

**IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA**  
**(MAIN REGISTRY)**

**AT DAR ES SALAAM**

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**MISCELLANEOUS CIVIL CAUSE NO. 07 OF 2023**

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**IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC OF  
TANZANIA OF 1977 AS AMENDED FROM TIME TO TIME**

**AND**

**IN THE MATTER OF ARTICLE 108 (2) OF THE CONSTITUTION OF THE  
UNITED REPUBLIC OF TANZANIA 1977, AS AMENDED FROM TIME TO  
TIME**

**AND**

**IN THE MATTER OF SECTION 2 (3) OF THE JUDICATURE AND  
APPLICATION OF LAWS ACT, [CAP. 358 R.E. 2019]**

**AND**

**IN THE MATTER OF INTERPRETATION OF ARTICLES 118 (2) AND 120 (2)  
& (3) OF THE CONSTITUTION OF THE UNITED REPUBLIC OF  
TANZANIA OF 1977 AS AMENDED FROM TIME TO TIME**

**AND**

**IN THE MATTER OF CONSTITUTIONALITY OF THE SUSPENSION OF  
RETIREMENT AGE AND/OR EXTENSION OF TENURE OF SERVICE OF THE  
CURRENT CHIEF JUSTICE, HONOURABLE PROFESSOR IBRAHIM JUMA  
WHO WAS OFFICIALLY REQUIRED TO RETIRE ON 15<sup>TH</sup> JUNE 2023**

**BETWEEN**

**HUMPHREY SIMON MALENGA ..... PETITIONER**

**AND**

**THE HON. ATTORNEY GENERAL..... RESPONDENT**

## JUDGMENT

*16/08/2023 & 22/09/2023*

Isaya, J.:

The petitioner, Humphrey Simon Malenga is a person of no levity and never sleeps in the subtle of thoughtlessness and frivolous character. The inquisitive mind of the resolute and responsible citizen, through the filed petition, is basically beseeching this court to invoke and perform its constitutional duty of interpreting the impugned provisions of Article 118(2) and Article 120(1), (2), and (3) of the Constitution of the United Republic of Tanzania, 1977 as amended from time to time ("**the Constitution**"). This trails the unquestionable retirement from office of the Chief Justice of Tanzania, Honourable Professor Ibrahim on 15.06.2023 and the momentous extension of his tenure by Her Excellency the President of the United Republic of Tanzania.

He is feeling uneasy and malcontent because having clocked 65 years as the maximum retirement age for the Chief Justice of the United Republic of Tanzania, His Lordship Professor Ibrahimu Juma had to vacate office as provided in the Constitution but to his dismay, he is still holding the office by virtue of the powers and order of Her Excellency, the President of the United Republic of Tanzania acting on the same Constitution. In the petitioner's view, the constitutional provisions were

misinterpreted or misconceived in extending the tenure of the Chief Justice to remain in office and the same is unconstitutional.

Eventually, he is seeking Judgment and Decree against the Respondent by this Honourable Court as follows: -

- a) To Interpret the Provisions of Articles 118(2) of The Constitution of The United Republic of Tanzania of 1977 as Amended, in respect of the age of retirement of the Chief Justice to be 65 years old and NOT the age of retirement of the Justice of Appeal;*
- b) To Interpret that Article 118(2) of The Constitution of The United Republic of Tanzania of 1977 as Amended is a "stand-alone" Article, it precludes provisions of Article 120 (1), (2), (3) and (4) of the Constitution of the United Republic of Tanzania 1977 as Amended when determining the tenure or age of retirement of the Chief Justice;*
- c) To Interpret that the powers of the President of the United Republic of Tanzania to suspend the retirement age of the Justice of Appeal or extend time of service of the Justice of Appeal for public interests pursuant to provisions of Article 120 (2) and (3) of the Constitution of the United Republic of Tanzania 1977 as Amended does not apply to a Justice of Appeal who is also the Chief Justice;*
- d) To Declare that the suspension of retirement age and/or extension of tenure of the current Justice of Appeal who is also the Chief Justice of Tanzania, Honourable Professor Ibrahim Juma pursuant*

*to the provision of Articles 120(2) and/or 120(3) of the Constitution of The United Republic of Tanzania, 1977 as Amended is unconstitutional.*

The gist of the petition can be easily appreciated from the following few grounds which have been raised in the petition. For ease of reference, I reproduce them as hereunder:

Article 118 (2) of the Constitution establishes the office of Chief Justice and grants the appointing authority to the President of the United Republic of Tanzania. Furthermore, this Article specifies the duration for which the Chief Justice may hold the office until reaching the retirement age of a Justice of Appeal.

That, the retirement age of the Justice of Appeal is not provided for under Article 118 of the Constitution; but rather, Article 120 of the Constitution.

That, According to Article 120 of the Constitution, it is provided that each Justice of Appeal shall be required to vacate their office upon reaching the age of sixty-five (65 Years Old) unless otherwise directed by the President. In the event of such directions (suspension of retirement age and/or extension of tenure), the Justice of Appeal shall continue to serve in the Office until the

expiration of the prescribed period by the President of the United Republic of Tanzania.

