IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM MAIN REGISTRY

AT DAR ES SALAAM

MISCELLANEOUS CIVIL CAUSE NO. 9 OF 2021

IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA 1977 – AS AMENDED FROM TIME TO TIME [CAP. 2 R.E. 2002]

AND

IN THE MATTER OF BASIC RIGHTS AND DUTIES ENFORCEMENT ACT [CAP. 3 R.E. 2019]

AND

IN THE MATTER OF A PETITION TO CHALLENGE THE CONSTITUTIONALITY OF THE PROVISIONS OF THE WRITTEN LAWS (MISCELLANEOUS AMENDMENT) (NO.3) ACT, 2020 WHICH AMENDS PROVISION OF THE BASIC RIGHTS AND DUTIES ENFORCEMENT ACT (CAP. 3 RE. 2019)

BETWEEN

ONESMO OLENGURUMWA...PETITIONER

VERSUS

ATTORNEY GENERAL...RESPONDENT

JUDGEMENT

MLYAMBINA, J.

In this Petition, Mr. Onesmo Olengurumwa, a long-standing and experienced human rights activist, is challenging the constitutionality of *Sections 4 (2); 4 (3); 4 (4), and 4 (5) of the Basic Rights and Duties Enforcement Act Cap 3 [R. E. 2019] (hereinafter referred to as BRADEA).* It is the position of the Petitioner that the said Sections are unconstitutional and void and deserve to be struck off the statute books. The Petitioner strongly believes that the impugned provisions are attempting through the backdoor to amend the Constitution of the United Republic of Tanzania, 1977 particularly *Article 26 (2)* and or impose into the Constitution requirements that were not considered by the framers of the Constitution.

At the very beginning, it is imperative to recall the rule that legislation comes to the Court with the presumption in favour of its constitutional validity. Therefore, the Petitioner who challenges this validity is required to establish a prima facie case on the correctness of assertion on point of fact. The Petitioner has to demonstrate with precision, on the standard required, the

right he alleges has been violated, the manner it has been violated and the relief(s) he seeks for such violation. In other words, there is a presumption of constitutionality in the law and that the burden of proof, is on the Petitioner to show that *Sections 4 (2); 4 (3); 4 (4), and 4 (5) of the BRADEA*, the nub of this Petition, are unconstitutional. However, once the Petitioner has established a *prima facie* unconstitutionality of the law, the burden will shift to the Respondent to justify that the impugned provisions of the law are constitutional.

In order to assess and establish whether the impugned provisions are unconstitutional, there are *inter alia* four important tests: *One*, vagueness. Whether *Sections 4 (2); 4 (3); 4 (4), and 4 (5) of the BRADEA (supra)* impermissibly delegates basic policy matters to the Court for resolution on uncertain, discriminatory and arbitrary basis. *Two*, a differential treatment between the citizen. Whether *Sections 4 (2); 4 (3); 4 (4), and 4 (5) of the BRADEA (supra)* treats citizens differently and arbitrarily. If yes, there cannot be equality before the law in respect of that law. *Three*, proportionality test. This is another test which *Sections 4 (2); 4 (3); 4 (4), and 4 (5) of the BRADEA (supra)* must satisfy to be constitutional. There are three issues on proportionality test. *Firstly*, whether *Sections 4 (2); 4 (3); 4 (4), and 4 (5) of the BRADEA (supra)* are rationally connected to their objective and not based on unfair or irrational considerations; *secondly*, whether *Sections 4(2); 4(3); 4 (4), and 4 (5) of the BRADEA (supra)* impairs the right or freedom envisaged under *Article 26 (2) of the Constitution (supra)*; *thirdly*, whether there are proportionality between the effects of *Sections 4 (2); 4 (3); 4 (4), and 4 (5) of the BRADEA (supra)* which are responsible for limiting the right

or freedom, and the objective which has been identified as of sufficient importance to warrant overriding a constitutionally protected right under *Article 26 (2) of the Constitution (supra). Four,* whether *Sections 4 (2); 4 (3); 4 (4), and 4 (5) of the BRADEA (supra)* abides with international human rights standards envisaged in *inter alia The African Charter on Human and People's Rights and the International Covenant on Civil and Political Rights.*

The Petitioner's 's particular insight, if we may respectfully say so, was to see that this Court, declares that: *One, Section 4(2), (3), (4); (5) of the BRADEA as amended (supra)* is inconsistent with *the constitution of the United Republic of Tanzania (supra)* for violating *Article 13(2) and 13(4), 13(6)(a), 26(1) and 26(2) of the Constitution (supra). Two, Section 4(3) of the BRADEA amended (supra)* is inconsistent with *the Constitution of the United Republic of Tanzania (supra)* for *violating Article 26(2) and 30(3) of the Constitution (supra). Three, Section 4(4) of the BRADEA as amended (supra)* is inconsistent with *the Constitution of the United Republic of Tanzania (supra)* for violating *Article 26(1), 13 (2), and 13 (6) (a) of the Constitution (supra). Four, Section 4(5) of the BRADEA as amended (supra)* is inconsistent with *the Constitution of the United Republic of Tanzania (supra)* for violating *Article 13(6)(a) and 26(1) of the Constitution (supra).*

The Respondent on the other hand are of opposite view. The herein below analysis will, therefore, shed a light that the above issues are not susceptible of answers by reference to any sharp criterion or reason as neither of the arguments nor the principles advanced can be mechanically applied to yield the expected results from any of the Parties.

Briefly, *Section 4 of the BRADEA (supra) was amended vide the Written Laws (Miscellaneous Amendments) No. 3 Act of 2020* resulting in the introduction of new *Sections 4 (2), 4 (3), 4 (4) and 4 (5) (supra).*

One, Section 4 (2) (supra) was introduced to restrict the High Court of Tanzania to admit a constitutional case unless the Petitioner proves (at the stage of admission) the extent to which the contravention of the provisions of *Articles 12 to 29 of the constitution (supra*) has affected him/her personally.

Two, Section 4 (3) (supra) was introduced to require a person exercising the right provided for under *Article 26 (2) of the Constitution (supra)* to comply and abide by the provisions or *Article 30 (3) of the Constitution (supra).*

Three, Section 4 (4) (supra) was introduced with the effect of restricting the filing of constitutional cases against the President, Vice-President, Prime Minister, the Speaker, Deputy Speaker, or Chief Justice for any act or omission done in the performance of their duties by designating the Attorney General as the Respondent.

Four, Section 4 (5) (supra) was introduced to provide for a mandatory requirement of exhaustion of all available remedies under any other written laws before filing a constitutional petition.

The Petitioner avers that; according to the Statement of Object and Reasons of the proposed amendments, the following were the main reasons for the amendments:

a) To empower the court to reject an application which has not complied with *Article 30 (2) of the Constitution (supra)* which requires a person who institute proceedings under *Part III of Chapter One of the Constitution (supra)* to establish that his right or duty owed to him has been, is being or is likely to be violated.

b) To require all suits or matters against the Heads of Organs of the State to be instituted against the Attorney General. The proposed amendment intends to enhance the provisions relating to immunity of Heads of Organs of States.

In reply, the Respondent had the following eight contention:

a) The complained provisions of BRADEA are not inconsistent but complement the provisions of *Articles 26 (2) and 30 (3) of the Constitution (supra).*

b) The demonstration of personal interest is a requirement under *Article 26 (2) of the Constitution (supra)* and as introduced to curb tile proliferation of vexatious and frivolous petitions;

c) The impugned sections have not attempted to amend the Constitution through the backdoor but merely to link *Article 26 (2) (supra)* and compliment *Article 30 (3);*

d) The constitutional principles of separation of powers; rule of law and the important role of the judiciary in the administration of justice have not been affected by the complained amendments and more importantly, they have played a role in ensuring procedural compliance;

e) The complained amendments are in compliance and in line with the spirit embodied within *the Treaty for the Establishment of the East African Community; The African Charter on Human and People's Rights and the International Covenant on Civil and Political Rights;*

f) The designation of the Attorney General as the necessary party to alleged violations in lieu of the incumbent heads of government was proper and in accordance with the powers and functions under the constitution and laws;

g) The introduction of the requirement to exhaust local remedies was informed by the fact of the existence of bodies like CHRAGG who have mandate to resolve and solve allegations of constitutional violations; and,

h) The complained violations were made in good faith and consequently they are saved under *Article 30 (2) of the Constitution (supra).*

The first issue is on; whether *Section 4 (2) of BRADEA* violates *Article 13 (4) of the Constitution (supra).* It was the Petitioner's submission that *Section 4 (2) of BRADEA (supra)* violates *Article 13(4) of the Constitution (supra)* which provides:

> *No person shall he discriminated against by any person or any authority acting under any law or in the discharge of the functions or business of any state office.*

According to the Petitioner, the restriction imposed by the Constitution under *Article 13 (6) of the Constitution* is absolute and unfettered. The State is not supposed to discriminate against any person when it is discharging its

functions under any law. But, *Section 4 (2) of BRADEA (supra)* requires the High Court to refuse to admit any petition from an ordinary person not accompanied by an affidavit showing personal interest. Also, the Commission for Human Rights and Governance is not required to demonstrate such interest.

It was the Petitioner's submission that *Article 73 (4) of the Constitution (supra)* requires the High Court, as any authority acting under law or in the discharge of the functions or business of any state officer to not discriminate any person. Yet, *Section 4 (2) (supra)* requires it to only admit CHRAGC's petitions without affidavit but not to do so for ordinary persons. Thus, in view of the Petitioner, it is a flagrant violation of the Constitution. Even more ominous is the enlistment of the Court in the furtherance of this violation. The Petitioner cited the decision of this court in the case of **Joseph D. Kessy v. Dar es Salaam City Council,** *Civil Case No.299 of 1988, High Court of Tanzania Dar es Salaam Registry (unreported),* was invited to bless the violation of the light to life by Dar es Salaam City Council which sought to be allowed to continue dumping waste at Tabata area in Dar es Salaam. This Court saw through the monstrosity of that invitation and through the late Lugakingira, J. (as he then was) stated:

> *I will say at once that I have never heard it anywhere for a public authority, or even an individual, to go to court and confidently seek permission to pollute the environment and endanger peoples' lives regardless of their number. Such wonders appear to be peculiarly Tanzanian, but I regret to say that it is not*

> *given to any court to grant such a prayer. Article 14 of our Constitution (supra) provides that every person has a right to live and to protect his life by society. It is therefore a contradiction in terms and a denial of this basic right deliberately to expose anybody's life to danger or, what is eminently monstrous, to enlist the assistance of the court in this infringement. (Emphasis added) (At page 9)*

The Petitioner contended that *Section 4 (2) of BRADEA (supra)* is a *replica* of what the Dar es Salaam City Council did as it invites this Court to violate *Article 13 (4) of the Constitution (supra).* Dar es Salam City Council and the Parliament on one hand and the Respondent on the other are public bodies and official respectively. They are supposed to be at the forefront of respecting the Constitution but strangely the Parliament at the instance of the Respondent enacted *Section 4 (2) in blatant violation of Article 13 (4) of the Constitution (supra)* that prevents a state organ to discriminate that it serves. It was submitted by the Petitioner that the said invitation though no longer unheaded of its peculiarity in Tanzania, this Court in the words of the late Lugakingira, J. (as he then was), should state that; it cannot be so easily enlisted to render its assistance in this infringement of a clear provision of the Constitution. Consequently, the Petitioner invited this court to declare that *Section 4(2) of BRADEA (supra)* violates and is inconsistent with *Article 13 (4) of the Constitution (supra)* and therefore invalid and void.

