



THE COURT OF APPEAL OF TANZANIA HEARS THE LANDMARK HUMAN RIGHTS CASE CHALLENGING RESTRICTIONS ON PUBLIC INTEREST LITIGATION

A. Hearing of the case

Today 13th May 2025 the Court of Appeal of Tanzania heard the long-awaited Civil Appeal No. 134 of 2022, involving renowned human rights defender Adv. Onesmo Olengurumwa versus the Attorney General of Tanzania. Hearing have being conducted before a panel of three Justices of Appeal: Hon. Levira J.A., Hon. Rumanyika J.A., and Hon. Ngwembe J.A. Advocate Olengurumwa was represented by a distinguished team of legal experts comprising Professor Emeritus Issa Shivji, Senior Counsel Mpale Kaba Mpoki, Dr. Rugemeleza Nshala, and Adv. John Beniel Seka.

This appeal arises from the dismissal of the original case by the High Court of Tanzania on 15th February 2022, which held that Sections 4(2), 4(3), 4(4), and 4(5) of the Basic Rights and Duties Enforcement Act are consistent with the Constitution of the United Republic of Tanzania and international human rights instruments. Dissatisfied with the High Court's decision, the appellant sought redress before the Court of Appeal.

The distinguished team of legal experts representing Adv. Olengurumwa (the Appellant) submitted before the court that Sections 4(2), 4(3), 4(4), and 4(5) of the Basic Rights and Duties Enforcement Act are unconstitutional because they violate Article 26(2) of the Constitution of the United Republic of 1977 on the reasons that they compromise the independent character of Article 26(2) and destroy the doctrine of public interest litigation as enched in Article 26(2), in fact they abolish public interest litigation in Tanzania.

Section 4(2) requires a public interest litigant to file an affidavit explaining how the alleged violation of constitutional rights under Articles 12 to 29 has personally affected him. Section 4(3) further tightened the scope for public interest litigation by requiring the petitioner seeking to file a case under Article 26(2) of the Constitution to comply with Article 30(3), which demands a disclosure of personal interest effectively shifting the legal standard for such cases. In addition, Section 4(4) introduced a requirement that when seeking redress for acts or omissions of high-ranking officials including the President, Vice-President, Prime Minister, Speaker, Deputy Speaker, and Chief Justice to sue the Attorney General instead of the officials directly. Lastly, Section 4(5) imposes a condition that all other available legal remedies under existing laws must be exhausted before initiating a case under the Basic Rights and Duties Enforcement Act.

Counsel for Adv. Onesmo further submitted that linking Article 26(2) to Article 30(3) of the Constitution by requiring proof of personal interest undermines the independence of Article 26(2), effectively subjecting it to the constraints of Article 30(3). In the celebrated case of Rev. Christopher Mtikila (1995), it was held that Article 26(2) confers an independent locus standi

and serves as the legal foundation for public interest litigation. This position was later affirmed by the Court of Appeal in *Attorney General v. Jeremia Mtobesya* (2018).

Therefore, section 4(2) unduly restricts the scope of Article 26(2) of the Constitution. The High Court of Tanzania failed to appreciate the independent nature and purpose of Article 26(2). In effect, section 4(2) amends Article 26(2) through the back door, contrary to the procedural requirements for constitutional amendment under Article 98 of the Constitution, which stipulates two essential conditions: legislative capacity and constituent capacity.

Sections 4(2) and 4(3) of the Basic Rights and Duties Enforcement Act introduce a new requirement under Article 26(2) of the Constitution namely, the requirement to demonstrate personal interest which does not exist in the Tanzanian constitution. Even where a petitioner under Article 26(2) has a personal interest, that interest is immaterial, because Article 26(2) is premised on public interest litigation rather than personal interest. Article 26(2) of the Constitution provides that every person has the right to protect the Constitution. This provision empowers any public spirited individual to fulfill a constitutional duty, a duty that is owed to society at large. Hence, Article 26(2) embodies a public duty, not a personal entitlement.

