

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL CAUSE NO. 03 OF 2023

MARY BARNABA MUSHI.....PETITIONER

VERSUS

ATTORNEY GENERAL..... RESPONDENT

RULING

08/05/2023 & 15/05/2023

KAGOMBA, J

Mary Barnaba Mushi, the Petitioner herein, came before this Court to challenge the constitutionality of the provision of section 130(2)(e) of the Penal Code [Cap 16 R.E 2022] ("the Penal Code"). She finds the impugned provision discriminating girls aged between 15 and 18 years based on their status as married women, when it comes to giving consent to sex. She feels the smell of discrimination when girls in that same age bracket who are married are considered to be capable of giving consent to sex but their peers who are not married are regarded incapable of consenting to sex.

In view of the perceived discrimination, the Petitioner finds the blamable provision of the Penal Code unconstitutional, and also inconsistent and incompatible with some international legal instruments to which Tanzania is a party. It is for these reasons, she moved this Court for the following reliefs, against the Respondent:

1. DECLARATION that section 130(2)(e) of the Penal Code is unconstitutional; void and no longer forms part of the laws of Tanzania.
2. DECLARATION that any consensual sexual intercourse between a male person and his married wife aged between 15 and 18 years amounts to marital rape.
3. DECLARATION that section 130(2)(e) of the Penal Code is inconsistent and incompatible with the African Charter on Human and Peoples Rights; the Universal Declaration of Human Rights; the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); and the Convention on the Rights of the Child.
4. ORDERS directing the Respondent within 30 days of the judgment to publish a Revised Edition of the Penal Code without section 130(2)(e).
5. ORDERS directing the Respondent within 3 months of the judgment to administratively present to the Registrar of the High Court, with a copy to the Petitioner, progress report on status of implementation of the judgment.
6. FURTHER ORDERS that each party to bear its own costs because this suit is filed in public interest and has been filed with a view to assisting the Court and the Respondent to perform their statutory duties conferred to them by the Constitution.

7. GRANT any other orders/relief the Court may wish to grant.

The Petitioner preferred this action by way of originating summons made under Articles 108 (2) and 64(5) of the Constitution (sic), read together with section 2(3) and 2(5) of the Judicature and Application of Laws Act [Cap 358 R. E 2019] narrating the grounds for the reliefs sought and the facts relied upon by the Petitioner. The summons is supported by an affidavit sworn by the Petitioner, who branded herself therein as a human rights activist focusing on women and children's rights.

The Petitioner's grievances were rebutted by the Respondent who filed a reply to the originating summons and a counter affidavit alongside a notice of preliminary objection bearing the following two points of law:

- (i) That the Petitioner has not cited any constitutional provisions against which the impugned provision is alleged to have offended; and
- (ii) Alternatively, the High Court composed of a single judge lacks jurisdiction to determine violations falling within Articles 12-29 of the Constitution.

During hearing of the preliminary objection, Mr. Stanley Kalokola, learned State Attorney, appeared before me to represent the Respondent. He was accompanied by Ms. Lucy Kimario, also a learned State Attorney, while the Petitioner was represented by Mr. John Seka, learned Advocate.



At the beginning of his oral submission, Mr. Kalokola dropped the first limb of the preliminary objection and proceeded to argue on the alternative point, that challenges the jurisdiction of the Court. It was his contention that insofar as the essence of the Petitioner's action is, by and large, founded on violations of basic rights and duties falling within Articles 12 to 29 of the Constitution, and since the only provision of the Constitution which clothes this Court with jurisdiction to determine such violations is Article 30(3) of the Constitution, and given that the only procedure to be applied when there are such violations, by virtue of Article 30(4) of the Constitution, is through the Basic Rights and Duties (Enforcement) Act [Cap 3 R.E 2019] ("BRADEA"), therefore, the jurisdiction of the Court should conform to section 10 of BRADEA where a panel of three High Court judges is required to determine this suit and not a single judge, as it is the case here.