As to whether *Section 4 (2) of BRADEA (supra) violates Article 13 (6) (a) of the Constitution (supra),* the Petitioner invited this Court to further declare

that *Section 4 (2) of BRADEA (supra)* violates and inconsistent with *Article 13 (6) (a) of the Constitution (supra)* because it denies Petitioners' rights of fair hearing and it goes without saying that the right of equality before the law and the right to a fair hearing are important fundamental human rights. In recognition of this fact, we are able to accept the Petitioner's submission that *Article 13 (6) (a) of the Constitution (supra)* provides for this right in no uncertain terms by stating the following:

> *To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely:*
>
> > (a) When *the rights and duties of any person are being determined by the court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the court or of the other agency convened (Emphasis added).*

In view of the Petitioner, however, a purposive reading of *Article 13 (6) (a) of the constitution (supra)* reveals that the State Authorities including the Government and the Judiciary are required to introduce appropriate procedures (that facilitate the efficient determination of rights and duties of any person by giving that person or entity a fair hearing. The Petitioner cited the case of **Mawazo Simon Ngodela v. Republic**, *Criminal Appeal No.48 of 2019) [2019] TZCA.328 Tanzlii* where the Court of Appeal had an occasion

to reemphasize the import and utility of the provisions of *Article 13 (6) of the Constitution* as it held at page 4 of the typed judgement:

> *It is trite law that parties to a case have equal rights to a fair trial which includes the right to be heard on appeal. The said right also extends to the right to appear during the hearing of the appeal. (Emphasis added).*

In the case of **LHRC & 2 Others v. Attorney General** [2006] TLR 240 popularly known as 'takrima case' this Court held:

> *With great respect to the learned state attorney, we disagree with him that the "takrima" provision are not discriminatory. They are discriminatory as between a 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. 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 are political candidates and voters while if the same actions are done by other categories of persons standing in*

similar relations, those actions become offensive. (Emphasis added)

The Court then put it succinctly when it held:

> *So long as the law is framed in a way which can result in a differential treatment between the citizen, 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 no! be able to offer "takrima". The resultant effect is a treatment between the haves and the have-nots. (Emphasis added).*

In **Eweda Mwanajoma and Johan Daniel v. Republic,** Criminal Appeal No. 174 of 2008 cited in **Simon Ngodela's case**, the Court of Appeal of Tanzania expressed its understanding of *Article 13 (6) (a) (supra)* to this effect:

> *Article 13 (6) (a) of the Constitution (supra) of the United Republic of Tanzania enjoins the state to ensure that there is in place a system whereby any person is afforded a fair hearing and the right or appeal against any decision on his rights.... (Emphasis added).*

The Petitioner went on to invite this court to see it in the same wavelength that *Section 4 (2) of BRADEA (supra)* introduce; inappropriate and restrictive

procedures that aim to thwart the would-be Petitioners right to access the court and seek judicial intervention and claim for his rights and or perform his/her duties. It was the Petitioner's arguments that the procedural requirements introduced by *Section 4 (2) (supra)* of filing an affidavit and of demonstrating the extent of personal injury is a clear attempt to block the right of equality before the law. This is more so because the CHRAG is given a leeway to approach the same forum without procedural hindrances. It was the position of the Petitioner that the leeway given to CHRAG contradicts Article *13(6)(a) of the Constitution (supra).*

On the issue whether *Section 4 (2) of BRADEA (supra) violates Article 26 (1) and 6 (2) of the Constitution (supra),* the Petitioner started to quote *Article 26 (1) and (2) of the Constitution (supra)* which states that:

1) Every person has the duty observe and to abide by this Constitution and the laws of the United Republic.
2) Every person has the right, in accordance with the procedure provided by law, to take legal action to ensure the protection of this Constitution and the laws of the land.

It was the Petitioner's submission that, *Article 26 (1) and (2) (supra)* would clearly show that the said Articles introduce the following fundamental principles of law:

a) There is a duty imposed on every person in Tanzania to observe and abide with the Constitution of the United Republic of Tanzania and the laws of Tanzania;
b) There exists a right conferred to every person to take legal action to ensure the protection of the Constitution and laws of Tanzania;

c) That the right and obligation imposed to every person in Tanzania to ensure constitutionalism and legality are to be exercised in accordance with procedures provided by law.

From the above stated fundamental principles deduced from *Article 26(1) and (2) of the Constitution (supra)*, the Petitioner was of submission that; *Section 4(2) of BRADEA (supra)* do not facilitate the attainment of the rights and duties provided by *Article 26(1) and (2) of the Constitution (supra)*. Indeed, the impugned section does not only frustrate the enjoyment of the right but also creates unnecessary and unconstitutional obstacles in the fulfilment of the imposed duty.

The Petitioner's submission was advanced on the basis that *Article 26 (1) of the Constitution (supra)* provides an obligation to all persons to abide by the constitution of the Country while *Article 26(2) (supra)* requires every person to take legal action to protect the Constitution and the laws of the land. Thus, all persons have the right and duty. And when one discharges both of them' (through their invocation) he or she cannot be compelled to demonstrate how he, or she is personally affected. The Petitioner cited the case of **Judge in Charge High Court Arusha & Attorney General v. N.I.N Munuo Ng'uni [2004]** TLR 44 which expounded on the circumstances that led to the enactment of the Basic Rights and *Duties Enforcement Act (BRADEA) (supra)* by the Tanzania Parliament at the instance of the Respondent to this effect:

> *We have no doubt in our minds that provision seeks to circumscribe the powers of the High Court in*

> *dealing with issues of fundamental rights. This was an overreaction on the part of the executive after the decision of the High Court in* ***A. G. v. Rev. Christopher Mtikila*** *[1995] TLR 3. (Emphasis added)*

It was the Petitioner's contention that reading of the BRADEA and the impugned amendments should be looked through the change of the circumstances it was originally enacted and how it was amended -in the year 2020. The original enactment was simply an overreaction to the decision of this Court in **Rev. Christopher Mtikila case** *(supra)* in 1994. The 2020 Amendments were a reaction to two stunning defeats in the case of **Attorney General v. Jeremiah Mtobesya**, *Civil Appeal No 65 of 2016* which was rendered on the 31st day of January 2018 and in the case of **Zitto Zuberi Kabwe v. The President of the United Republic of Tanzania & 3 Others,** Misc. Civil Cause No 1 of 2020 High Court of Tanzania Mwanza (unreported) of 1 of March 2020. In **Jeremia Mtobesya's case** *(supra)* the Court of Appeal concurred with the interpretation of *Article 26 (2) of the Constitution (supra)* by the High Court in **Rev. Christopher Mtikila** when it stated:

> *We subscribe to and adopt the foregoing statement of principle. We may only add that by commencing with the expression "Every person..." as distinguished from "an aggrieved or interested person", the Article confers standing on a desirous Petitioner to seek to protect the rights of another or*

the general public at large despite having no sufficient interest on the impugned contravention. The Article is, in itself, a departure from the doctrine of locus standi as we know it in the Common Law tradition. (Emphasis added).

In the case of **Zitto Zuberi Kabwe** *(supra),* a petition that was filed to challenge the decision of the President of United Republic to remove the Controller and Auditor General (CAG) who had not reached the constitutional retirement age of 65 from office, the Respondent raised 6 points of preliminary objection two of which read:

I. The petition is frivolous, vexatious and contrary to the provision of *the Basic Rights and Duties Enforcement Act, Cap. 3 of [R.E 2002] (henceforth "the BRADEA") (supra) and Article 26 (2) (supra)* of the constitution of the *United Republic of Tanzania 1977, Cap. 2 [R.E. 2002] (supra).*

II. The petition is incompetent for having been preferred against a wrong party.

This Court, (Mlacha J, who decided on these points of objection) held the following regarding the second point of objection:

With respect again, I don't think that it is proper to take the Petitioner to a route which he did not opt. Neither do I see anything wrong with the route he has taken. As pointed out above, this is not an issue for judicial review. It is an issue for public interest litigation in the safeguard of the constitution; for

which the Petitioner, as a citizen of this contrary, has the mandate to file under Article 26 (2) of the Constitution (supra). With these remarks ground two is found to be baseless and dismissed. (Emphasis added)

On the third point of objection, he decided:

> *It is therefore Clear, with respect to the learned Principal State Attorney, that Article 46 (2) has no relation to constitution (supra) petitions against actions of the President of the United Republic of Tanzania done in his official capacity. If there was such a restriction, in my view, the whole purpose of (sic) rule of the law would be meaningless. The rule has always been that the action of the government and the President can be measured against the constitution and that is the logic behind the enactment of Article 26 (2) of the constitution (supra). It follows those actions of the President, and the Government can be tested against the constitution by any person through public interest litigation under Article 26 (2) (supra) as was in this case. (Emphasis added).*

As to *Article 26(1) (supra),* the Petitioner noted that this Court pronounced itself very clear on its true import in time. In the case of **Mwalimu Paul**

John Mhozya v. Attorney General 1996 (TLR) 1. In this case **Samatta J.K** (as he then was) stated at page 133 of the report:

> *The notion, apparently harbored by some people in this country that the President of the United Republic is above the law is subversive of the Constitution and the laws. All Government leaders, including the President, are, like the humblest citizen, bound to comply with the laws of this country. The King can do no wrong has no place in our law even if the ward president is substituted for the word 'King'. Everyone and every institution or organization in this country is enjoyned to pay respect to the principle of supremacy of the law, sees 26(1) of the Constitution (supra). [Emphasis added].*

The Petitioner, therefore, invited this Court to rule that the said *Section 4 (2) (supra) pugnaciously offends Article 26 (1) (supra) and Article 26 (2) of the Constitution (supra).* It is also contrary to the binding interpretation of the import of *Article 26 (2) of the Constitution (supra)* given by this Court in **Rev. Christopher Mtikila case** *(supra)* and the Court of Appeal of Tanzania in **Jeremia Mtobesya case** *(supra),* hence it is unconstitutional and must be disdainfully struck out of the statute books of our country.

In answer to the above submission, the Respondent made a reply that *Section 4 (2) of the BRADEA (supra),* only introduces the requirement of exhibiting the extent of affection by the Petitioner in Affidavit. The exception

of this requirement is where the Petitioner is the *Commission for Human Rights and Good Governance* (hereinafter referred to as CHRAGG) *(supra)*. The Respondent went on to submit that every general condition has exceptions, what is important is the justification for the said exceptions.

The Respondent submitted that, *Section 4(2) of the BRADEA (supra)*, sets condition for individuals to file constitutional petition except CHRAGG. The justifications for such a requirement to exhibit affection are not hard to find. The provision serves as a check for frivolous and vexatious petition which have consistently being filed in the name of public interests. The Respondent cited the decision of this Court in the case of **Centre for Strategic Litigation Limited & Another vs Attorney General & 2 Others,** (*supra*) in which this Court while faced with the Petition which passed admissibility criterion but later it found it to be a frivolous Petition. At page 43-44 this Court held:

> *Despite the instant petition preferred as public litigation, but as seen above this is one of the most frivolous and vexatious petitions that cannot escape an order without costs.*

The Respondent insisted that not every petition allegedly to be in the public interest, as in the instant petition, real is the public interest case. Therefore, in view of the Respondent, *Section 4 (2) of the BRADEA (supra)*, tries to impose a filter for frivolous and vexatious petition since the facts in the affidavit will suffice to show whether or not there is fit petition to be admitted and entertained by this Court; otherwise, this Court will be flooded by cases

in the name of public interest while the Public is unaware if their interest (if any) are being litigated and on what basis.

In assessing the origin and resultant effect of the doctrine of public interest litigation, the Respondent submitted that the spirit of public interest litigation was influenced by India, the Supreme Court of India was faced with the instance of being flooded of petitions in the name of public interest litigation which were not. This is what the Supreme Court of India had to say in the case of **Neetu v. State of Punjab and Others** *(supra)*, Civil Appeal No 95 of 2007 at page 2:

> *...a time has come to weed out the petitions, which though titled as public interest litigations are in essence something else. It is shocking to note that Courts are flooded with large number of so-called public interest litigations where even a minuscule percentage can legitimately be called as public interest litigations. Though the parameters of public interest litigation have been indicated by this Court in large number of cases, yet unmindful of the real intentions and objectives, High Courts are entertaining such petitions and wasting valuable judicial time which, as noted above, could be otherwise utilized for disposal of genuine cases.*

Further to that, it was the Respondent's submission that the provision aims to protect Bona fide Petitioner to entertain bona fide claims by requiring the Petitioner to disclose interests in the matter and to avoid petition that are

instituted for publicity and private gains and those which increase unnecessary pressure to the Judicial system which results in excessive delays in disposal of the genuine and bona fide cases. It was observed by the Supreme Court of India that in Public Interest Litigation, other Petitioner use it for publicity seeking and with malice. In the case of **Central Electricity Supply Utility of Odisha vs. Dhobei Sahoo & Others***(supra)*, Civil Appeal No. 9872 of 2013 at page 9, the Court stated that:

> *Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the Armory of law for delivering social justice to the citizens.*

More so, this Court expounded the concept of Sufficient interest in the case of **Rev Christopher Mtikila v. AG** [1995] TLR 31 *(supra)* at page 45, where it emphasized on bona fide claims:

> *I hasten to emphasize, however, that standing will be granted on the basis of public interest litigation where the petition is bona fide and evidently for the public good and where the Court can provide an effective remedy. This point is underscored in* ***Peoples Union for Democratic Rights v. Minister of Home Affairs,*** *where it was stated that*

> *'public interest litigation' meant nothing more than what it stated, namely, it is a litigation in the interest of the public. It is not the type of litigation which is meant to satisfy the curiosity of the people, but it is a litigation which is instituted with a desire that the court would be able to give effective relief to the whole or a section of the society.*

To determine on whether the Petition is genuine and bona fide as stated in the above case, there must be a criterion for establishing that fact for which the Petitioner submitted that, *Section 4 (2) of the BRADEA (supra)* which introduce the requirement of Affidavit of affection is one of the criteria. Since affidavit is a substitute of oral evidence, the averments and disposition in the same will warrant the Court in determining the admissibility of the Petition on the viability of the Petition. Short of that, the Court will have no basis to check on whether the Petition is genuine and bona fide even if it is in the name of the public there must be facts to support that in the affidavit on how the public are affected.