By contrast, rights are typically associated with personal entitlements, which is the requirement under Article 30(3) of the Constitution. However, Article 26(2) is *sui generis*; it is grounded in the notion of public duty, not individual right. Consequently, the remedy available under Article 30(3) is personal, while the remedy under Article 26(2) serves the public interest. The High Court failed to appreciate this fundamental distinction.

Furthermore, Section 4(3) of the Basic Rights and Duties Enforcement Act improperly conflates Article 26(2) with Article 30(3) under the procedural framework of Article 30(4) of the Constitution. However, the Basic Rights and Duties Enforcement Act is a procedural law, and procedural laws are traditionally regarded as handmaids of justice they are designed to facilitate, not obstruct, access to justice.

Section 4(4) of the Basic Rights and Duties Enforcement Act, which requires that petitions be brought solely against the Attorney General, is unconstitutional on two principal grounds: first, it undermines accountability; and second, it results in the improper joinder of parties. By conferring immunity on public officials such as the President, Vice-President, Prime Minister, Speaker, Deputy Speaker, and Chief Justice, Section 4(4) effectively shields them from legal scrutiny. This legal insulation fosters impunity and is inconsistent with the fundamental principles of the rule of law and accountability. In a constitutional democracy, the President is not above the law. The office is not a monarchy, and if these officials commits a constitutional or legal violation in the course of official duties, they must be held accountable.

Counsel for Adv. Onesmo submitted that in public law litigation, the Attorney General is always a necessary party. However, it is a well established legal principle that all proper parties that is, those against whom allegations of a wrongful act or omission are made must be joined in the proceedings. Failure to join such parties violates the constitutional right to be heard under

Article 13 of the Constitution. Courts cannot grant effective remedies against individuals who have not been properly impleaded. The Attorney General may appear as a necessary party and counsel for the party representing, but not as a substitute for the person who committed the impugned act.

In public law cases, the individual to be impleaded is the public officer who committed the alleged wrong. Section 4(4), by prohibiting the impleading of such officials, effectively grants them immunity. This immunity amounts to impunity and obstructs access to justice. Therefore, Section 4(4) is unconstitutional as it violates both the right to be heard and the principle of legal accountability.

Advocates for the appellant further submitted that there are two authoritative judgments of the Court of Appeal of Tanzania addressing the standard of proof in public interest litigation. In *Julius Ndyababo v. Attorney General* [2004] TLR, the Court held that the burden of proof lies on the party challenging the proposition advanced by the other. In constitutional petitions, the petitioner is required to demonstrate that a particular piece of legislation is unconstitutional, based on the legal presumption that all enacted laws are constitutional until proven otherwise. This position was reiterated by the Court of Appeal in *Dickson Sanga v. Attorney General*, reaffirming the standard set in *Julius Ndyababo*. Therefore, the contention that a petitioner must prove their case beyond reasonable doubt is legally unfounded. Given that both judgments were delivered by the Court of Appeal, the High Court was bound to follow them under the doctrine of precedent.

Counsel for Adv. Onesmo thus faulted the trial court for holding that the petitioner failed to meet the required standard of proof. The Respondent in the lower court relied on Article 30(2) of the Constitution, arguing that the limitations imposed by the Basic Rights and Duties Enforcement Act were constitutionally saved. However, the appellant's counsel submitted that Article 30(2) confers limited not absolute legislative powers to impose restrictions on constitutional rights. Such limitations must strictly conform to the conditions set out under Article 30(2)(a)–(f) of the Constitution. Any statutory limitation that falls outside the scope of these grounds is unconstitutional and invalid.