To concretize his contention, Mr. Kalokola argued that the originating summons stated clearly that the basis of the Petitioner's grievances is on Articles 12(2), 13(1), 13(2), and 29(2) of the Constitution. That, with the exception of Article 64(5), which was also cited as the basis for the Petition, the rest of the cited constitutional provisions fell squarely within Articles 12 to 29 of the Constitution, for which a panel of three judges is required to hear and determine their violation.

Mr. Kalokola faulted the Petitioner for citing Articles 64(5) and 108(2) of the Constitution. He argued that Article 64(5) does not provide for jurisdiction of the Court, rather it speaks about instances where an Act of Parliament contravenes the Constitution, and consequences of such contravention.

As for the cited Article 108(2), Mr. Kalokola conceded that it confers jurisdiction to the Court, but quickly added, only where there are no specific provisions of the law regulating a type of violation complained about. He was emphatic that any violation of Articles 12 to 29 of the Constitution is specifically covered by BRADEA, in which case he thinks it was misdirection on part of the Petitioner to cite a general provision of Article 108(2) in his originating summons. In this connection, he cited the Ruling of this Court in **Odero Charles Odero vs Director of Public Prosecution & the Attorney General**, Misc. Civil Cause No. 20 of 2021 as well as the decision of the Court of Appeal in **The Director of Public Prosecutions vs. Daudi Pete** [1993] T.L.R 22.

Mr. Kalokola wound up his submission in chief by praying the Court to dismiss the Petition, with costs, for being defective, and on account of the Court lacking jurisdiction when sitting with a single judge.

Replying, Mr. John Seka, took off by questioning whether the objection merited to be a preliminary objection, in the first place. He had in mind the principle enunciated in the famous case of **Mukisa Biscuits Manufacturing Tanzania Ltd v Westend Distributors Ltd** (1969)1 EA 669, that a preliminary objection has to be on a point of law that, when determined, can dispose of a matter before the Court. He was of the view that this objection was not tenable for a reason that the Respondent does not, in effect, challenge the jurisdiction of this Court, but its composition. That, under such circumstances, the Court has jurisdiction but may be said

to lack proper composition, which can be remedied by returning the case file to the Principal Judge to consider allocating it to a panel, if needed.

On the substantive part of the preliminary objection, Mr. Seka had three arguments for his client's case: **Firstly;** since the Petition challenges the constitutionality of section 130(2)(e) of the Penal Code, and the remedy sought is to declare the same unconstitutional, it was proper for the Petitioner to move the Court vide Article 108(2) of the Constitution read together with Article 64(5) and not Article 30(3) of the Constitution as argued by Mr. Kalokola. He added that the Petitioner was not talking about basic rights and duties, rather, whether it was legally right to challenge the unconstitutionality of the cited provision of the Penal Code, for being inconsistent with the Constitution and international instruments forming part of our laws.

Secondly; since Article 30(3) implies a requirement that the violation to be challenged thereunder has to be personal, which is not the case in the instant Petition whereby the grievances raised by the Petitioner cover all Tanzanian girls aged between 15 to 18 years who are unmarried, this matter is not amenable under Article 30(3) of the Constitution but Articles 108(2) and 64(5), and *ipso facto*, BRADEA was inapplicable.

Thirdly; this matter is a novel one, in that, it encompasses violation of Articles of the Constitution covered under BRADEA as well as Articles outside the scope of BRADEA. For this reason, he invited the Court to see this exceptionality, and to find that it was Article 108(2) which confers original jurisdiction on the Court for matters, like this, which have no express



specific procedure. He prayed the Court not to award costs, even if the objection was sustainable, for this is a public interest litigation matter.

In his rejoinder, Mr. Kalokola emphatically reiterated that the jurisdiction of the Court was lacking for this type of a petition which is profoundly based on the provisions of the Constitution covered by BRADEA. He also reiterated his prayer to have the suit struck out with costs.

Having carefully considered the rival submissions by the learned minds, the Court is to determine, generally, whether this preliminary objection has merit. However, before considering its merits or otherwise, I should first address the question put forth by Mr. Seka as to whether, this objection has met the threshold of a preliminary objection on point of law.