The Respondent went on to challenge the Petitioner arguments which are based on the believe that *Article 26 (2) of the Constitution (supra)* which open room for public interest litigation is not subject of the procedure under the BRADEA. In view of the Respondent, this is misleading, as the correct position is that *Article 26 (2) (supra)* represent one of the sets of basic right falling within *Article 12-29 of Part III Chapter One of the Constitution (supra).* Therefore, like any other rights under *Article 12-29 of the Constitution (supra),* the procedure of enforcement is regulated under the

BRADEA which is made under *Article 30 (4) of the Constitution (supra).* On that point, the Respondent begged to pose and reflect the Parliamentary' proceedings on the discussion on this Point at page 186-189 where the Attorney General of the United Republic of Tanzania was communicating the rationale of having *Section 4 (2) of the BRADEA (supra)* and cited examples in different jurisprudence on aspect of human rights where the principle of victimhood is highly enforced.

It was the reply submission of the Respondent that like other aspect of laws like criminal and civil law, they have their own procedure law which is *Criminal Procedure Act, Cap 20 [R.E 2019]and Civil Procedure Code, Cap 33 [R.E. 2019] (supra).* The procedural law on issues of human rights and constitution is the BRADEA and the same has been in force over 20 years. Thus, unless one is told that *Article 26 (2) of the Constitution (supra)* does not fall within the Bill of Rights under Constitution, then one has to refresh his minds on which procedural law is applicable to enforce *Article 26 (2) of the Constitution (supra).* Even the Petitioner has not mentioned then which procedural law is used to enforce *Article 26 (2) (supra)* given the fact that the same Article require implementation to be in accordance the procedure provided by the law.

As regards the case of **S.P Gupta v. Union of India,** AIR 1982 SC 149, 1981, cited by the Petitioner, which highly address and developed the concept of public interest litigation, the Respondent striked back on the observation of the Court on this Judgement at page 15, 1 6, 19 and . 24. The supreme Court indicated instances under which the Petition may not be

admitted even if it is preferred under the name of public interest. In **S.P Gupta v. Union of India** (*supra*) at page 15 the Court held that:

> *...But we must hasten to make it clear that the individual who moves the court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice and he is acting for personal gain or private profit or out of political motivation or other oblique consideration, the court should not allow itself to be activated at the instance of such person and must reject his application at the threshold, whether it be in the form of a letter addressed to the court or even in the form of a regular writ petition filed in court.*

The Respondent maintained that the impugned provisions are intended to limit or deter the busybodies from filing cases in courts of laws even where there is no infringed right by respective Petitioner. Further, it is trite law and leaning that, for one to institute a case he has to demonstrate locus stand/his rights which constitute a cause of action, thus filing of case. Thus, it is by so doing the filing of cases, be it civil or constitutional will be legally regulated and the Court is not put to pressure of having many cases from Busybodies who have either no task to do or searching for publicity nor any other hidden goal from themselves or someone else.

The amendment of the BRADEA accommodate the challenges under which the Public Interest Litigation may be faced and accord locus to the bona fide

and litigant with sufficient interest under *Section 4 (2) of the BRADEA (supra)*. The Respondent called upon the Court to note that when the Supreme Court of India in **S.P Gupta v. Union of India** (*supra*) developed the concept of locus standi in public interest litigation, there was no law regulating matter on proceedings under Public Interest. This is the reason; the Supreme Court even warned the Courts in India as reflected in page 22 paragraph 24 of the Judgement that:

> *...But-we must be careful to see that the member of the public, who approaches the court in cases of this kind, is acting bona fide and not for personal gain or private profit or political motivation or other oblique consideration. The court must not allow its process to be abused by politicians and others to delay legitimate administrative action or to gain a political objective. Andre Rabie has warned that "political pressure groups who could not achieve their aims though the administrative process" and we might add; thorough the political process," may try to use the courts to further their aims". These are some of the dangers in public interest litigation which the court has to be careful to avoid.*

According to the Respondent, the above challenges, necessitated the High Court of Gujarat at Ahmedabad in 2010 to enact *'The High Court of Gujarat [Practice and Procedure for Public Interest Litigation] Rules, 2010'* which was published in the Gujarat Government Gazette, Part-IV-C Central Section). As

such, since 2010 Public Interest Litigation in India is regulated as per the Rules cited above. Thus, *Section 4 (2) of the BRADEA (supra)* in the instant Petition, is to regulate proceedings under the BRADEA in order to have bona fide claims being litigated by Petitioner who has disclosed his interest in the Affidavit. *Rule 3 (b) and (d) of the High Court of Gujarat [Practice and Procedure for Public Interest Litigation] Rules* states as follows:

> *3(b) nature and extent of the personal interest of the Petitioner, if any, involved in the cause*
>
> *And*
>
> *3(d) facts constituting the cause, in chronological order. If the Petition is based on news report, it must be stated whether the Petitioner has taken steps to verify the facts personally.*

The Respondent submitted that, the requirements exhibited in *Rule 3 (b) and (d)* above, is a replica of what *Section 4 (2) of the BRADEA (supra)* wants from the Petitioner. The Respondent maintained that, there is nothing wrong for the Petitioner to disclose how personally he/she is affected and this is what constitute personal interest in the matter. In the case of **Rahul Sharma, I.P.S. (Retd) v. State of Gujarat & 2 Others**, Writ Petition (PIL) No. 219 of 2016, citing with approval the case o**f Ashok Kumar Pandey v. State of West Bengal** at page 20, the Court had this to say:

> *It is further observed that though the parameters of public interest litigations have been indicated by the Honourable Supreme Court in large number of cases, yet unmindful of the real intentions and wasting*

valuable judicial time which could be otherwise utilized for disposal of genuine cases.

With regards to the exception given to CHRAGG under *Section 4(2) of the BRADEA (supra)* to disclose personally interest, the Respondent submitted that, CHRAGG is a constitutional organ established *Article 129 and 130 of the Constitution (supra)* to promote human rights and good governance within the United Republic of Tanzania. Further to that, CHRAGG has mandate under *Article 130(1)(e)* of the Constitution*(supra)* read together with *Section 6 (1) (e) (supra)* of the Commission for Human Rights and Good Governance Act *(supra)*, (hereinafter referred to as CHRAGG Act) to initiate proceedings before the Court of law to prevent violation of human rights. In doing this, the interests of CHRAGG is well established through its mandates under the Constitution.

Based on the nature of the case, the Court has considered the arguments of both parties at length. At the outset, we share view with the Respondent that, a treatment between CHRAGG and other person is a differential treatment which does not fall within the ambit of discrimination as the Petitioner would like this Court to believe. CHRAGG has a constitutional and legal standi as its functions are creature of the Constitution and CHRAGG Act, thus the BRADEA was taking cognizance of the said fact. To amplify further, the Court would fake judicial notice under *Section 59 (1)(a) and (b) of the Tanzania Evidence Act (supra)* on the establishment- and functions of CHRAGG and hence there is no need to disclose interest which have already been disclosed in the Constitution and *the CHRAGG Act.* On the concept of differential treatment, the Respondent cited the case of **African**

Commission on Human and Peoples' Rights v Kenya (merits)' to the effect that not every differential treatment constitutes . discrimination. In the above case the Court had this to say:

> *In terms of Article 2 of the Charier, while distinctions or differential treatment on grounds specified therein are generally proscribed, it should be pointed out that not all forms of distinction can be considered as discrimination. A distinction or differential treatment becomes discrimination, and hence, contrary to Article 2 (supra), when it does not have objective and reasonable justification and, in the circumstances where it is not necessary and proportional.*

At any event, *Sections 4 (2); 4 (3); 4 (4), and 4 (5) of the BRADEA (supra)* does not treat citizens differently and arbitrarily. The enactment of *Section 4 (2) of the BRADEA (supra)* is saved with *Article 30 (1) and 30 (2) (a) and (b) of the Constitution (supra)* which does not render unlawful any existing law or prohibit the enactment of any law on account of public interest. Indeed, the Petitioner has failed to justify with evidence on how the provision is discriminatory given the fact that CHRAGG and other legal or natural persons are not of the same status. The reason being that the burden of proof rests with the Petitioner as per the case of **Shanti Sports Club v. Union of India***(supra)*, (2009) 15 SCC 705; AIR 2010 SC 433], in which at page 26 the Court held as follows:

> *The burden to prove the charge of discrimination and violation of Article 14 (supra) was on the appellants.*

> *It was for them to produce concrete evidence before the court to show that their case was identical to other persons whose land had been released from acquisition and the reasons given by the Government for refusing to release their land are irrelevant or extraneous. Vague and bad assertions made in the writ petition cannot be made basis for recording a finding that the appellants have been subjected to invidious or hostile discrimination.*

The Court do trivialise the arguments of the Petitioner to treat amendment of *Section 4 (2) of the BRADEA (supra)* as unconstitutional. We agree that the issue is one of constitutional principle but the impugned provision is neither arbitrary nor vague. However, it is the view of the Court that the enactment of the BRADEA was in compliance with what the Constitution under *Article 30 (4) (supra)* dictates to the state authority to legislate in terms of procedure for institution proceedings under *Part III of Chapter One of the Constitution* among others. *Section 3 of the BRADEA (supra)* reads:

> *This Act shall apply only for the purposes of enforcing the provisions of the basic rights and duties set out in Part III of Chapter One of the Constitution.*

We accept the broad thrust of the Respondent's argument on the importance of enacting the impugned provisions of BRADEA. The principles of the constitution, standing alone, in our opinion, compel to have procedural rules for assessing whether any petition filed by a citizen possess reliable and fair evidence. Indeed, the call by *Section 4 (2) of the BRADEA (supra)* for the

petition to be supported with an affidavit is meant to vindicate whether a petition filed by a human rights activist like the Petitioner herein is based on allegation offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a Constitutional Court seeking to administer justice. But the principles of the constitution cannot be enforced in a stand alone without procedural rules thereof. The court is of strong findings that, it is not only desirable but also reasonable in the interests of justice to apply a *"public litigation petition filter rule"* or rather what we call *"a public litigation case filter doctrine"* imposed under *Section 4 (2) of the BRADEA (supra)* for the petition of public litigation to be supported with an affidavit. Such requirement will serve the following purposes: *First,* it will safeguard Court to entertain litigation not on a false hypothesis of public interests but private interests brought in the umbrella of public interests. *Second,* it will bar many Petitioners with the mala fide intention who are likely to file Petition on public litigation basis which are not real of public interests. It is not easy for the civil court to establish mala fide intention of the parties unless there is an affidavit in support of such Petition. *Third,* attachment of affidavit helps to avoid multiplicity of cases which are not based on public interests. As a result, help the court to evade huge unnecessary backlog of cases. *Fourth,* attachment of affidavit is a compliance of the law since the Constitutional Court is guided by BRADEA Procedural Rules to deal with cases fairly, within reasonable time and at a proportionate cost. *Fifth,* filtration of public litigation cases by way of affidavit attachment to the petition will avoid hindrance to speedy disposal of other matters as

the Court will have time to deal with other real cases. *Sixth,* it serves resources of the court and of the parties.

It follows, therefore, that the impugned provisions *of the BRADEA (supra)* are rationally connected to their objective and not based on unfair or irrational considerations.