Counsel for the Appellant submitted that Article 30(2) of the Constitution sets out six specific grounds under which limitations may be lawfully imposed on fundamental rights and freedoms. When the Respondent invokes Article 30(2) as a justification for a limitation, it is their burden to clearly identify and demonstrate which of the six permissible grounds their argument falls under. A general or blanket reference to Article 30(2), as was done before the High Court, is insufficient and constitutionally defective. At the trial stage, the petitioner was only required to establish a *prima facie* case that the impugned provisions were unconstitutional. In response, the Respondent merely cited Article 30(2) in broad terms, without specifying which clause among sub-paragraphs (a) to (f) justified the limitations imposed by the Basic Rights and Duties Enforcement Act. This vague reliance fails to meet the constitutional threshold.

The appellant's counsel further submitted that, in India, a person bringing a public interest litigation must demonstrate that they have no personal interest in the matter. However, the position in Tanzania is different. Section 4 of the Basic Rights and Duties Enforcement Act as amended seeks to impose a requirement of personal interest in public interest litigation, thereby distorting the constitutional vision under Article 26(2). The appellant's counsel invited the Court to expressly declare this requirement unconstitutional. It was submitted that, since the 2020 amendments to the Basic Rights and Duties Enforcement Act, numerous public interest cases have failed solely because of the improper requirement to demonstrate personal interest contrary to the very essence of public interest litigation envisaged under Article 26(2) of the Constitution.

With regard to Section 4(5) of the Basic Rights and Duties Enforcement Act, which requires a petitioner to exhaust all available remedies under any written law, counsel for the appellant submitted that the Court of Appeal has a noble duty to pronounce that there are no written procedures specifically prescribed for enforcing rights under Article 26(2) of the Constitution. In practice, however, such procedures have existed informally and have been utilized even before the enactment of the Basic Rights and Duties Enforcement Act.

Section 4(5) is unconstitutional because it introduces a requirement to exhaust local remedies that is not contemplated under Articles 26(1) and 26(2) of the Constitution. Article 26 guarantees constitutional rights, and it is crucial to uphold these rights. The Constitution permits individuals to take action to protect it, but it does not specify formal procedures for enforcement. In fact, the High Court has handled numerous cases without reference to such written procedures, including the cases of Kukutia, Chumchua Marwa, Daudi Pete, and Mtikila, among others.

There are also Court of Appeal decisions that make it clear that a petitioner is not required to demonstrate exhaustion of all available remedies before filing a public interest case. These precedents uphold the principle that public interest litigation is not contingent upon such exhaustion.

As legal practitioners, we have been left to wonder: what exactly are these "available remedies under other written laws"? It is likely that the remedies envisaged refer to civil suits, which may be initiated by filing a plaint or petition. However, such remedies would require the petitioner to demonstrate a personal interest in the matter. A civil suit, therefore, is not a viable remedy for a public interest claim under Article 26(2), as it requires the petitioner to show personal harm or interest, which contradicts the essence of public interest litigation.

Another potential remedy is an appeal, but this is only available to a person aggrieved by a decision, and as such, it is a personal remedy. In the same vein, judicial review is another possible avenue for redress; however, judicial review also requires the applicant to demonstrate that they have been personally affected by the matter. As such, a mere busybody, with no personal interest or harm, cannot file for judicial review. This further reinforces the point that

there are no available remedies for challenging the violation of constitutional rights under Article 26(2) that do not require personal interest.

Additionally, the judgment mentions the possibility of approaching the Commission for Human Rights and Good Governance (CHRAGG) to vindicate public rights. However, under Section 22(4)(b) of the CHRAGG Act, petitioners are required to exhaust available remedies before approaching the Commission. These remedies, however, are not available to individuals who have no personal interest in the matter, which further restricts access to justice for public interest litigants.

Advocates for the appellant further submitted that the requirement for a public interest litigant to exhaust all available remedies is an overreaction by the legislature. The enactment of the Basic Rights and Duties Enforcement Act, along with the 2020 amendments, represents a disproportionate response. When enacting these provisions, the legislature overlooked several key decisions of the Court of Appeal. For instance, in *Kukutia Ole Pumbun*, the Court of Appeal held that a person seeking to vindicate a constitutional or fundamental right is free to choose the venue and forum for seeking redress.