That the Constitution allows or gives a mandate to the President of the United Republic of Tanzania to either suspend retirement age or extend tenure to a Justice of Appeal pursuant to Article 120(2) and (3) of the Constitution.

That the powers under Articles 120(2) and (3) of the Constitution are exceptions to the general rule of retirement age of the Justice of Appeal in Tanzania provided under Article 120(1) of the Constitution, to wit, 65 years old. While the provisions of Article 118(2) of the Constitution state that the Chief Justice shall hold office until the retirement of the age of Justice of Appeal, Articles 120(2) and (3) of the same Constitution allow the President of United Republic of Tanzania to either suspend retirement age or extend the tenure of service of a Justice of Appeal.

That, Articles 120 (2) and (3) of the Constitution do not preclude such powers by the President of the United Republic of Tanzania to suspend retirement age or extend the tenure of service of a Justice of Appeal holding the position of Chief Justice in Tanzania.

That, these provisions of the Constitution [Article 118(2) and 120 (1), (2) and (3)] require expeditious judicial intervention and

interpretation to establish a consistent and harmonious understanding to the general public and the Judiciary as to the constitutionality of the position of the current head of Judiciary, Honourable Chief Justice, who is and has been a Justice of Appeal prior to his appointment as the Chief Justice and whose retirement age has either been suspended or his tenure extended from 15<sup>th</sup> June 2023.

That, this Court possesses the authority and responsibility to interpret Articles 118 (2) & 120 (1), (2), and (3) of the Constitution related to the powers of the President to suspend retirement age and/or extend the tenure of service of the Justice of Appeal who is also the Chief Justice. While the Parliament is vested with the power to legislate and the Executive serves as the law enforcement organ of the State, it is the Judiciary entrusted with the powers to interpret the law.

The respondent was not ready to let the Petition go unchallenged, as expected she opposed the petition and the orders sought therein through the counter affidavit sworn by Ms. Frida P. Mwera, the State Attorney. In her unwavering opinion, she pointed out that, Article 120 (1) must be read together with Article 120 (2) and (3) to get the retirement age of the Justice of Appeal which is 65 years. Article 120(2) and (3)

extend to the Chief Justice by virtue of Article 118(2) which stipulates that the Chief Justice has to retire upon reaching the age of retirement of the Justice of Appeal. She further averred that Article 118(2) and Article 120(2) and (3) must be read as a whole and not in isolation to get the retirement age of the Chief Justice, and she also stated that the provisions of Articles 118(2), 120(1), (2) and (3) of the Constitution are in harmony.

On 11<sup>th</sup> of July 2023, both parties in the present petition prayed the same be deposed by way of written submissions, following the prayers of the parties this court ordered the same to be deposed by way of written submissions. Pursuant to the order of this Court given on 11<sup>th</sup> of July 2023, both parties filed their respective written submissions.

In the whole course of hearing of the matter at hand the petitioner enjoyed the service of Mr. Ipilinga Panya, Mr. Aliko Harry Mwamanenge, Ms. Joyce Brown, Mr. Matinde Mwaisaka and Joyce Mwakapila, Learned Advocates while respondent enjoyed the service of Dr. Boniphace N. Luhende, Solicitor General; Ms. Alice Mtulo, Senior State Attorney; Mr. Bavoo Junus and Ms. Vivian method, Learned State Attorneys. I extend my appreciation to the team of members of the bar for the commitment, hard work, and attentive cooperation.

The petitioner proposed the issues that he wished to guide this court to reach a just decision. They met no counter-proposal from the other side. Really, I find the act as an implied nod to them. The issues proposed are as follows: -

- a) Whether the Provisions of Articles 118(2) of The Constitution of The United Republic of Tanzania of 1977 as Amended provides for the age of retirement of the Chief Justice to be 65 years old or that of the age of retirement of the Justice of Appeal;
- b) Whether Article 118(2) of The Constitution of The United Republic of Tanzania of 1977 as Amended is a "stand-alone" Article when determining the retirement age of the Chief Justice of Tanzania. Or in alternative, whether in determining the retirement age of the Chief Justice of Tanzania as provided for under Article 118(2) of the Constitution reference is only made to Article 120(1) and precludes provisions of Article 120(2), (3) and (4) of the Constitution of the United Republic of Tanzania 1977 as Amended;
- c) Whether powers of the President of the United Republic of Tanzania to suspend the retirement age of the Justice of Appeal or extend the time of service of the Justice of Appeal for public interests pursuant to provisions of Article 120 (2) and (3) respectively of the Constitution of



the United Republic of Tanzania 1977 as Amended do apply to the Justice of Appeal who is also a Chief Justice;

d) Whether suspension of retirement age and/or extension of tenure of the Justice of Appeal who is a Chief Justice pursuant to the provision of Articles 120(2) and/or 120(3) of the Constitution of The United Republic of Tanzania as Amended is constitutional;