The principle in **Mukisa Biscuits** (supra) as to what amounts to a preliminary objection is, my view, that the objection has to consist of a pure point of law on matters pleaded or those arising from clear implication in the pleadings. The point of objection has to be apparent on the pleadings without a need to ascertain facts by evidence, and that the objection has to be on a point of law, capable of disposing the matter before the Court.

The above legal position was also restated in **Ali Shabani and 48 Others V. Tanzania National Road Agency (TANROADS) and Another**, Civil Appeal No. 261 of 2020, CAT, Tanga, where the Court of Appeal, although dealing with an objection on time limitation, had this to state on the preliminary objection, generally;



*"It is clear that an objection as it were on account of time bar is one of the preliminary objections which Courts have held to be based on pure point of law **whose determination does not require ascertainment of facts or evidence. At any rate, we hold the view that no preliminary objection will be taken from abstracts without reference to some facts plain on the pleadings which must be looked at without reference examination of any other evidence**".*

[Emphasis added]

In this matter, the objection is that the Court has no jurisdiction in view of its composition. The learned State Attorney, for the Respondent, has clearly submitted on the point that section 10 of BRADEA requires complaints based on Article 12 to 29 of the Constitution to be determined by this Court but when composed of three judges and not a single judge. Obviously, this is a pure point of law. It requires this Court to look not far than on the dictates of the relevant jurisdictional provisions on the substance of the matter at hand, aided by the pleadings. And, if the Court forms the view that the jurisdiction is impaired or lacking, it shall have to halt the proceedings. For these reasons, I am clear in my mind that what has been raised in the notice of preliminary objection matches the essential features of a valid preliminary objection on point of law. Certainly, it doesn't contravene the position of the law as stated in **Mukisa Biscuits**.

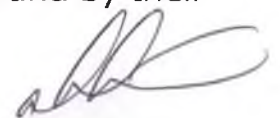
Coming back to the substantive issue as framed herein, firstly, it is the position of the law as stated in **Shyam Thanki and Others v. New Palace**



Hotel [1972] HCD 97, that jurisdiction of the Court must not be inferred, rather it should expressly be provided for by law. This general rule, makes it imperative for the Court to be extremely cautious and profoundly keen when its jurisdiction is questioned. As stated earlier herein, the counsel for the Respondent calls upon the Court to determine whether it has jurisdiction over the matter before it in view of its composition.

Three arguments can be discerned from Mr. Kalokola's submission. **One**; that the originating summons clearly mentions that the Petitioner's grounds of the grievances are inclined on Articles 12(2), 13(1), 13(2), and 29(2) of the Constitution as well as Article 64(5). **Two**; since the Petition is grounded on the cited Articles 12(2), 13(1), 13(2), and 29(2), violation of which falls squarely under the ambit of Article 30(3), the Petition becomes defective for being brought under Article 108(2) which does not confer jurisdiction on the Court for the type of complaints raised. **Three**; since the Petition is grounded on violations of the Articles 12(2), 13(1), 13(2), and 29(2) for which BRADEA was specifically enacted to provide procedure pursuant to Article 30(4) of the Constitution, the jurisdiction of the Court must to conform with the mandatory provision of section 10 of BRADEA, whereby the Court shall sit as a panel of three judges and not a single judge.

I entirely agree with the above arguments, as well as the authorities cited by Mr. Kalokola to augment his position. From the originating summons, it is conspicuously clear that the Petition is grounded on Articles 12(2), 13(1), 13(2), and 29(2) of the Constitution which provide for basic rights and duties. It is the position of the law that parties are bound by their



own pleadings. (See **James Gwagilo vs Attorney General** [2004] T.L.R 161). The originating summons clearly states the basis of the Petition, thus:

*"AND THE DETERMINATION OF THE GROUNDS FOR THE PETITION **being premised and based on** the strength of Articles 64[5], **12[2; 13[1], 13[2], 29[1] and 29[2]** of the Constitution of the United Republic of Tanzania".*
[Emphasis added].