As submitted by the Respondent, the BRADEA is a procedural law for the enforcement of rights and freedoms under *Article 12- 29 of the Constitution including Article 26 (2) of the Constitution (supra)* which the Petition has based. The reason is that, *Section 4 (1) of the BRADEA (supra)* confines itself on *Articles 12-29 of the Constitution (supra). Section 4 (1) of the BRADEA (supra)* reads:

> *If any person alleges that any of the provisions of Sections 12 to 29 of the Constitution (supra) has been, is being or is likely to be contravened in relation for him, he may, without prejudice to any other action with respect to the same matter that is lawfully available, apply to the High Court for redress.*

It is the findings of this Court that the Petitioner is required to be tested as to whether he has sufficient interest and he is acting bona fide. To be able to detect this, there must be facts in the supporting affidavit stating the extent of Petitioner's interest. Such evidence may be admitted, irrespective of where, or by whom, or on whose authority was made provided it states in clear terms the Petitioner's interest. It is our further view that, the

procedural requirement of attaching an affidavit in public litigation cases will cure the often imperceptible or insurmountable effects of having many cases from activists with their hidden agenda that in real sense does not serve public interests.

Indeed, the Petitioner do not dispute that the impugned BRADEA Sections does not contain any express words that abrogate the citizens' right to challenge institution of proceedings under *Part III of Chapter One of the Constitution.* Rather, the impugned provisions are handmaid of achieving such goal in a fair and justice manner.

To the contrary, if the Petitioner's position is accepted, the Court will be faced with numbers of Petition brought for inter alia private gain, political motivation and publicity. The development of locus standi in public interest litigation in India has always considered two important things, that is the bona fide of the claims and sufficient interest of the Petitioner unlike what the Petitioner would like to suggest that whenever the Petitioner has invoked *Article 26 (2) of the Constitution (supra)*, then that is enough to constitute public interest litigation. This what the Court had to say in **S.P Gupta v. Union of India** *(supra)* at page 17:

> *The view has therefore been taken by the courts in many decisions that whenever there is a public wrong or public injury caused by an act or omission of the State or a public authority which is contrary to the Constitution or the law, any member of the public acting bona fide and having sufficient interest, can*

maintain an action for redressal of such public wrong or public injury.

Needless the afore findings, we agree with the submission in reply by the Respondent on four points. *One*, the standard required in petition of this kind is that of establishing a prima facie case and not just to draw inferences on balance of probabilities as in normal civil case. Our jurisprudence on standard of proof on constitutional case can be traced on the case of **Rev. Christopher Mtikila v. Attorney General** [1995] TLR 31 and later confirmed in several decision including the case of **Centre for Strategic Litigation Limited & Another v. Attorney General & 2 Others,** Misc. Civil Cause No. 21 of 2019 (unreported). A proof by establishing a prima facie case (criminal) was also restated in the case of **The Attorney General v. Dickson Paul Sanga**, Civil Appeal No. 175 of 2020, Court of Appeal of Tanzania at Dar es Salaam (unreported). In **Rev Mtikila v. Attorney General** (*supra*), this Court had this to say:

> *Breach of the Constitution is such a grave and serious matter that cannot be established by mere inference but by proof beyond reasonable doubt.*

Two, until when the Petitioner has discharged that burden, then the burden will shift to the Respondent. In this case, though the Petitioner has failed to prove the alleged discrimination, there are justifications as to why the Parliament enacted the said provision. The reason being that the Respondent is also bound to justify the limitation under which we accept that *Section 4 (2) of the BRADEA (supra)* limits individuals or litigants who have no bona fide claims to have their case admitted by the Court.

Three, the Petitioner's cited case of **Kukutia Ole Pumbun and Another** and **Attorney General v. Rebeca Z Gyumi**, Civil Appeal No. 204 of 2017 *(supra)* in support the concept of discrimination is distinguishable to the instant case on the circumstances under which the Court established discrimination and does not fall within the criterion for discrimination.

Four, on the public interest and *locus standi,* the Petitioner has cited the case of **Rev. Christopher Mtikila v. Attorney General** *(supra)* [1995] TLR 31 and **Attorney General v. Jeremia Mtobesya** *(supra),* Civil Appeal No. 65 of 2016. However, not every violation of the rights of human rights will result to unconstitutionality. This was the position taken in the case of **Elizabeth Stephen and Another v. Attorney General** [2006] TLR 404 in which it was held that:

> *But we should always bear in mind that not every infringement of basic rights should be declared unconstitutional.*

With the case **Rev. Christopher Mtikila v. Attorney General** (*supra*), we maintain our finding on the application of *Article 26(2) of the Constitution (supra)* to give the right for public interest. However, as argued in reply by the Respondent, this case was filed and decided without consideration of *the Basic Rights and Duties Enforcement Act* as the same was enacted in 1994. Second, the interpretation of the Court on *Article 26 (2) (supra)* did not take cognizance of the first clause on the requirement to exercise the right in accordance with the procedure provided by the law. *Article 26 (2) (supra)* reads:

> *Every person has the right, in accordance with the procedure provided by law, to take legal action to*

ensure the protection of this Constitution and the laws of the land.

The same position was in the case of **the Attorney General v. Jeremia Mtobesya** *(supra),* where the Court of Appeal did not expound much on the term "procedure provided by the law" envisaged under *Article 26 (2) of the Constitution (supra).* We accept that, the procedure provided by the law for purpose of *Article 26(2) (supra),* is that which is provided under BRADEA that provides for the procedure of enforcing basic rights and duties under *Article 1 2-29, Article 26(2) (supra) inclusive.* We further agree with the Respondent that, if the Parliament wanted to exclude and treat *Article 26 (2) (supra)* differently from other Articles, then they would have enacted specific procedural law to govern and regulate public interest litigation, which we say it was not the intention.

Five, the Petitioner has cited the case of **Joseph D. Kessy v. Dar es Salaam City Council** *(supra),* to justify what he alleges to be a position equivalent to the instant Petition when addressing the issue of discrimination by the state authority under *Article 13(4) of the Constitution (supra).* We find that the Petitioner has misinterpreted the provision of *Article 13(4) of the Constitution (supra)* as the status of CHRAGG under our Constitution is known and hence the Court of law ought to take judicial notice of the establishment of CHRAGG under the Constitution and CHRAGG Act. To amplify more, the cited case was not premised under *Article 13(4) of the Constitution (supra)* and this Court was not faced with the similar circumstances as in this Petition, hence the case is distinguishable with the facts pertaining this Petition.

As alluded earlier, the impugned *Section 4(2) of the BRADEA (supra)* as amended when read together with other sub sections of *Section 4 (supra)* and the whole of the BRADEA, one will understand that the same was inserted to compliment the work of having bona fide claims and litigants before the Court has admitted a Petition. This kind of statutory interpretation is what the Court has emphasized in the case of **Barclays Bank Tanzania Limited v. Phylisiah Hussein Mcheni and Pan African Energy Tanzania Limited v. Commissioner General Tanzania Revenue Authority** *(supra)* so as to avoid misinterpretation of statute. Further to that, the provision is justifiable under *Article 30(1) and 30(2) of the Constitution (supra)* in order to effectively enforce the basic rights and duties under *Article 12-29 in which Article 13(2), 13(4), 13(6) 260) and 26(2) (supra)* form part of it.

The Court share views of both the Petitioner and the Respondent on the elements encompassed under *Article 26(1) and (2) of the Constitution (supra).* However, as properly replied by the Respondent, the Petitioner in his analysis to *Article 26(1) and (2) of the Constitution (supra)* did not address the part dealing with "to be exercised in accordance with the procedures provided by the law" and whether the requirement under *Section 4(2) of BRADEA (supra)* is not one of the procedures envisaged under Article 26(2) of the Constitution. As we pointed out, the provision of *Section 4(2) of the BRADEA (supra)* imposes a procedural requirement to compliment the requirement under *Article 26(2) of the Constitution (supra)* and it cannot be said to violate the Constitution which has allowed establishment of procedural law. That observed, the first issue is answered in the negative.

The second issue is whether *Section 4(3) (supra)* is a violation of *Article 26(2) of the constitution (supra)* and consequently unconstitutional and/or void. *Section 4(3) of the BRADEA (supra)* states:

> *For avoidance of doubt, a person exercising the right provided for under Article 26(2) of the Constitution (supra) shall abide with the provisions of Article 30(3) of the Constitution (supra). (Emphasis added).*

The Petitioner called upon the Court to remember that in the case of **Rev Christopher Mtikila** *(supra),* the Court, speaking through the late Lugakingira, J. (as he then was), was categorical that *Article 26(2) of the Constitution (supra)* was an independent and stand-alone article with no cross linkage to *Article 30(3) of the Constitution (supra).* In arriving at this position, the Court noted the following at page 45:

> *Mr. Mussa suggested that this provision has to be read with article 30(3) (supra) and cannot be used in lieu of the latter. With respect, I cannot agree. It is a cardinal rule of statutory and constitutional interpretation that every provision stands independent of the other and has a special function to perform unless the contrary intention appears. There is nothing in Article 26(2) (supra) or elsewhere to link it to article 30(3) (supra). The only linkage is to that 30(4) (supra) and this is one of procedure rather than substance: Clause (4) empowers Parliament to make provision for the*

procedure relating . to the of-institution of proceedings under the article. It has not done so to date but that does not mean that the court is hamstrung. [Emphasis added)

The Petitioner submitted that *Section 4(2) of BRADEA (supra)* seeks to fuse the two despites of the High Court stating that they are separate and independent from each other. *Section 4(2) (supra)* says they are one. The Petitioner, therefore, maintained that an Act of Parliament cannot be allowed to contradict or offend what is provided for by the Constitution.

The Petitioner was of submission that Professor Issa Shivji a renowned Constitutional law Professor and Scholar, in the Article entitled **"Abolition of Public Interest Litigation in Tanzania**" did not mince words when he reacted to the amendment made by Parliament, at the instance of the Respondent, when he stated about *Section 4 (3) of BRADEA (supra):*

> *Firstly it purports to amend the constitution through the back door by making. Article 26(2) (supra) subject to article 30 (3) (supra). The fact that the relevant section 4(3) (supra) starts with the phrase "for the avoidance of doubt" does not save it because if there was any doubt as to the relation between Articles 26(2) (supra) and 30(3) (supra), it was made abundantly clear by the Mtikila case which decided that these two provisions of the Constitution were not linked. In my view, Section 4(3) (supra) is unconstitutional because the Constitution can only be*

amended by following a special procedure and cannot be amended, either directly or indirectly or under some guise of clarification, by an ordinary Act of Parliament.

Secondly, the amendment purports to overrule court's decision in the case of Mtikila. *It is unusual self-respecting constitutional democracies to overrule decisions of courts. To overrule or negate the effect of court decisions by legislation amounts to one branch of the state (the legislature) interfering with and usurping the power of the other branch of the state (the judiciary).* True, the legislature occasionally does it, particularly in the case of conservative court decisions which strike down progressive reforms of the government of the day. Even so, the Executive through the Legislature rarely resorts to overruling progressive decisions of courts which enlarge the fundamental rights of citizens. It would be socially embarrassing and politically, imprudent. It would result in attracting a bad reputation in the eyes of citizens of the Country and the community of democratic states. (Emphasis added)

In the end, the Petitioner invited this Court to reiterate its position of the difference between *Article and 26(2) (supra) and article 30 (3) (supra)* of

the Constitution and declare that *Section 4(3) (supra)* is unconstitutional and be struck out of the statute books forthwith.

In answer to the second issue, the Respondent agreed that the two provisions are different, but did not subscribe to the Petitioner invitation to the effect that their procedural effect is different. The reason offered by the Respondent was that the provision of *Article 26(2) (supra)* envisages existence of procedural law for which such a right may be exercised. Looking *Article 30 (3) of the Constitution (supra)* which limit the exercise of the right to *Article 12-29, Article 26(2) of the Constitution (supra)* gives wider power of protection of Constitution and other laws and the same form part under Article 12-29 of the Constitution *(supra).*

Then, the Respondent posed a question, whether there are two different procedural law for enforcement of the right under *Article 26(2) (supra)* and that of *Article 30(3)* of the Constitution *(supra).* The answer to this question, in view of the Respondent, is in negative as there is one procedural law for the enforcement of the basic rights and duties under the Constitution.