Before going to the merit of this petition I find it wise at this juncture to observe and agree with both the Petitioner and the respondent as stated in the petition and the counter affidavit of the respondent that the Judiciary is vested with powers to interpret the law, Parliament is vested with powers to legislate and the executive is vested with powers to enforce the law. This taxonomy of powers is found in the so-called doctrine of separation of power. The case of **Mwalimu Paul John Muhozya v. A. G [1996] TLR 130**, discussed the issue of separation of power and the court held that "*the balance of power between the three branches of government namely the legislature, executive and judiciary and the relation of the court to the other branches must be carefully maintained....one branch of Government should not take over the powers of another branch*". The Court of Appeal has also asserted affirmatively

the doctrine of separation of powers in the case of **DPP v. Daudi Pete [1993] TLR 22 (CA)**, it was held that; "In my view, the Doctrine of Separation of Powers can be said to be infringed when either the Executive or the Legislature takes over the function of the Judicature involving the interpretation of the laws and the adjudication of rights and duties in disputes either between individual persons or between the state and individual persons."

Fortunately, the concept is well envisaged in our constitution too under Articles 4 (1) and (2) which provides for the separation of power among organs of the State, and in clear words it vests the judiciary with sole power of administration of justice, the same provides that,

*4 (1) Shughuli zote za Mamlaka ya Nchi katika Jamhuri ya Muungano zitatekelezwa na kudhibitiwa na **vyombo viwili vyenye mamlaka ya utendaji, vyombo viwili vyenye mamlaka ya kutekeleza utoaji haki**, na pia vyombo viwili vyenye mamlaka ya kutunga sheria na kusimamia utekelezaji wa shughuli za umma.*

*2) Vyombo vyenye mamlaka ya utendaji vitakuwa ni Serikali ya Jamhuri ya Muungano na Serikali ya Mapinduzi ya Zanzibar; **vyombo vyenye mamlaka ya kutekeleza utoaji haki vitakuwa ni Mahakama ya Serikali ya Jamhuri ya Muungano na Mahakama ya Serikali ya Mapinduzi ya Zanzibar**, na vyombo vyenye mamlaka ya kutunga sheria na kusimamia utekelezaji wa shughuli za umma vitakuwa ni Bunge na Baraza la Wawakilishi.*

In exercising its powers of administration of justice, the judiciary is duty bound to interpret the laws for a safe arrival in a fair and just decision, as per Article 4 (4) of the Constitution which provides that,

*4 (4) Kila chombo kilichotajwa katika ibara hii kitaundwa na kutekeleza majukumu yake kwa kufuata masharti mengine yaliyomo katika Katiba hii.*

I think, the most poignant point here is that it is within the province of the courts to interpret law and through the wordings of the provision above, the Judiciary should adhere to the rules of interpretation of the law in order to meet the requirements provided under Article 107A (2) of the Constitution in the dispensation of justice. And we can confidently say, as Professor Ian Loveland in the book titled "Constitutional Law and Human Rights, a Critical Introduction" 3<sup>rd</sup> Edition, summed;" ... as a matter of constitutional theory, parliament legislates and the court interprets"

Now let us turn to the points for determination.

The question as to whether the provision of Articles 118(2) of The Constitution provide for the age of retirement of the Chief Justice to be 65 years old or that of the age of retirement of the Justice of Appeal is the question which seeks to get the true reason and meaning of the provision.

In arguing the aforementioned issue, the petitioner stated that the provision of Article 118 (2) of the Constitution allows the President of The United Republic of Tanzania to appoint any person who qualifies to be or has qualifications to be appointed as Justice of Appeal as per the qualifications laid down under Article 118(3) of the Constitution to be the Chief Justice. Thus, the Constitution has taken cognisance that a Chief Justice may be appointed amongst Justices of Appeal or a person who was not Justice of Appeal but has the required qualifications. However, the said Article 118 (2) of the Constitution states clearly that, the Chief Justice shall hold office until he attains the retirement age of the Justice of Appeal which is provided for under Article 120 (1) of the Constitution, that is the age of sixty-five (65) years.

He went on to submit that, the Chief Justice of Tanzania, Honourable Prof. Ibrahim Juma tenure is known by the general public to have ended on 15<sup>th</sup> June 2023; and that the current Chief Justice ought to have vacated the office of the Chief Justice of Tanzania with effect from 15<sup>th</sup> June 2023 since the Constitution did not intend that the exceptions which provided for under Article 120 (2), (3) and (4) of the Constitution to be applied to a person holding the office of the Chief Justice. He argued that if the said exceptions would apply to the Chief Justice, it would be a great danger and breach of the Constitution to

have a Chief Justice who was not a Justice of Appeal (for example, a person appointed to be the Chief Justice who has qualifications of a Justice of Appeal) enjoying privileges of suspension of their retirement age and/or extension of their tenure of service. To substantiate his submission the petitioner quoted the provision of Articles 118 (2) and 120 (1) of the Constitution.