While, I agree with Mr. Seka that the Petitioner has also premised her claims on sub-Article (5) of Article 64, which is outside the scope of BRADEA, and I have observed that she was keen not to specifically mention any infringement of basic rights in her affidavit, I nevertheless hold, as pleaded in the originating summons, that the petition is premised and based on the provisions of basic rights and duties. The long title of BRADEA provides the purpose of the said law, which is: *"to provide for the procedure for enforcement of constitutional basic rights and duties and for related matters"*. *Ipsa facto*, relevant BRADEA provisions are unescapable in determination of this Petition. I have in mind the following provisions:

Sub-section (2) of section 1, on the application of BRADEA, states:

*"(2) This Act shall apply to Tanzania Zanzibar as well as to Mainland Tanzania **in relation to all suits the courses of action in which concern the provisions of Articles 12 to 29 of the Constitution**".* *[Emphasis added]*



Mr. Seka was of the view that this is a hybrid matter for which no procedure has been prescribed, hence Article 108(2) could be invoked. His views, I think, come from the fact that the Petition is not entirely based on Articles 12(2), 13(1), 13(2), 29(1) and 29(2) of the Constitution which attract the invocation of BRADEA, but is also based on Article 64(5). This sub-article (5) of Article 64 reads as follows:

*"(5) Without prejudice to the application of the Constitution of Zanzibar in accordance with this Constitution concerning all matters pertaining to Tanzania Zanzibar which are not Union Matters, this Constitution shall have the force of law in the whole of the United Republic, **and in the event any other law conflicts with the provisions contained in this Constitution, the Constitution shall prevail and that other law, to the extent of the inconsistency with the Constitution, shall be void**".*

[Emphasis added].

With respect, I don't think the citing of sub-article (5) of Article 64 in the Petition made this suit a hybrid matter since the sub-Article does not deal with **the cause of action** rather, the consequence of contravening Constitutional provisions. As reproduced above, this sub-Article, among other things, provides for action to be taken by the Court in case an enacted Act of Parliament is found to contravene the Constitution. The pleadings and even the submissions of Mr. Mr. Seka, revealed that the rock bed of this Petition is violation of the children's right, under the cited Articles 12(2),

13(1), 13(2), 29(1) and 29(2). It is for this reason, the invocation of jurisdiction of the Court to enforce such rights has to be consistent with the provision of section 10 of BRADEA, which under sub-section (1) provides as follows:

*"10. -(1) **For the purposes of hearing and determining any petition made under this Act** including references made to it under section 9, **the High Court shall be composed of three Judges of the High Court;** save that the determination whether an application is frivolous, vexatious or otherwise fit for hearing may be made by a single Judge of the High Court".*

[Emphasis supplied]

Mr. Seka could have a point when he submitted to the effect that the wording of sub-Article (3) of Article 30 implies that for that sub-article to be invoked a Petitioner should be complaining about violation of her own personal rights, which was not the case in the instant Petition. To appreciate this view of the learned counsel, I reproduce sub-article (3) of Article 30 of the Constitution, in both Kiswahili and English versions, respectively, as hereunder:

*"(3) **Mtu yeyote** anayedai kuwa sharti lolote katika Sehemu hii ya Sura hii au katika sheria yoyote **inayohusu haki yake** au wajibu kwake, limevunjwa, linavunjwa au inaelekea litavunjwa na mtu yeyote popote katika Jamhuri ya Muungano, anaweza kufungua shauri katika Mahakama Kuu".*



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

Section 4 of BRADEA, has been enacted with wording of similar fashion when it provides:

*"4. Where **any person** alleges that any of the provisions of Articles 12 to 29 of the Constitution has been, is being or is likely to be contravened **in relation to 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".*

From the above cited provisions, the words "***inayohusu haki yake***" as per Swahili version of the Constitution or "**concerning his rights**" in the English version and "**in relation to him**" in BRADEA, may not be said to be used accidentally. When given literal meaning, they could rightly be interpreted to exclude any person instituting proceedings on behalf of some other persons, as in the instant Petition.