This Court, doubtless, agree with the Respondent that in the case **Rev. Christopher Mtikila v. Attorney General** *(supra),* it observed the following important things in relation to *Article 26(2) and 30(3) of the Constitution (supra)* and its linkage: *One, Article 26(2) and 30(3)* are linked by using *Article 30(4). Article 30(4) of the Constitution (supra)* is the provision which empowers the State Authority to enact legislation on the procedural guidance on institution proceedings before the High Court and powers of the High Court in hearing matters relating to basic rights and

freedoms among others. In the instant Petition, *Section 4(3) of the BRADEA (supra)* has linked *Article 26(2) and 30(3) (supra)* under the umbrella of *Article 30(4) of the Constitution (supra)* since the BRADEA was enacted under provision of *Article 30(4) of the Constitution(supra).*

Two, the linkage of *Article 26(2) and 30(3) (supra)* is on procedure and not substance. To amplify this, the procedural enforcement of the two Articles may be linked and in the instant Petition, the linkage of *Article 26(2) and 30(3) (supra)* is based on *Section 3 of the BRADEA (supra)* which addresses on the application of BRADEA being limited to the enforcing the provision of the basic rights and duties set out in *Part III Chapter One of the Constitution, Article 26 (2) (supra)* inclusive. Similarly, the procedural requirement under *Section 4 of the BRADEA (supra)* including *Section 4 (3) (supra)* are applicable whether the right which is exercised falls under *Article 26(2) or 30 (3) of the Constitution (supra).*

It is important to note that, the decision of **Rev. Christopher Mtikila v. Attorney General** *(supra)* and that of **Director of Public Prosecutions v. Daudi Pete** [1993] TLR 22 in which the issue of procedural enforcement of basic rights and duties under *Article 30 (4) of the Constitution (supra)* was addressed, the Court invoked practice and procedure of the High Court since the BRADEA was yet to be enacted. In **Director of Public Prosecutions v. Daudi Pete** *(supra)* at page 29 the Court of Appeal had this to say:

> *We concur with the Trial Judge that the provisions of sub-articles (3) and (4) of art 30 (supra) sufficiently confer original jurisdiction upon the High Court to entertaining proceedings in respect of actual or*

threatened violations of the Basic Rights, Freedoms and Duties. We also concur that until the Parliament legislates under sub-art (4) (supra) the enforcement of the Basic Rights, Freedoms and Duties may be effected under the procedure and practice that is available to the High Court in the exercise of its original jurisdiction, depending on the nature of the remedy sought.

As pointed out, the fusion of the two Articles is in respect on the procedure of institution of proceedings under the Basic Rights, Freedoms and Duties under BRADEA and not what the Petitioner purports it to be. It is not strange, even the Petitioner has cited *Article 26(2) and 30(3) of the Constitution (supra)* in the Originating Summons and *Section 4 (1) of the BRADEA (supra)* among others, to show that the two provisions may be fused as a matter of procedure in the institution of the proceedings under the BRADEA. Since the BRADEA sets the procedural requirements and that the Petitioner herein complied by moving this Court under *Article 26(2) and 30(3) of the Constitution (supra)* and *Section 4(1) of the BRADEA (supra)* at the same time supported the Originating Summons with the affidavit which speaks on the interest of the deponent and the Public at large and the Petition was admitted, the Petitioner cannot come forward to challenge the provision under which the Petition has based without objection and no question of locus standi have been raised in respect of *Article 26(2) of Constitution (supra)* and *Section 4 of the BRADEA (supra)*.

According to the Respondent, what *Section 4 of the BRADEA* dictates is a normal procedural on admissibility under domestic and international mechanisms. Since our Constitution recognizes basic human rights and duties, the Petitioner and other persons have constitutional obligation to abide by the Constitution and other laws including the BRADEA as part of human duties. To bolster up their argument, the Respondent cited the case of **Director of Public Prosecutions v. Daudi Pete** *(supra)* in which at page 23 it was held that:

> *The Constitution of the United Republic of Tanzania recognizes and guarantees not only basic human rights but also basic human duties consistent with the African Charter on Human and Peoples' Rights...*

The Respondent's submission was advanced on the basis that, as part of basic human duties, the BRADEA has set out the admissibility criteria as it is the practice under the African Charter on Human Rights and Peoples' Rights (hereinafter referred to as ACHPR). To buy the practice, the African Court on Human and Peoples' Rights (hereinafter referred to as African Court) uses the criteria under *Article 56 of the ACHPR* as the admissibility criteria. These includes; exclusion of application based on news disseminated through mass media, exhaustion of local remedies, application submitted within reasonable time etc. The idea is that, there must be a filter for Petitions brought before the Court so that the Court can deal with bona fide claims and not frivolous ones.

It is the findings of this Court that the Petitioner has misconstrued the decision of **Rev. Christopher Mtikila v. Attorney General** *(supra)* for

which his argument was based in challenging *Section 4(3) of the BRADEA (supra)*. The above decision recognized linkage of *Article 26(2) and 30(3) of the Constitution (supra)* even before the enactment of BRADEA. Surprising the Petitioner want to suggest that this Court in **Rev. Christopher Mtikila v. Attorney General** *(supra)* directed what should the Parliament legislate. It is the further findings of the Court that, the above case took cognizance of absence of procedural law under *Article 30(4) of the Constitution (supra)* and hence there is no order which was issued and contempt by the Respondent. The enactment of the BRADEA was purely on enforcement and implementation of *Article 30(4) of the Constitution (supra)* which demands for an Act of Parliament to provide for procedures and Power of this Court in the enforcement of basic rights and duties under the Constitution.

As regards an Article by Emeritus Prof. Issa Shivji titled **Abolition of Public Interest Litigation,** we do agree with the Respondent that, much as we respect the views of our highly respected Prof. Issa Shivji, though distinctly argued, the same have no binding effect before this Court. Indeed, We regret to observe that, Prof. Shivji erred on two important issues; *one*, is the fact that the amendment to the BRADEA was made by *Written Laws (Miscellaneous Amendments) Act* and specifically aimed to amend the BRADEA and other laws and not the Constitution, and *two*; we are compelled to believe that Prof. Shivji was in forgetfulness that the procedure under which the Parliament may alter the Constitution is provided under *Article 98 of the Constitution* and the same may be effected by an Act of Parliament save the quorum of Parliament when is passing the amendment is different from ordinary Act of Parliament. Also, it is necessary to take into account

that the amendment of BRADEA was not initiated under *Article 98 of the Constitution (supra)* and thus, his view on the amendment to overrule the court's decision is mis-appreciation on the parliamentary supremacy in legislation.

The third issue is on whether *Section 4(4) (supra)* of the basic Rights and *Duties Enforcement Act is 13(6)(a); and 26(1) of the Constitution (supra)* of the United Republic of Tanzania and consequently unconstitutional and/or void. *Section 4(4) of BRADEA (supra)* provides:

> *Notwithstanding any provision to the contrary, where redress is sought against the President, Vice-President, Prime Minister' the Speaker, Deputy Speaker or Chief Justice for any act or omission done in the performance of their duties, a petition shall only be brought against the Attorney General: (Emphasis added).*

The Objects and Reasons behind the Bill that led to the enactment of *Section 4(2), 4(3), 4(4) 2nd 4(5) of BRADEA (supra)* partly reads:

> It is further recommended to introduce a new subsection which requires all suit (sic) or matters against the Heads of organs of the State to be introduced against the Attorney General: The proposed amendment intends to enhance the provisions relating to immunity of Heads of Organs of State. (Emphasis added).

The Petitioner refuted the contention that impugned *Section 4(4) of BRADEA (supra) covers* the heads of the organs of the State. It was the view of the Petitioner that the Vice President, the Prime Minister, Deputy Prime Minister and the Deputy Speaker are not the heads of the organs of state. It is only the President, Speaker and Chief Justice who are the heads of the three organs of the State. So, this speaks volume about the so-called intentions of *Section 4 (4) of BRADEA (supra).*

On the afore footage, we do agree with the Petitioner that the literal interpretation of the object of the BRADEA was to cover Heads of the Organs of the State, that is the President, the Speaker and the Chief Justice. Literally, there is nothing in the object of the BRADEA Bill which implies that the aim was to cover a Vice President, Prime Minister, or Deputy Speaker.

Also, to put the record clear, the provision does not speak or mention the Deputy Prime Minister as alleged by the Petitioner, the position which does not exists. At large, the Court treats it as an error of the pen.

In any event, it is sufficient, perhaps, to remind oneself of the dangers of over-literal interpretation of the language of a statute which were identified

by Lord Nicholls of Birkenhead in **MD Foods plc (formerly Associated Dairies Ltd) v. Baines** [1997] 1 All ER 833 at 840, [1997] AC 524 at 532:

> *Linguistic arguments of this character should be handled warily. They are a legitimate and useful aid in statutory interpretation, but they are no more than this. Sometimes a difference in language is revealing and therefore important, other times not. In the process of statutory interpretation there always comes a stage, before reaching a final decision, when one should stand back and view a suggested interpretation in the wider context of the scheme and purpose of the Act. After all, the object of the exercise is to elucidate the intention fairly and reasonably attributable to Parliament when using the language under consideration.*

The literal interpretation of the language of the intended Objects and Reasons behind the Bill that led to the enactment of *Section 4(2), 4(3), 4(4) 2nd 4(5) of BRADEA (supra)* was to cover the Heads of the Organs of the State. If this analysis is correct, it is plain that the Bill has not expressly or by necessary implication intended to the contrary effect. It excluded the Vice President, the Prime Minister and the Deputy Speaker.

However, the court has asked itself as to; whether the breach is justifiable in terms of the BRADEA aims it seeks. The court proceeded to ask itself as to; whether it is practical to sue the President, Chief Justice and the Speaker

through the Attorney General and leave out the Vice President, Deputy Speaker and the Prime Minister be sued in their capacities. It is the findings of the court that, it would not be appropriate and practical. At large, the law would not only be discriminative in nature by its intent over such authorities which are of highest cadre but also be a bar in daily Government undertakings.

In any case, the procedure of not instituting proceedings under BRADEA directly against them but bringing against the Attorney General does not give the said authorities immunity.

Needless, *Section 4(4) (supra)* has not barred suit against the Heads of State, the Vice President, Prime Minister or the Vice Speaker. But the procedure of instituting proceedings under BRADEA requires the same be brought against the Attorney General.

Further, the fundamental question to determine is; whether the President in his capacity as a Head of State and Government, she is a Public Officer. We think not. *Section 4 of the Interpretations of Laws Act Cap 2 [R.E. 2019]* defines a Public Officer or Public Department" to mean:

> extends to and includes every officer or department invested with or performing duties of a public nature, whether under the immediate control of the President or not, and includes an officer or department under the control of a local authority, the Community, or a public corporation;

Applying the above definition of a President, we find no reason why we should construe the word President to mean also a Public Officer. Even in *the Constitution of the United Republic of Tanzania (supra),* there is no provision which says the President is a Public Officer. Again, the offices of the Chief Justice, Judges, Judicial Commissioners, for example, are not public officers in terms of the Constitution, although these officers perform functions of a public nature. We are, therefore, of view that, if one wants to sue the President in his official capacity as Head of Government, the Vice President or the Chief Justice or the Speaker, or the Deputy Speaker or the Prime Minister, he should commence one's proceedings against the Attorney General. They cannot be sued personally while acting in their capacities. This position was also taken by the Malawi Supreme Court of Appeal at Blantyre in the case of *The President of Malawi (1st Appellant), Speaker of National Assembly (2nd Appellant) and R. B. Kachere and Others (Respondent),* M.S.C.A Civil Appeal No. 20 of 1995.

We agree with the Petitioner on the submission that; it is well known our country is a "republic." The term which is defined by **Black's Law Dictionary Centennial Edition** (1891-1991) to mean:

> *A common worth that form government in which administration of affairs is open to all the citizens. In another sense, it signifies the state, independently of its form of government. (At page 1302)*

Being '"republic" all people on it are subject to the law. *Article 13(1) of the Constitution (supra)* provides that:

All persons are equal before the law and are entitled, without any discrimination to protection and equality before the law.

The emphasis on equality is also found in *Article 26(1) of the Constitution (supra)* which states:

Every person has duty to observe and to abide by this constitution and the laws of the United Republic.

The Petitioner has argued that *Article 13(2), 13(3) 13(4) and 13(6)(a) (supra)* prohibits discrimination of any kind between all persons in the United Republic. Strangely, *Section 4(4) of BRADEA (supra)* purposes to shield the President of the United Republic of Tanzania, the Vice President of the United Republic of Tanzania, the Prime Minister, the Chief Justice, the Speaker and Deputy Speaker from being sued in their official capacities!