On the other hand, the respondent is only comfortable with the first part of the petitioner's submission on Article 118(2) of the constitution and approves that the age of retirement of Chief Justice is the same as the age of retirement of other Justices of Appeal, that it is the age of retirement of Justice of Appeal which determines the end of the tenure of the Chief Justice, and that, there is no exclusive nor peculiar age of retirement of Chief Justice apart from the age of retirement applicable to a Justice of Appeal. He further agrees that the wording of Article 118(2) of the Constitution is couched in a manner that empowers the President to appoint a Chief Justice not from Justices of Appeal but rather from persons who qualify to be appointed Justices of Appeal. However, the last part of part of the petitioner's submission made him come charging along. His attack carried no tolerance for the Petitioner's thinking on further interpretation of the provision. He thus challenged that; Firstly, the Petitioner has manifestly dissociated the provisions of Articles 118 and

120 as far as the retirement age of the Chief Justice is concerned. While on one hand, the Petitioner disowns the complementarity of such provisions of the Constitution, he ironically agrees, on the other hand, that the retirement age of the Chief Justice is limited only to 65 years. He clarified that in real fact the 65 years is not found in Article 118 but in Article 120.

The second front is that Reading the wording of Article 118 between the lines will reveal that the Chief Justice is a Justice of Appeal because of the following:

i) In Article 118(1) for instance, there is an umbrella clause of such provisions that: "Kutakuwa na Jaji Mkuu wa Mahakama ya Tanzania ..... *na Majaji wengine wa Rufani wasiopungua wanne...*". The word "*wengine*" as used in the phrase "*na Majaji wengine wa Rufani*" clearly intimates the fact that the Chief Justice is part of those "other Justices of Appeal".

ii) In Article 118(2), the umbrella clause to those provisions provides as follows: "*Jaji Mkuu atateuliwa na Rais kutoka miongoni mwa watu wenye sifa za kuwa Jaji wa Rufani na atakuwa ndiye Kiongozi wa Mahakama ya Rufani na pia Mkuu wa Mahakama ya Tanzania kama ilivyofafanuliwa katika Ibara ya 116 ya Katiba....*". The words "*na atakuwa ndiye Kiongozi wa Mahakama ya Rufani...*" clearly signifies that the Chief Justice is part and parcel of the Court of Appeal. No wonder, even the designation "Chief

Justice” depicts the fact that the holder of the same is the “Chief” of “Justices of Appeal.

iii) In Article 118(2), the closing phrase provides, thus: “...*na atashika madaraka ya Jaji Mkuu mpaka atakapotimiza umri wa kustaafu kama Jaji wa Rufani...*”. The words “...*kama Jaji wa Rufani*” connote that: [1] the age of retirement of Chief Justice is the same as the age of retirement of “other” Justices of Appeal; [2] that it is the age of retirement of Justice of Appeal which determines the end of tenure of the Chief Justice; and [3] that, there is no exclusive nor peculiar age of retirement of Chief Justice apart from the age of retirement applicable to a Justice of Appeal.

By and large, she submitted that through the purposive and harmonious interpretation of Article 118(2) of the Constitution, where a person who is appointed as Chief Justice is not from the subsisting Justices of Appeal, such person would, according to Article 118(2), become a Justice of Appeal. She had a further view that the wording of Article 118(2) is crafted in a manner that obligates a holder of the office of Chief Justice to undertake both administrative and judicial functions, hence a bearer of an office of Chief Justice is also a Justice of Appeal. She added that the Petitioner’s hypothetical scenario does not apply to our present scenario

owing to the fact that before his appointment to the office of Chief Justice, the incumbent Chief Justice was a Justice of Appeal.

Well, as conceded by both the retirement age of the Chief Justice under Article 118(2) of the Constitution is the same as the retirement age of the Justice of Appeal. There is no dispute that the retirement age of the Justice of Appeal is provided under Article 120 (1) of the Constitution which is 65 years. The petitioner takes a view that the current Chief Justice having clocked 65 years on 15<sup>th</sup> June 2023 ought to have vacated the office of the Chief Justice of Tanzania with effect from 15<sup>th</sup> June 2023 since the Constitution did not intend the exceptions provided for under Article 120 (2), (3) and (4) of the Constitution to be applied to a person who holds the office of the Chief justice. He had a further view that if the said exceptions would apply to the Chief Justice, it would be a great danger and breach of the Constitution to have a Chief Justice who is not a Justice of Appeal.

Is the Chief Justice of Tanzania necessarily the Justice of Appeal?

