has to take judicial notice under Section 58 of the Law of Evidence that the majority of the voters are poor. They are ignorant of their rights as well as their responsibilities. They can be easily manipulated by the so-called normal hospitality ("takrima").

As correctly submitted by the Advocates for the petitioners the enactment of the "takrima" provisions is a very dangerous approach in the whole process of conducting elections. It amounts to building a culture, which if sustained, will lead this nation to a bad destination. People should get the opportunity to think freely and decide freely and should not be subjected to influences of "takrima". They should also be left to learn that it is their responsibility/duty to elect competent candidates and not those who are able to influence voting by offering "takrima".

As for the invitation by the learned advocates for the court to consider public opinion on the "takrima" provisions, we are afraid to say that it is not an invitation which this court can accept because the court acts on evidence which is on record. The court cannot rely on what the media says as a basis for its decision. Those who gave their opinion were exercising their freedom of expression but they were not giving evidence in court.

As observed earlier, there was no lawful object which had to be achieved by introduction of the "takrima" provisions. Given the serious effects of the "takrima" provisions we cannot allow them to continue being in the statute books.

On the evidence and the submission presented in this court we are satisfied on the standard required that the "takrima" provisions are discriminative and they are violative of Articles 13(1) and 21(1) of the Constitution. They were quite unnecessary. The law as it was

before the introduction of the "takrima" provisions was sufficient to enable the court to distinguish expenses inevitable in the election process which did not amount to corrupt practices and those which per se amounted to corrupt practices. The cases cited by the learned Stated Attorney support this view.

The Parliament contravened Article 13(2) of the Constitution by enacting such provisions into the National Elections Act.

Tanzania is a party to various International Human Rights Instruments. The Universal Declaration of Human Rights (UDHR), which is the core of International Human Rights law, is incorporated in Article 9(f) of our Constitution. Article 7 of the UDHR provides for equality before the Law and bars discrimination. Article 21 of UDHR provides for the right to participate in the government of ones country directly or freely choosen representative.

It is provided in Article 21(3) that the will of the people shall be the basis of the authority of the government; this shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedure.

Since the "takrima" provisions are violative of Articles 13(1), 13(2), 21(1) and 21(2) of the Constitution we declare the said provisions null and void and we order the same to be struck out of National Elections Act, (Cap 343 R.E.2002), forthwith. However, we

have further seen that section 130 (b) and (c) of the National Elections Act give powers to the High Court to allow such acts done in food faith or traditional hospitality to be exception which would otherwise make the acts or omission corrupt or illegal practice. We think this provision may lead to absurdities in the face of what we have declared on sections 119 (2) and (3). So in our view although the petitioners have not specifically prayed for the nullification of this provision we think that it cannot be saved either. We exercise our powers under " any other relief" and proceed to declare that section 130 (b) and (c) are also unconstitutional and should be struck out of the statute. This being public interest litigation, there is no order for costs.

N. P. KIMARO,
JUDGE

S. A. MASSATI,
JUDGE

T. MIHAYO,
JUDGE

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

P. A. LYIMO
DISTRICT REGISTRAR