It was the view of the Petitioner that, enhancement of the immunity of the Heads of the Organs of State is a strange contention. If any Head of the Organ of State harms a person in his official capacity that Head of State Organ cannot claim protection and shift his or her violation to the Attorney General. Since, all persons are equal before the law. They are then answerable to the law. Since it is not allowed for any person to ask to step into the shoes of a law breaker. The lawbreaker is the one who is legally answerable. To underscore this point, the Petitioner sought this Court's indulgence on the case of **Kukutia Ole Pumbun and Another***(supra)* in which the Court of Appeal of Tanzania stated the importance of non-discrimination.

The Petitioner went further to cite the case of **Mwalimu Paul John Mhozya v. Attorney General***(supra)*, in which Samatta J K. (as he then was) laid down essential and profound principles regarding the constitution and equality before the law. He held:

> *1. A court will not be deterred from a conclusion because of regret at its consequences:* ***Normal v. Neuberger Products Limited*** *(1956)3 All ER. 970 at 978.*
>
> *2. It is wrong for a court of law to be anxious or to appear anxious to avoid treading on executive toes.*
>
> *3. A. Constitution is a living instrument which must be construed in the light of the present-day conditions. The complexities of our society must be taken into account in interpreting it. A workable constitution is a priceless asset to any country.*
>
> *4. A constitution must be given a generous purposive construction:* ***Attorney General of the Gambia v. Momodou Jobe*** *(supra) (1984) 3 W.L.R. 174. Respect must –of course, be paid to the language used in, the instrument.*

We are in full agreement with the Petitioner's submission that the balance power between the three branches of government, namely the executive, the legislature and the judiciary, and the relationship of the courts to the other two branches must be carefully maintained. Any statutory alteration

on that balance must be in unmistakable terms. One branch of the government should not usurp the powers of another branch.

Also, we join hands with the Petitioner on five vital points. *One*, that the notion, apparently harbored by some people in this country. That, the President of the United Republic, is above the law is subversive of the Constitution and the other laws. Indeed, such notion has to be viewed with an initial scepticism. All Government leaders including the President are like the humblest citizen bound to comply with the laws of the country. The maxim "The King can do no wrong" has no place in our country even if the word 'President' is substituted for the word 'King'. Everyone and every institution or organization in this country is enjoined to pay respect to the principal of the supremacy of the law as per *Article 26 (1) of the constitution.*

Two, flexibly in the application of procedural law is a desirable thing, for it assists to ensure that at the end of the day justice triumphs when it comes to the issue of compliance with rules of procedure. The instinct for strictness should, where appropriate, be subdued. Substance rather than form should be the court's primary concern.

Three, Public interest conscious citizens and organizations in this country have sought to hold to account their leaders for transgressions of the law in the course of executing their public duties. They have translated their consciousness by filing constitutional petitions under *Article 26 (2) (supra)* and other provisions. Some of the cases filed by these persons and organizations include: **Legal and human Rights Centre & Tanganyika Law Society v. Hon. Mizengo Pinda & Attorney General** *(supra)*, Misc.

Civil Cause No 24. of 2013 **Ado Shaibu v. the Honourable John Pombe Joseph Magufuli & 2 Others,** Misc. Civil Cause N029 of 2018; **Zitto Zuberi Kabwe v. The President of the United Republic of Tanzania & 3 Others** *(supra);* and **Paul Revocatus Kaunda v. Speaker of National Assembly & Others**, Misc. Civil Cause No. 10 of 2020, High Court of Tanzania; to mention but a few.

In the case of **Zitto Zuberi Kabwe** *(supra)* the Respondents including the Attorney General raised the third point of objection which read *"The petition is incompetent for having been preferred against a wrong party."* The Respondents wanted the Court rule that the Petition against the President was not maintainable and that the Chief Secretary was the one who was supposed to be sued. The Petitioner rejected that proposition and this Court overruled the objection by stating:

> *It is therefore clear with respect to the learned principle State Attorney, that Article 46 (2) (supra) has no relation to constitution petitions against actions of the President of the United Republic of Tanzania done in his official capacity. If there was such a restriction, in my view the whole purpose of the rule of the law would be meaningless the rule has always been that of the actions of the government and the president can be measured against the constitution and that is the logic behind the enactment of Article 26 (2) of the constitution (supra). It follows those actions of the President and*

the Government, as such can be tested against the constitution by person through public interest litigation under Article 26 (2) (supra) as was in this case. The Fourth ground is those devoid of merits and it is dismissed. [Emphasis added].

Four, the principle behind our constitutional dispensation are that all persons are not only equal under the law but also equally accountable.

Five, it is a well-known- principle of law that there are proper and necessary parties in a suit. **The Black's Law Dictionary Sixth Edition Centennial Edition**: (1891-1991) defines a proper party as:

As distinguished from necessary party, is one who has an interest in the subject-matter of the litigation which may be conveniently settled therein. One without whom a substantial decree may be made, but not a decree which shall completely settle all the questions which may be involved in the controversy and conclude the right of all the persons who have any interest in the subject of the litigation...
A proper party is one who may be joined in action but whose nonjoinder will not result in dismissal. (At page 12,16) (Emphasis added).

The Black's Law Dictionary *(supra)* defines the "necessary parties" in the following manner:

In pleadings and practices those persons 'who must be joined in an action because, inter alia, complete

> *relief cannot be given to those already parties without their joinder.*

Those persons who have such an interest in controversy that a final-judgement or decree cannot be made without either affecting their interests or leaving the controversy in such a condition that its final adjudication may be wholly inconsistent with equity and good conscience. A "necessary patty" is one whose joinder is required in order to afford the plaintiff the complete relief to which he is entitled against the defendant who is properly suable in that county. But such principle is limited in civil cases which is not the case here.

Six, we also agree with the Petitioner, as far as civil cases are concerned, on the principle established by the Court of Appeal of Tanzania in the case of **Abdulatif Mohamed Hamis v. Mehboob Yusuf Osman & Fatna Mohamed**, Civil Revision No 6 of 2017 at Dar es Salaam (unreported), in which the Court had an opportunity to restate the meaning of the necessary and proper parties and it stated:

> *Although there is no definite test to be applied in this connection, in the Indian case of* ***Benares Bank Ltd. v. Bhagwandas****, A.I.R. (1947) All 1 8, the full bench of the High Court of Allahabad laid down two tests for determining the questions whether a particular party is necessary party to the proceedings: First, there has to be a right of relief against such a party in respect of the matters involved in the suit and; second, the court must not*

be in a position to pass an effective decree in the absence of such a party. The foregoing benchmarks were described as (rue tests by Supreme Court of India in the case of ***Deputy Comr Hardoi v. Rama Krishna****, A.I.R (1953) S.C. 521. (Emphasis added)*
We, in turn fully adopt the two tests and, thus, on parity of reasoning, a necessary party is one whose presence is indispensable to the institution of a suit and in whose absence no effective decree or order can be passed. Thus, the determination as to who is a necessary party to a suit would vary from case to case depending upon the facts and circumstances of each particular case. Among the relevant factors for such determination include the particulars of the non-joined party, the nature of relief claimed as well as whether or not, in the absence of the party, an executable decree may be passed. (Emphasis added).

The Court of Appeal noted that under the *Indian Code of Civil Procedure Code Rule 9 of Order 1* was *in pari materia* with our Civil Procedure Code (CPC) but contained a rider (proviso) that disapplies it in case of non-joinder of a necessary party. Despite our CPC having no such rider the Court of Appeal pronounced itself very clearly:

Our CPC does not have such a corresponding proviso but, upon reason and prudence, there is no gainsaying the fact

that the presence of a necessary party is, just as well, imperatively required in our jurisprudence to enable the courts to adjudicate and pass effective and complete decrees. Viewed from that perspective, we take the position that Rule 9 of Order I only hold good with respect to (he misjoinder and non rejoinder of non-necessary parties. contrary. in the absence of necessary parties, the court may fail to deal wlth the suit as It shall, eventually, not be able to pass an effective decree. It would be idle for a court, so to say to pass a decree which would be of no practical utility to the plaintiff. (Emphasis added).

However, we don't agree with the Petitioner on the argument that *Section 4 (3) of BRADEA (supra)* seeks to elevate, the President, the Chief Justice and the Speaker to a level unheard of. No one can dare to say that this provision seeks to make the respective heads immune from court proceedings and a citizen cannot have redress against them. In other words, the named person's wrongs with impunity! This kind of immunity is reminiscent of the age which followed the adage "the king can do no wrong', the sovereign is above the law and cannot be impleaded in his own courts. The president is not a monarch. All the offices mentioned in the section are constitutional offices. The occupants of these offices are bound by the Constitution. They are not above the law. Their powers and duties are conferred and limited by the law and through the Constitution and the law that they are held accountable to the people. The Court of Appeal had an occasion to state the

importance of access to justice in the case of **Julius Francis Ishengoma Ndyanabo v. Attorney General** [2004] TLR 14:

> *We agree with Professor Shivji (we did not hear Mr. Mwidunda expressing a view contrary to that submission) that the Constitution rests on three fundamental pillars namely (1) rule of law; (2) fundamental rights; and (3) independent, impartial, and accessible judicature. These three pillars of the constitutional order are linked together by the fundamental light of access to justice. As submitted by. Professor Shivji, it is access to justice which gives life to the three pillars. Without that right, the pillars would become meaningless, and injustice and oppression would become the order of the day. (Emphasis added).*

In the case of **Zitto Zuberi Kabwe** *(supra)* Mlacha J., rejected the attempt of the Respondent to shield the President from liability when he stated:

> *It was therefore clear before Feleshi J, that the President of this country can be a party in a public interest litigation but has to be pleaded in his official capacity not as private person. I share the views of Feleshi JK, but I propose to go a step further for future guidance....*

It is therefore clear, with respect to the learned Principle State Attorney, that Article 46 (2) has no relation to constitutional petitions against actions of the President of United Republic of Tanzania done in his official capacity. If there was such a restriction, in my view, the whole purpose of the rule of the law would be meaningless. The rule has always been that the actions of the government and the President can be measured against the constitution and that is the logic behind the enactment of Article 26 (2) of the constitution(supra). It follows those actions of the President, and the Government as such be tested against the constitution by person through public interest litigation under Article 26 (2) (supra) as was in this case. The fourth ground is thus devoid of merits and it is dismissed. (Emphasis added).

Needless, as pointed out by the Respondent, there is nowhere *Section 4(4) (supra)* has barred suit against the Heads of State. Instead, the procedure has been changed from instituting proceedings under BRADEA directly against them and the same be brought against the Attorney General. What the Petitioner has failed to understand is the facts that proceedings under the BRADEA are not normal civil proceedings involving private persons. To be precise, the procedure of preferring suit against Heads of State in civil and criminal remain intact under the Constitution and other laws.

The Court is of the findings that the role of the Attorney General under the Constitution, is that of the Chief Adviser of the Government of the United Republic of Tanzania on matters of law, meaning that, if there is any decision or omission by the Government including the leaders, impliedly the Attorney General is responsible for that act or omission and he will have to defend it. This is the spirit of *Article 59(3) and (4) of the Constitution (supra).* The Attorney General has audience in Court of law and he can defend interest of the Government and is responsible for legislative drafting as *Section 8 (b) and (c) of the Office of the Attorney General (Discharge of Duties) Act, [Cap 268 R.E 2019].*

The other procedural law on accountability of the Heads of State remains proportionally intact. However, for the proper implementation of the remedies which this Court is entitled by the Constitution and BRADEA to grant, the Attorney General as a Chief Advisor of the Government and initiator of legislative drafting, is better placed for proper implementation of the orders of the Court. There are two fold orders which may be granted by this Court under *Article 30(5) of the Constitution and 13(2) of the BRADEA (supra)* of two folds: *One*, the Court may declare law or action concerned as unconstitutional and hence void; and *Two*, the Court instead of declaring the law or action unconstitutional, it may afford the Government or other authority an opportunity to rectify the defect found in law or action. *Article 30(5) of the Constitution (supra)* reads:

> *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 72 to 29 of this Constitution (supra), 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 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 in 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.