I think this should be ample time to reproduce Article 118 (2) and Article 120 (1) (2) and (3) of the Constitution as hereunder:

*118(2) Jaji Mkuu atateuliwa kutoka miongoni mwa watu wenye sifa za kuwa Jaji wa Rufani na atakuwa ndiye kiongozi wa Mahakama ya Rufani na pia Mkuu wa Mahakama ya Tanzania kama inavyofafanuliwa*



*katika Ibara ya 116 ya Katiba na atashika madaraka ya Jaji Mkuu mpaka atakapotimiza umri wa kustaafu kama Jaji wa rufani”.*

***120.**-(1) Kila Jaji wa Rufani atalazimika kuacha kazi yake atakapotimiza umri wa miaka sitini na tano, lakini masharti ya Ibara hii ndogo yatatumika bila kuathiri masharti yafuatayo katika ibara hii.*

*(2) Jaji yeyote wa Rufani aweza kustaafu kazi ya Ujaji wa Rufani wakati wowote baada ya kutimiza umri wa miaka sitini, isipokuwa kama Rais ataagiza kwamba asistaafu, na iwapo Rais ataagiza hivyo, basi huyo Jaji wa Rufani atakayehusika na maagizo hayo ya Rais hatakuwa na haki ya kustaafu mpaka upite kwanza muda wowote utakaotajwa na Rais kwa ajili hiyo.*

*(3) Iwapo Rais ataona kuwa kwa ajili ya manufaa ya umma inafaa Jaji wa Rufani aliyetimiza umri wa miaka sitini na tano aendele kufanya kazi, na Jaji huyo wa Rufani anakubali kwa maandishi kuendelea kufanya kazi, basi Rais aweza kuagiza kuwa Jaji huyo wa Rufani aendele kufanya kazi kwa muda wowote utakaotajwa na Rais.*

A careful study of Article 118 (2) will reveal that the Chief Justice is appointed from among the persons who possess the qualifications to be appointed as a Justice of Appeal. And the same shall be head of the Court of Appeal. I think the view that has been taken by the Respondent that the Chief Justice is part and parcel of the Justice of Appeal team makes

sense because the provision clearly signifies that the Chief Justice is part and parcel of the Court of Appeal. He is both the Justice of Appeal and the Chief Justice. It is true the wording of Article 118(2) is crafted in a manner that obligates a holder of the office of Chief Justice to undertake both administrative and judicial functions. I indeed find logic in interpreting that the said provisions bind the office of Chief Justice and Justice of Appeal together. I subscribe to the view that a bearer of the office of Chief Justice is also a Justice of Appeal. I am really not inclined to agree with the Petitioner's view that there is a great danger and breach of the Constitution to have a Chief Justice who is not a Justice of Appeal. This does not apply to our present scenario owing to the fact that before his appointment to the office of Chief Justice, the incumbent Chief Justice was a Justice of Appeal.

Again, I am well mindful that the determination of this matter touches the provisions of the great law in our country, the Constitution. Such a conviction dictates what methodology can be used in interpreting the Constitution that can support or undermine our Constitution. The unity of the Constitution is taken to mean one portion of the Constitution is interpreted by recourse to another. It permits the Constitution to be interpreted from within by comparing one provision with similar others. It is the harmonization method that upholds the spirit of the Constitution

and respect for the wishes of the people. In the cited case of **Honourable Gerald Kafureeka Karuhanga versus Attorney General, Constitutional Petition No. 0059 of 2013**, the Court of Appeal of Uganda recited the interpretation principle as follows:

*"A cardinal rule of Constitutional interpretation is that the constitution must be looked at as a whole, the entire constitution must be read as an integral whole and no particular provision should destroy the other each should sustain the other. This is the rule of harmony, completeness, and exhaustiveness"*

The court further held that:

*"Constitution provisions must be interpreted within the context of the Constitution and its values as a whole."*

Another case in our jurisdiction had the same view as far as the constitutional interpretation is concerned. In the case of **Julius Francis Ishengoma Ndyanabo v. The Attorney General (2004) TLR 14**, the court stated thus: -

*First, the Constitution of the United Republic of Tanzania is a living instrument, having a soul and consciousness of its own as reflected in the Preamble and Fundamental Objectives and Directive Principles of State Policy. Courts must, therefore, endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be*

*construed in tune with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and rule of law..."*

I am again convinced and having regard to the illumination on the best way to interpret the constitution in the cited authorities above, the characteristic tendency of the meaning in the so-called umbrella clauses such as in Article 118(1) clause "Kutakuwa na Jaji Mkuu wa Mahakama ya Tanzania ... *na majaji wengine wa Rufani* wasiopungua wanne...". So obviously the word "*wengine*" as used in the phrase "*na Majaji wengine wa Rufani*" clearly suggests that the Chief Justice is part of those "other Justices of Appeal". In article 118 (2) Clause "*na atakuwa ndiye Kiongozi wa Mahakama ya Rufani...*" Also, clause "*kama Jaji wa Rufani*". All these clauses carry a powerful convincement and irresistible conclusion that the Chief Justice is not just another person among the Justice of Appeal but one of them. After all, he enjoys the same age of retirement as other Justices of Appeal, and no exclusive nor peculiar age of retirement of Chief Justice apart from the age of retirement applicable to a Justice of Appeal. I should hold and find that basically, the Chief Justice in Tanzania is a Justice of Appeal too.