However, on the flip side, the Constitution casts a duty to every person to take legal action to protect the Constitution. This duty opens up legal possibilities for those, like the Petitioner herein, who dare to institute proceedings for protection of Constitutional basic rights of some other people via sub-article (2) of Article 26, which provides as follows: -



*"(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 is my humble opinion that the existence of the duty to protect the Constitution under the sub-article (2) of Article 26 necessarily calls for a wider interpretation of sub-article (3) of Article 30 of the Constitution, such that one can take legal action to protect the Constitutional basic rights of some other people.

There is a plethora of public interest litigations where this Court assumed jurisdiction in circumstances similar to the Petition at hand, where Petitioners were not direct beneficiaries of the legal action they initiated. And as submitted by Mr. Kalokola, sub-article (3) of Article 30 of the Constitution has been adjudged to be the right provision for enforcing violations involving Articles 12 to 29 of the Constitution. This was the view of this Court in **Odero Charles Odero vs Director of Public Prosecution & the Attorney General**, (supra); **Paul Emmanuel Kilasa Kisabo v The Attorney General**, Misc. Cause No. 09 of 2022, HCT -Main Registry at Dar es Salaam; and even in the decision of the Court of Appeal in **The Director of Public Prosecutions vs. Daudi Pete** (supra). In the latter case, which was decided before the enactment of BRADEA, the Court of Appeal stated:

"We concur with the learned trial judge that the provisions of sub-articles (3) and (4) of Article 30 sufficiently confer original jurisdiction upon the High Court to entertain proceedings in



respect of actual or threatened violations of the Basic Rights, Freedoms and Duties...".

The Court of Appeal further denounced the applicability of sub-article (2) of Article 108, which was also cited in this Petition, when it stated:

*".....since there is a specific provision under the Constitution, that is Article 30(3) and (4) concerning the enforcement of Basic Rights, Freedoms and Duties in question, **any proceedings for that purpose must be instituted under that specific article of the Constitution**".* [Emphasis added].

Looking at the reply from the Petitioner's side, it appears to me that Mr. Seka carried mixed and contradictory views on this matter. While on one hand he argued that the Petitioner wasn't minded about infringement of basic rights but unconstitutionality of section 130(2)(e) of the Penal Code, he ended up submitting that the Petitioner was concerned with infringement of the rights of all Tanzanian girls aged between 15 to 18 years who are unmarried, and not herself.

The point here is that, while he wanted to distance the Petition from infringement of basic rights, freedoms and duties, probably for avoiding the trap of section 10 of BRADEA, his submission has acknowledged that, at the center of the Petition there is, indeed, a cry against infringement of the basic rights, freedoms and duties of some Tanzania citizens in favour of whom the Petition has been filed and reliefs are being sought. For reasons, stated herein the provision of section 10 of BRADEA, which requires a panel of three



judges of this Court to determine this matter is unescapable. The requirement for a panel of three judges is also stated under sub-rule (1) of Rule 15 of the Basic Rights and Duties Enforcement (Practice and Procedure) Rules, 2014. Going through this route appears to me to be the right procedure.

To recap, the above deliberations lead to these conclusions: **Firstly**, this Petition is premised on BRADEA scheme. **Secondly**; the jurisdiction of the Court in as far as hearing, determination and enforcement of matters of basic rights and duties is concerned originates from sub-articles (3) and (4) of Article 30 of the Constitution and not Article 108(2). **Thirdly**; insofar as the Petition is premised under the BRADEA provisions, it must be instituted in this Court under the specific provision of sub-article (3) of Article 30 of the Constitution, whereby section 10 of BRADEA would be invoked to compose a panel of three judges for proper exercise of the Court's jurisdiction according to the dictates of the law.

Based on the above reasons, therefore, I find merit in the preliminary objection raised by the Respondent. The same is sustained accordingly. As a consequence, I strike out the Petition, with no order as to costs.

Dated at Dar es Salaam this 15th day of May, 2023.




ABDI S. KAGOMBA

JUDGE