Our reading to the above provision, justify the reason as to why the Parliament wants the Attorney General to be impleaded instead of the Heads of the State in order to facilitate the implementation of Court order when the Government is ordered to rectify the defect. The Attorney General who initiate legislative drafting, will be a realistic person to champion legislative drafting as in the instant Petition. The practice of impleading or having the Attorney General be accountable to the Court of law for the action or omission of the Government and its organ is not strange. In East African Court of Justice, suits are brought against Attorney General of each Partner

State and at the African Court on Human and Peoples Rights, application are brought against the *United Republic of Tanzania; and the Attorney General (supra)* is responsible to defend the actions or omission of the State concerned. This applies where the action or omission challenged have been committed by one of the Head of State.

For all these reasons we would reject the submissions of Counsel for the Petitioner that *Section 4 (4) of the BRADEA (supra)* is in violation of Article 13(6)(a) *(supra)*; and 26 (1) of the Constitution *(supra)* of the United Republic of Tanzania.

The fourth issue was whether *Section 4(5) (supra) of the Basic Rights and Duties Enforcement Act* is violative of *Articles 13(6)(a) and 26(1) of the Constitution (supra) of the United Republic of Tanzania* and consequently unconstitutional and/or void. *Section 4(5) of the BRADEA (supra)* provides.

> (5) A Petitioner shall, prior to seeking redress under this
> Act, exhaust all available remedies under any other written
> laws. (Emphasis added).

In view of the Petitioner, *Section 4 (5) of the BRADEA (supra)* is a provision enacted to prevent Petitioners from ever filing the case as they exhaust "all" repeat "all" available remedies under any other written laws.

The Petitioner invited this Court to remember that the attempt to compel parties in suits against the government to exhaust all or other available remedies is the obsession of the Respondent for many years. The Petitioner cited the case of **Kukutia Ole Pumbun and Another v. the Attorney General and Another** *(supra)* (1993) TLR 159 (CA) in which the

Respondent marshalled this argument, and the Court of Appeal captured that contention at page 164 that:

> *Replying to these submissions Mrs. Sumari supported the decision of the High Court that section 6 was not unconstitutional. If we understood her correctly, the thrust of her argument was that although section 6 violates arts 13(3) and 30(3) of the Constitution (supra), that by itself did not make the said section unconstitutional because the complainant of the violation has other remedies open to him such as orders of mandamus and certiorari. In other word, if the Government withheld the consent, the appellants could always seek remedy for this by asking for an order of mandamus or certiorari compelling the Government to give consent or not to withhold consent. (Emphases added).*

Thus, the Court of Appeal did not buy Mrs. Sumari's (as she then was) argument and held on the same page:

> *With due respect to the learned State Attorney this amounts to evading the issue. It does not really grapple with and answer the question before us. The argument merely echoes the provisions of Article 13(3) of the constitution (supra). That article says that an aggrieved person may seek redress in the High Court and that this is without prejudice to any*

> *other remedy, which may be available to him. This means that the complainant of a violation of a basic human right is free to seek redress under Article 30(3) (supra) although he could equally well have sought relief by way of mandamus or certiorari. Therefore, if the appellants in this case chose to seek remedy, as they did, under Article 30(3) (supra) they were exercising their constitutional right as to which procedure to follow in seeking redress. There can be no justification whatsoever for saying that because it presents an obstacle, the complainant or violation of this basic human right should be restricted to other forms of remedy. A complainant should be free to choose the best method legally open to him to prosecute his cause. (Emphasis added).*

This statement was also the restatement of the Court of Appeal's position encapsulated in the case of **Patman Garments Industries Limited v. Tanzania Manufacturers Limited** 1981 TLR 303 at page 310 that:

> *An application by way of certiorari is one of the means (sic), not the sole means, of challenging such an order, and we are satisfied that in the circumstances of this case, the appellants were certified to challenge the relocated order the way it was done. (Emphasis added).*

As remarked by Justice Mlacha in **Zitto Zaberi Kabwe's case** *(supra)*, it is a matter of choice. The Court observed:

> *Just a member of the public who wants to see that the provisions of the Law and the constitution are respected. His interest is to see that the acts of the 1st Respondent of removing and replacing the CAG are in line with the constitution. The best remedy in such a situation is to file a constitution petition because in judicial review he will lack the locus standi for want of personal interest. (Emphasis added).*

It was the Petitioner's submission that the Respondent would be magnanimous and accept defeat by respecting the decisions of the High Court and the Court of Appeal which clearly ruled that one should not be restricted from vindicating his or her right through all available means including filing a constitutional case. It is that individual who has the sole right of choosing the best available means to him or her and not the law or Respondent. That decision should always be respected.

The Petitioner paused a question and wondered, what are "all available remedies under any other written laws"? The Petitioner advanced three points. *First*, at no time can one say that all the -remedies have been exhausted. One stands to be told that he was supposed to file a judicial review application and when this does not work only to be told he or she should have filed a normal suit. Such vague wording contradicts the principle of legal certainty as it is unclear which other laws are being referred to, their

adequacy to the Petitioners Seeking redress and the risk spending costly resources to satisfy such a broad requirement.

Second, there is one thing that is axiomatic but yet seems to escape the minds of the Respondent all the time. This is: "human life is limited and it is not permanent. "A day gone in one's life is lost forever and will never be recovered. Each passing day humans are dying while others are born. Similarly, our leaders are not permanent as they are humans. The Petitioner went on to pause a question as to when our leaders wrong someone, why should an individual be forced to pursue lesser attractive option to him or her to vindicate their rights or public interest? Will that person be alive by the time the so-called "all available remedies under any other written laws"? No one knows? As neither the law nor the wronged/wronging person can guarantee one's life duration. The Petitioner justified that the law and the state are not the authors of life. Life is a gift from' God. so, if that person who feels that the leader be it the President, or Vice President, or Prime Minister, or Speaker, or Deputy Speaker, or Chief justice is undermining public interest then he or she has no recourse and has to wait for that leader to leave office! Lastly, the Petitioner paused another question: Can the law guarantee that both the violating leader and the public interest spirited individual will be alive or in good health? The Petitioner, therefore, answered the question in negative and opined that Rule 4(5) of the BRADEA prevent these leaders from being held to account.

Third, exhaustion of "all available remedies under any other written laws" is a cul-de-sac aimed at preventing public spirited individuals from accessing the judiciary. Moreover, it puts a public-spirited person in strait jacket that

binds him or her forever from not being able to get out of it and being able to walk to the High Court to vindicate public interest. What a stratagem once one enters that route he is doomed. This is not a procedure that is supposed facilitate recess to justice. It is a provision that literal kills access to justice which can only be fostered by adequate redress options. This only invites self-help. This is the danger that the Court of Appeal observed in the case of **Julius Francis Ishengoma Ndyanabo** *(supra)* and stated:

> *About two years ago, delivering his judgment in* ***Chief Direko Lesapo v. (1) North West Agricultural Bank (2) Messenger of the Court, Ditsobotla,*** *with Which the rest of the members of the Constitutional Court of South Africa agreed, Samatta, J. said, at page15.*
>
> *The right of access to Court is indeed foundational to the stability of an orderly society and ensures the peaceful, regulated and institutionalized mechanisms to resolve disputes, without resorting to self-help. The right of access to Court is a bulwark against vigilantism, and the chaos and anarchy which it causes, construed in this context of the rule of law and the principle against self-help in particular, access to Court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable. (Emphasis added).*

After quoting the above statement, it stated its position:

> *Access to courts is undoubtedly, a cardinal safeguard against violation of one's rights, whether are fundamental or not. Without that right, there can be no rule of law, therefore, no democracy. A Court of law is the "last resort of the oppressed and the bewildered." Anyone seeking a legal remedy should be able to knock on the doors of justice and be heard. (Emphases added)*

Article 13 (6) (a) of the Constitution (supra) states:

> 6. *To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely:*
>
> *a). When the rights and duties of any person are being determined by the court or-any other agency, that person shall be entitled to a fair hearing and to the right of appeal of other legal remedy against the decision of the court of the other agency concerned. (Emphasis added).*

The Petitioner was of submission that an impugned provision has to be juxtaposed to the Article of the Constitution that is alleged to be violated. **Attorney General v. Jeremia Mtobesya** *(supra)*, Civil Appeal No. 65 of 2016 (unreported) by the Court of Appeal of Tanzania when it stated:

i) *As regards the duty of the court, we need to do no more than to borrow and adopt a persuasive wisdom*

of the Supreme Court of the United States of America in U.S vs Buffer, 297 U.S 1 119361 where it was expressed:

When Act of Congress is appropriately challenged in the courts as not conforming to the constructional mandate, the judicial branch of the government has only duty to lay the article of the constitution which is invoked beside the statute which is challenged and to decide whether the letter squares with the former. All the court does, or-can do, is to announce its considered judgment it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of the provisions of the constitution; and having done that, duty ends." (At pages 47-48). (Emphasis added).

According to the Petitioner, when *Section 4 (5) of the BRADEA (supra)* is juxtaposed with *Articles and 13 (6) (a) and 26 (1) of the Constitution (supra)* provisions one will find that it is unconstitutional. It prevents people from first reaching the court and also from a fair hearing which the High Court of Hong Kong III **Harvest Sheen D Limited and another v. Collector of Stamp Revenue 2 CHRLD** 246 held:

If a litigant is entitled to a fair trial, it must be implicit that the litigant gets to trial in the first place.

Similarly, the Court of Appeal stated in similar vein in **Mawazo Simon Ngodela v. Republic,** Criminal Appeal No.48 of 2019) [2019] TZCA328-Tanzlii it held at page 4 of the typed judgement:

> *It is trite law that parties to a case have equal rights to a fair trial which includes but not limited to the right to be heard on appeal. The said right also extends to the right to appear during the hearing of the appeal. (Emphasis added).*

The Petitioner did not dispute the Respondent's contention that CHRAGG has a constitutional mandate to receive human rights complaints, but argued that the Respondent has forgotten that the role of interpreting the constitutionality of any legislation is vested only to the High Court of Tanzania. For instance, in the case of **Julius Ishengoma Francis Ndyanabo v. The Attorney General***(supra)*, Civil Appeal No. 64 of 2001 (unreported) (Samatta C.J.) at pp.17-18 now reported in [2004 1 TLR 14 the Court of Appeal insisted that:

> *The provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions, functions, but grows and the Will and dominant aspirations of the people prevail. Restrictions on*

> *fundamental rights must therefore be strictly construed. So, Courts have a duty to interpret the Constitution so as 'to further fundamental Objectives and Directives of State policy. (Emphasis added).*

It was the Petitioner's correct view that no other organ that can declare any law to be unconstitutional other than the judiciary. The Petitioner reminded the Respondent that by virtue of *Article 107A (1)* it is only the court of law that has the final authority on the proper interpretation of the Constitution in the United Republic of Tanzania. The Petitioner seeks the power of the court to determine the constitutionality of the amended provisions BRADEA and no other human rights violations which may have several options of seeking redress including sending complaints to CHRAGG.

Therefore, the Petitioner asserted that the burden, of proving the constitutionality of the challenged provisions of the law lies to the Respondent before this court and not elsewhere. This was emphasized in **Leons Ngalat v. Alfed Salakara and Another** (CAT) CA. No. 381/96 (unreported), where the court emphasized that:

> There is, presumption that every statute is constitutional unless proved otherwise the Petitioner has the burden to show unconstitutionality of the law or provisions of the law, and' after proving the burden shifts to the Respondent to prove the constitutionality.

In the end the Petitioner invited this Court to rule that *Section 4(5) of the BRADEA (supra)* is a flagrant violation of *Article 13(3) (a) and Article 26(2) of the Constitution (supra)* and thus unconstitutional that cannot be allowed to remain in the statute books of our country for even one more minute.

In response to the issue whether *Section 4 (5) (supra)* of the Basic Rights and Duties Enforcement Act is violative of *Article 13 (6) (a) and 26 (1) of the Constitution (supra)*, the Respondent submitted that *Section 4 (5) of the BRADEA (supra)* is not a new creature under the BRADEA unless this Petition is brought for sake of challenging everything just everything. Thus, before the enactment of *Section 4 (5) of the BRADEA (supra)* which enhance the admissibility requirements on accounts of exhaustion of all available remedies, there existed *Section 8 (2) of the BRADEA (supra)* which fused two things; one is the issues of adequate means of redress and two is the issue frivolous and vexations application. *Section 4(5) and 8(2) (supra)* reads:

> *4(5)A Petitioner shall, prior to seeking redress under this Act, exhaust all available remedies under any other written laws.*
>
> *8 (2) The High Court shall not exercise its powers under this section if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law, or that the application is merely frivolous or vexations.*

It was the Respondent reply that the two sections, does not communicate different intention which was earlier legislated under *Section 8 (2) of the BRADEA (supra)* though one speaks about the Petitioner and the other speaks about the High Court but the emphasize remain on the need to exhaust available remedies or redress under other laws. Thus, the catch words here is available of the other remedies or redress under other laws. The justification are not hard to find because the Constitution itself has created number of organs with different mandates like *Article 129 of the Constitution (supra)* which establishes the CHRAGG read together with the *CHRAGG Act* to investigate matters on human rights and good governance and give remedy of *Article 132 (supra)* which establishes a Public Leaders Ethics Secretariat with power to inquire into the behaviour and conduct of any public leader for the purpose of ensuring that the provisions of the law concerning the ethics of public leaders are duly complied with.