The next question examines whether Article 118(2) of The Constitution of The United Republic of Tanzania of 1977 as Amended is a “stand-alone” Article when determining the retirement age of the Chief Justice of Tanzania. In the alternative, in determining the retirement age of the Chief Justice of Tanzania as provided for under Article 118(2) of the Constitution reference is only made to Article 120(1) and precludes provisions of Article 120(2), (3) and (4) of the Constitution of the United Republic of Tanzania 1977 as Amended. The petitioner submitted to the effect that Article 118 (2) of the Constitution is a stand-alone provision regarding the tenure of the Chief Justice which is why it refers to Article 116 of the Constitution. The cross-reference made to Article 120 (1) of the Constitution in relation to the retirement age of the Justice of Appeal is only relevant in determining the retirement age for the Chief Justice, which is 65 years. He stated that as the Constitution allows a person who is not a Justice of Appeal to be the Chief Justice, the President of the United Republic of Tanzania cannot invoke the powers conferred to him/her under Article 120 (2) (3) of the Constitution because such powers apply to the Justices of appeal only. To cement the argument, he referred this court to the cases of **Honourable Attorney General v. Reverend Christopher Mtikila, Civil Appeal No. 45 of 2009,**

**Court of Appeal of Tanzania at Dar es Salaam (unreported),**

in which it was held that the process entails reading the entire constitution as an integrated whole without letting one provision destroy the other. This decision recited the position stated in the case of **Rev. Christopher Mtikila vs. Attorney General [1995] TLR 31** at p. 66. Also, the case of **EG v. The Hon. Attorney General & 10 Others, Petition No. 150 of 2016, High Court of Kenya at Nairobi**, in which it was held as hereunder:

*"Constitutional provisions must be construed purposively and in a contextual manner. Accordingly, courts are constrained by the language used. Courts may not impose a meaning that the text is not reasonably capable of bearing. In other words, the interpretation should not be "unduly strained" but should avoid "excessive peering at the language to be interpreted without sufficient attention to the historical contextual scene," which includes the political and constitutional history leading up to the enactment of a particular provision."*

He went on to submit that the court guided by the principles above must consider the literal meaning of the provision of the Constitution before resorting to purposive translation. Therefore, the wording of Article 118 (2) of the Constitution is clear enough and does not need to invoke purposive interpretation when determining the retirement age of the Chief Justice.

Responding to the second issue the respondent started by reciting the basic canons of Constitutional interpretation that, the Constitution has to be interpreted as a whole; that, no one particular provision should destroy the other but each should sustain the other; that, no one provision of the Constitution should be segregated from the others and considered alone; that, where several provisions of the Constitution have a bearing on the same subject, none should be ignored or preferred over the other; and that, in interpreting Constitution, Courts should give much consideration to the context of the language and texts of the Constitution.

He took the view that Article 118(2) of the Constitution is incomplete and a dependent provision, and cannot, in any way, be stand-alone as alleged by the Petitioner. As pinpointed earlier on, the gist of Article 118(2) is clear that it makes provisions for the tenure of the Chief Justice. However, Article 118(2) does not tell the exact figure of the envisaged retirement age. Instead, it makes a cross-reference to the age of retirement of a Justice of Appeal, which, in fact, is not provided for in the provisions falling below Article 118(2). The envisaged age of retirement of a Justice of Appeal is only provided for under Article 120(1) of the Constitution (65 years) or upon extension by the President Article 120(3). Therefore, in order to determine the retirement age of the Chief Justice, one has to read both Articles 118(2) and 120(1) together and as a whole.

Any attempt to disconnect the relationship between these two provisions would lead to a total absurdity because Article 118(2) does not tell the exact age of retirement of a Justice of Appeal, in terms of figures.

His further view was that the provision of Article 120 (1) of the Constitution cannot be read in isolation from other sub-articles under Article 120 of the Constitution. The respondent referred the court in the case of **Attorney General vs Rev. Mtikila, Civil Appeal No. 45 of 2009, Court of Appeal of Tanzania at Dar es Salaam (Unreported)**, the Court cited with approval of the case of **Rev. Christopher Mtikila vs Attorney General [1995] TLR 31**, where it was insisted that the Constitution and its provisions should be read harmoniously, purposely and an integral whole. He went on to state that even if the literal rule is applied as insisted by the petitioner one cannot get the age of retirement of a justice of Appeal in Article 118. Therefore, Article 118(2) of the Constitution is not a “stand-alone” Article, when determining the retirement age of the Chief Justice of Tanzania, as provided for under Article 118(2) of the Constitution, reference has to be made not only to Article 120(1) but also article 120(2), (3) and (4) of the Constitution.

In this issue, the standalone Constitutional provision refers to a specific provision or clause that is independent and self-contained within



a constitution. It negates the sense of being in a broader section or article. There is no universally recognized set of tests for standalone constitutional provisions. Nevertheless, the interpretation and applications of those provisions generally follow the principle and method of Constitutional interpretation. Is article 118 (2) of the Constitution self-contained within the Constitution? Obviously, the answer is in the negative because both parties agree that the envisaged age of retirement of a Justice of Appeal is only provided for under Article 120(1) of the Constitution. This means, that in order to get the age of retirement of the Chief Justice one has to make a cross-reference to Article 120(1) of the Constitution. This reason alone disqualifies Article 118(2) of the Constitution to be a standalone or self-contained provision.

In the second part of the issue, I should start by borrowing a leaf from the cited Zimbabwe's case of **Kika v Minister for Justice & Others, HC 2128/21 and HC 2166/21 (HH 264-21)**, on pages 20 and 21 of the typed judgment, the High Court of Zimbabwe said:

*"It is an established principle that sections of the constitution must not be read in isolation but must be read together and in the context of the whole text in order to give effect to the purpose and objective of the Constitution. In this case, the two*

*sections are not in conflict but must be read together and with the constitution as a whole."*

The preferred purposive and generous interpretation method of the Constitution seems to be accepted by the petitioner when he cited the case of **EG v. The Hon. Attorney General & 10 Others, Petition No. 150 of 2016, High Court of Kenya at Nairobi**, in which it was held as hereunder:

*"Constitutional provisions must be construed purposively and in a contextual manner. Accordingly, courts are constrained by the language used. Courts may not impose a meaning that the text is not reasonably capable of bearing. In other words, the interpretation should not be "unduly strained" but should avoid "excessive peering at the language to be interpreted without sufficient attention to the historical contextual scene," which includes the political and constitutional history leading up to the enactment of a particular provision."*

The question here is whether in determining the retirement age of the Chief Justice of Tanzania as provided for under Article 118(2) of the Constitution reference is only made to Article 120(1) and precludes provisions of Article 120(2), (3) and (4) of the Constitution. In examining this question, I will agree with the petitioner and the respondent that the interpretation process should give meaning and entails reading the entire constitution as an integrated whole without

letting one provision destroy the other (see the case of **Attorney General vs Rev. Mtikila, Civil Appeal No. 45 of 2009, Court of Appeal of Tanzania at Dar es Salaam (Unreported)**), which cited with approval the case of **Rev. Christopher Mtikila vs Attorney General [1995] TLR 31**). A curious study of Article 118(2) in relation to Article 120 (2) (3) and (4) of the Constitution will not reveal a clear demarcation line in its plain meaning as to whom alone the provisions are to serve. Admittedly, I find no blockade or clear restraint that the provision was not intended for the Chief Justice. As rightly submitted by the respondent the provision of Article 120 (1) of the Constitution is accompanied by the clause that *"...but the provisions of this sub-article shall apply subject to the subsequent provisions of this article."* I am convinced that Article 120 (1) is related and works in harmony with the subsequent provisions of the Article. Indeed, there is no such prohibition for the president whenever she considers it to be in the public interest that a Justice of Appeal should continue to be in office after attaining 65 years of age under Article 120 (3) of the Constitution. Being an integral part of the Justice of Appeal, the Chief Justice is no exception. As stated above, the provisions of the Constitution should not be considered

and interpreted piecemeal or in isolation. They must be construed with regard to the Constitution as a whole.

What then can be said about this issue? I wish to find as stated above that Article 118 (2) is never a stand-alone provision in the Constitution, and when determining the retirement age of the Chief Justice of Tanzania as provided in Article 118(2) of the Constitution, reference should be made not only to Article 120(1) but also to Article 120(2), (3) and (4) of the Constitution.

Coming now to the third issue on whether the powers of the President of the United Republic of Tanzania to suspend the retirement age of the Justice of Appeal or extend the time of service of the Justice of Appeal for public interests pursuant to provisions of Article 120 (2) and (3) of the Constitution do apply to the Justice of Appeal who is also a Chief Justice.

Pursuant to the submissions of the parties and answers given to issues above, the provisions of Article 120 (2) and (3) clearly state power vested to the President regarding the tenure of the Justice of Appeal. Admittedly, the said provisions do not mention the Chief Justice at all. The foundation of conditions and power provided under the said Sub Articles (2) and (3) of Article 120 of the Constitutions are derivative

under Sub Article (1). Hence, one should aspire the harmony and integration with the other constitutional provisions for the purpose of interpretation. Confronted with a similar situation In **Karuhanga's case (Supra)** the Court stated as follows:

*"Reading Article 143 in isolation of Article 144(2) would go against a cardinal rule of constitutional interpretation that the Constitution must be looked at as a whole, the entire Constitution must be read as an integral whole and no one particular provision should destroy the other but each should sustain the other. This is the rule of harmony, of completeness and exhaustiveness..."*

A careful study of the provisions of Articles 118 and 120 of the Constitution will reveal that the provisions were drafted with a sense of dependency, a proper relationship should be established between the subjective and objective purpose in the interpretation of the same. Although the provision of Article 120 did not mention expressly the Chief Justice, Article 118 (2) makes reference to Article 120 (1) of the Constitution. Likewise, Article 120 (1) makes a reference to Article 120 (2), (3) and (4). As we find that Article 118 (2) does not stand alone and the same makes a cross-reference to Article 120 (1), also we find that the Chief Justice is a Justice of Appeal. In conclusion, I think, we cannot hold that the powers vested to the president and conditions stated under

Articles 120 (2) and (3) of the Constitution are not intended for the Chief Justice since if the crafters have intended so, they could state the same in clear words.