From the above few cited examples of the organs established by the Constitution and Acts of Parliament, it was the reply submissions of the Respondent that, it would be absurd to have established organs by Constitution be made redundant to provide redress under the law and allow everything to be thrown to the Court of laws for which we think it was not the intention of framer of the Constitution. Constitution petition and remedies under the BRADEA were meant to be remedies of the last resort and not alternative to remedies already available under other mechanisms. This was the observation of this Court in the case of **Paul Revocatus Kaunda v. Attorney General**, Misc. Civil Cause No 33 of 2079 (HC unreported) at page 21 it was held that:

> *We are settled that the purpose of the BRADEA is to provide for the procedure for enforcement of constitutional basic rights, for duties and for related matters. With this context in mind, Section 8 of the BRADEA (supra) provides for the High Court's jurisdiction in bill of rights cases. Sub-sections 8(l)(a) and (b) generally vests in this court jurisdiction to hear and determine any application made under section 4 of the BRADEA (supra) which provides for the right to apply to this court for redress. However, sub-sections 8(2) and (3) of the BRADEA (supra) outline some limitations as to the exercise of such jurisdiction. Subsection 8(2) (supra). on its part, excludes the exercise of the powers of this court in cases where "it is satisfied that adequacy means of redress for alleged contravention are or have been available to the person concerned under any other law...*

We have carefully and passionately considered the submissions of both parties on exhaustion of local remedies. This Court was faced with interpretative role on provision of *Section 4 and 8(2) of the BRADEA (supra)* in the case of **Tanzania Cigarette Company Limited v. the Fair Competition Commission and the Attorney General,** Misc. Civil Cause No 31 of 2010. (HC unreported). In this case, one of the issues was; whether it was proper for the Petitioner to prefer a constitutional petition without first

exhausting local remedies available under the Fair Competition Tribunal. In deliberating on the viability of the objection based on exhaustion of local remedies, this Court at page 20 had this to say in respect to *Section 4 and 8(2) of the BRADEA (supra)*:

> *Apart from the principle of constitutionality of Acts of Parliament, we think, law in Tanzania is also settled on the principle that litigants should first exhaust other lawfully available remedies under statutory or case law, before they can seek remedies under the Basic Rights and Duties Enforcement Act. This principle of resorting to lawfully available remedies before seeking basic rights remedies compliments the principle of constitutionality of Acts of Parliament. The duty to exhaust other lawfully available remedies before resorting to basic rights and duties remedies is borne out from reading of sections 4 and 8(2) (supra) of the Basic Rights and Duties Enforcement Act. Section 4 (supra) of the Basic Rights and Duties Enforcement Act in essence restates the position of law that is also articulated under subsection (2) of section 8 (supra). We think that these provisions exhort litigants to first exhaust other lawfully available remedies before seeking remedies under the Basic Rights and Duties Enforcement Act.*

In the above holding, this Court reinforced that, the requirement to exhaust local remedies was in existence in BRADEA even before the amendment and the fact that *Section 4 (supra)* is a *replica* of *Section 8(2) of the BRADEA (supra), the same requirement has to be retained.* Further, the Court re-affirmed the principle of constitutionality of statutes that create alternative remedies and that the remedies under the BRADEA should be remedies of last resort. This is well articulated at page 21 of **Tanzania Cigarette Company Limited v. The Fair Competition Commission and the Attorney General** *(supra),* in the following words:

> *In our interpretation, subsection (2) of section 8 (supra) suggests that recourse to provisions of the Basic Rights and Duties Enforcement Act is not to be resorted to where there are other adequate means of redress available to a potential Petitioner. Subsection (2) of section 8 (supra) of the Basic Rights and Duties Enforcement Act provides that the jurisdiction of High Court is not to be exercised if the High is satisfied that adequate means of redress are or have been available to the person concerned under any other law, or ...In fact, this interpretation of section 8 of the Basic Rights and Duties Enforcement Act gives effect to the presumption of constitutionality of statutory provisions (supra).*

As indicated in the above case, there is no dispute on the issue of exhaustion of local remedies under the BRADEA and if this Court was of the view that

the same is not necessary, it would have said so. However, the Court correctly interpreted the law and justified as to why it is important to exhaust available remedies before embarking to initiate the proceedings under the BRADEA.

In challenging the requirement for exhaustion of local remedies, the Petitioner has cited the case of **Kukutia Ole Pumbun and Another v. Attorney General, Patman Garments Industries Limited v. Tanzania Manufacturer Ltd and Zitto Zuberi Kabwe** *(supra).* The Respondent pointed out that the above cases were not premised on challenging the constitutionality of the provision for exhaustion of local remedies under the BRADEA.

However, as pointed out earlier, the duty of the Court in interpretation of statutes is to make them operative and therefore, when the Parliament incorporated *Section 4(5) and 8(2) of the BRADEA (supra),* they were aware of the freedom of parties to the case to choose what remedies to pursue but they choose to make the remedy under the Constitution and BRADEA.

As regards human rights violation, it is our observation that the requirement of exhaustion of local remedies is founded on the principle that a government should have notice of human rights violation in order to have the opportunity to remedy such violations before being sued before the court. However, we agree with the Petitioner that exhaustion of local remedies is a challenging component not only in Tanzania but also in most of African countries as it not easy to make clear and direct claim of exhaustion of local remedies. But

that should not make cases be filed without other adequate means of redress available to a potential Petitioner.

Again, as submitted by the Petitioner, in this petition, the Petitioner seeks the power of the court to determine the constitutionality of the amended provisions BRADEA and no other human rights violations. But that does not mean that constitutionality of the provision of the law can be assessed without considering human rights standards. For that reason, this court insists that the mandatory exhaustion of available other redress before jumping to file a constitutional case promotes reform of legal system as the claims will be highlighted in various platforms. It also creates an efficient justice system and autonomous administrative state.

Needless the above observation, the points worth for consideration are three in number which marks as an exception to the general rule: *One*, whether there are available local remedies. On this point, the point remains as to whether the Petitioner is able to pursue other remedy without legal or practical impediments. *Two*, whether the available local remedies are effective with a reasonable prospect and undue delay. If the available local remedies are futile, then there cannot be a such need. *Three*, whether the available local remedies are adequacy and capable of providing redress to the Petitioner in relation to the alleged violation.

It is our considered view that, if the three issues above are answered in the negative, then the requirement of exhausting available local remedies would be meaningless. In the instant petition, there is no any evidence to answer the above issues in the negative.

We further consider that it is appropriate to hold, in answer to the issue of exhausting available local remedies, that there is nothing in the Constitution to preclude the protection of larger national interests' rules which requires a Petitioner to exhaust all the available local remedies prior instituting a constitutional petition.

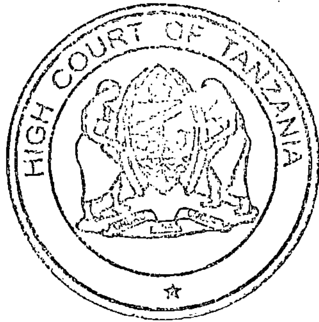
It is of significance in this respect that a decision has been taken to set up a general rule that exhaustion of available local remedies is mandatory in filing constitutional petitions save where; first, there are no available local remedies or where there are legal or practical impediments. *Second,* the available local remedies are ineffective, unreasonable and prone to delay. *Third,* where the available local remedies are inadequacy and incapable of providing redress to the Petitioner in relation to the alleged violation.

The fifth issue is; whether the impugned provisions are saved by *Article 30(2) of the Constitution (supra).* This issue needs not take us at length. The contents of paragraph 3, 6, and 7 of the Originating Summons do not lay any proof. As replied by the Respondent, the impugned provisions of the BRADEA do not violate *Articles 13(2) and (4), 13(6) (a) 26(1), (2) and article 30(3) of the* constitution *(supra)* but lather are saved under the provisions of *Article 30(2) of the same Constitution (supra).* The said *Article 30(2) (supra)* states:

> *It is hereby declared that the provisions contained in this Part of this Constitution which set out of the principles of rights, freedoms, and duties, does not render unlawful any existing law or prohibit the*

enactment of any law or the doing of any lawfully act in accordance with such law for the purposes of:

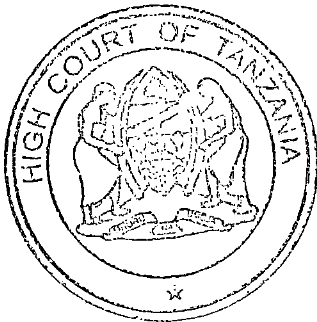
In the end, though we appreciate the call by the Petitioner that the Court should remind the Parliament and the Government that by virtue of *Article 107A (1) of the Constitution (supra)* is the final authority on the proper interpretation of the Constitution in the United Republic of Tanzania, there are six reasons why, in our opinion, this petition must fail. *One*, the complained provisions of BRADEA complement and links the provisions of *Articles 26 (2) and 30 (3) of the Constitution (supra). Two*, the demonstration of personal interest is a requirement under *Article 26 (2) of the Constitution (supra). Three*, the complained amendments have played a role in ensuring procedural compliance in maintaining the constitutional principles of separation of powers; rule of law and the important role of the judiciary in the administration of justice and are in compliance and in line with the spirit embodied internationally within *the Treaty for the Establishment of the East African Community; The African Charter on Human and People's Rights and the International Covenant on Civil and Political Rights. Four*, the designation of the Attorney General as the necessary party to alleged violations in lieu of the incumbent heads of government was proper and in accordance with the powers and functions under the Constitution and laws. *Five*, the introduction of the requirement to exhaust local remedies was informed by the fact of the existence of bodies like CHRAGG. And, six, the complained violations were made in good faith and consequently they are saved under *Article 30 (2) of the Constitution (supra)*. Considering the nature of the petition, we award no costs. Order accordingly.



E. B. LUVANDA

JUDGE

15/02/2022



Y. J. MLYAMBINA

JUDGE

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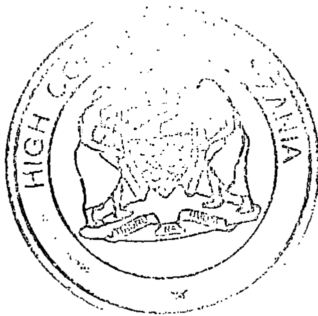
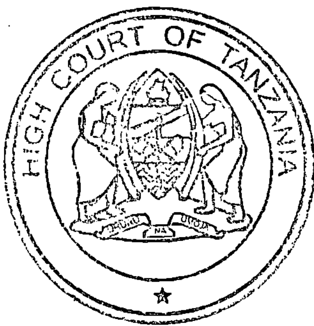


S. M. MAGOIGA

JUDGE

15/02/2022

Judgement pronounced and dated 15th day of February, 2022 in the presence of Counsel John Seka assisted by Counsel Paul Kisabo for the Petitioner and in the presence learned State Attorney Stanley Kalokola for the Respondent. Right of Appeal fully explained.



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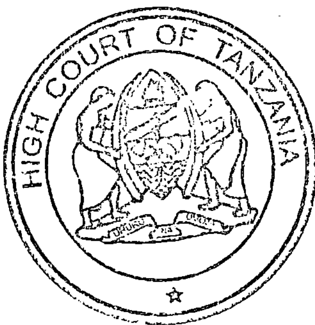

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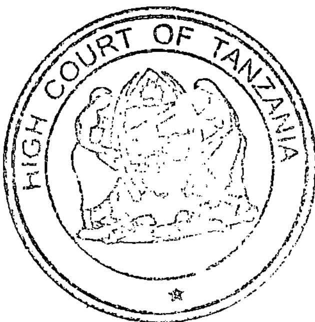

S. M. MAGOIGA
JUDGE
15/02/2022