In the fourth issue, the submissions made by the parties necessarily recite the same words and authorities made in issues 1, 2, and 3. And I find no reason to reiterate them here. The fourth issue examines whether suspension of retirement age and/or extension of tenure of the Justice of Appeal who is a Chief Justice pursuant to the provision of Articles 120(2) and/or 120(3) of the Constitution of The United Republic of Tanzania as Amended is constitutional. In my considered view, and much as it has been discussed in the issues above the President has powers under Article 120(3) read together with Article 118(2) to extend the tenure of the Justice of Appeal to enable him to continue to discharge his duties as such. Maybe, at this juncture, I would find it important to appreciate that the Constitution of the United Republic of Tanzania before the year 2005, Article 118 (1) and (2) of the same Constitution provided as follows;

***118.-(1) Kutakuwa na Jaji Mkuu wa Mahakama ya Rufani (ambaye katika ibara zifuatazo kwenye Katiba hii atatajwa tu kwa kifupi kama "Jaji Mkuu" na Majaji wengine wa Mahakama ya Rufani wasiopungua wawili, isipokuwa kwamba kikao maalum cha Mahakama nzima kitakuwa kamili kikiwa na Majaji wa Rufani wasiopungua watano.***

*(2) Jaji Mkuu atateuliwa na Rais na atakuwa ndiye Kiongozi wa Mahakama ya Rufani na pia Mkuu wa Idara ya Mahakama kama ilivyofafanuliwa katika ibara ya 116 ya Katiba hii.*

The above-cited provision of the Constitution was not enough to determine the tenure of the person holding the position of the Chief Justice to include retirement age and matters on suspension and extension of his tenure. since the same went without stating under which conditions or age the person holding the office of Chief Justice will vacate office and for the avoidance of this predicament, the parliament in the year 2005 enacted the provision to amend the above Sub Articles (1) and (2) of Article 118 of the Constitution and the same read as follows;

***118.-(1) Kutakuwa na Jaji Mkuu wa Mahakama ya Tanzania (ambaye katika Ibara zifuatazo kwenye Katiba atatajwa tu kwa kifupi kama "Jaji Mkuu") na Majaji wengine wa Rufani wasiopungua wanne, isipokuwa kwamba kikao maalum cha Mahakama nzima kitakamilika kama kitakuwa na Majaji wa Rufani wasiopungua watano.***

***(2) Jaji Mkuu atateuliwa na Rais kutoka miongoni mwa watu wenye sifa za kuwa Jaji wa Rufani na atakuwa ndiye Kiongozi wa Mahakama ya Rufani na pia Mkuu wa Mahakama ya Tanzania kama ilivyofafanuliwa katika Ibara ya 116 ya Katiba na atashika madaraka ya Jaji Mkuu mpaka atakapotimiza umri wa kustaafu kama Jaji wa Rufani, isipokuwa kama:***

***(a) atajiuzulu; au***

*(b) kiti chake kitakuwa wazi kutokana na maradhi au kifo;*

*(c) atavuliwa wadhifa wa Jaji Mkuu na Rais*

It is clear from the above-quoted provision of the Constitution that, the 2005 amendments, added the prevailing conditions which can determine the tenure of a person holding the office of the Chief Justice. Literally for one to know the retirement age of the Chief Justice shall first read the provision of Article 118 (2) of the Constitution and later find out in another Article the retirement age of the Justice of Appeal, and for the matter at hand is Article 120 (1) of the Constitution.

As stated earlier, the fourth issue basically depends on the findings of the three issues above. It is a trite law that where several provisions of the Constitution have a bearing on the same subject, they should be read and considered together so as to bring out the full meaning and effect of their intent. None should be ignored or preferred over the other see the case of **Twinobusingye Severino v. Attorney General**, Constitutional Petition No. 47 of 2011 (CC))

Without spending much time on this as we find above, Article 120 (1) of the Constitution cannot be read with isolation of the provision of Articles 120 (2), (3) and (4) of the Constitution, on that sense the whole provision of Article 120 of the Constitution does apply to the Chief Justice, accurately suspension of retirement age and/or extension of the Justice




of Appeal who is a Chief Justice pursuant to the provision of Articles 120(2) and or 120(3) of the Constitution is legitimate.

Having determined the issues above, I find the petition without merit. It stands dismissed. No order as to costs.

Order accordingly.

  
**G.N. Isaya**  
**Judge**  
**22.09.2023.**

**Court:** Judgment delivered in open court this 22<sup>nd</sup> day of September, 2023 in the presence of Mr. Ipilinga Panya and Aliko Harry Mwamanenge, Learned Advocates for the petitioner. Ms. Victoria Lugndo, State Attorney, for the Respondent, Ms. Catherine Shenkunde (B/C), and Hon. Chilemba Chikawe (JLA).

  
**G.N. Isaya**  
**Judge**  
**22.09.2023**

Right of Appeal fully explained. /

**G.N. Isaya**  
**Judge**  
**22.09.2023**