The 2020 amendments to the Basic Rights and Duties Enforcement Act are in clear contradiction to what is provided under Article 26(1) of the Constitution. Article 26(1) guarantees the right to petition for the protection of constitutional rights without the imposition of unnecessary procedural barriers or limitations.

Counsel for the appellant, therefore, respectfully prayed for the Court to declare Section 4(2), 4(3), 4(4), and 4(5) of the Basic Rights and Duties Enforcement Act null and void. It was further prayed that these provisions be immediately struck from the statute book, as they infringe upon the constitutional rights guaranteed under Article 26.

B. Reply submission by the Respondent, the Attorney General

The Respondent was represented by Hangi Chang'a (Principal State Attorney), Narindwa Sekimanga (Senior State Attorney) and Stanley Mhenge. They jointly submitted as follows

Section 4(5) of the Basic Rights and Duties Enforcement Act imposes the condition that all other available legal remedies under existing laws must be exhausted before initiating a public interest case. The State attorneys emphasized this point, citing the case of *Freeman Aikael Mbowe v. Attorney General*, where the High Court held that Mbowe's case was premature due to the pendency of a criminal case at the time. This reasoning was presented as justifying the exhaustion of other remedies before a case could proceed under the Basic Rights and Duties Enforcement Act.

Further, the State attorneys submitted that Section 4(4) does not confer immunity, but rather outlines procedures. According to this provision, if allegations are made against heads of organs, the petitioner must sue the Attorney General. The rationale behind this procedural requirement, they argued, is grounded in Article 30(5) of the Constitution.

On the standard of proof in public interest cases, the State attorneys asserted that when instituting a constitutional case, the petitioner must prove their case beyond a reasonable doubt. They contended that this high standard is necessary because the Constitution is the supreme law of the land, containing the Bill of Rights, and any challenge to its provisions demands a higher standard of proof.

Further, the limitations under Section 4 of the Basic Rights and Duties Enforcement Act are saved under Article 30(2) of the Constitution. Citing Daudi Pete, the State attorneys submitted that the High Court held that whenever a limitation is imposed, it must be justified. Therefore, the amendments to Section 4 are saved under Article 30(2)(a) and (b) of the Constitution, which allow for reasonable limitations on fundamental rights.

Moreover, the State attorneys argued that the requirement for an Affidavit under Section 4(2) is a procedural requirement, as stipulated by Article 26(2) of the Constitution. They further asserted that the procedures set out under Article 30(3) are consistent with those under Article 26(2), and these provisions primarily address procedural aspects, not substantive rights. Therefore, the essence of filing an Affidavit is to demonstrate how the petitioner has been personally affected by the matter at hand.

The State attorneys also submitted that Section 4 of the Basic Rights and Duties Enforcement Act does not amend the Constitution through a backdoor process, but instead introduces a procedural requirement that is within the legislative competence.

In their final submissions, the State attorneys prayed that the Court of Appeal find the grounds of appeal to be meritless and uphold the High Court's decision. They argued that the High Court's judgement was proper based on the Respondent's submissions, which demonstrated that the amendments to the Basic Rights and Duties Enforcement Act are constitutional.

C. Rejoinder submission by the counsel for the appellant

The counsel for the appellant rejoined that Section 4(5) of the Basic Rights and Duties Enforcement Act, which mandates the exhaustion of all available remedies, is inapplicable in the context of public interest litigation. The Mbowe case is distinguishable because it was instituted under Article 30, which pertains to personal rights, whereas public interest cases are brought before the High Court under Article 26(2). There is no equivalent provision in the law for public interest cases under Article 26(2), and consequently, there are no other remedies available for the petitioner to exhaust before filing a public interest case.

Regarding the standard of proof in constitutional cases, the appellant's counsel referenced the Rev. Mtikila case of 1995. In that case, the Court was asked to draw an inference, but it hesitated to do so unless the matter was proved beyond a reasonable doubt. However, this decision did not establish a standard of proof for public interest cases.

Public interest cases are inherently based on points of law rather than points of fact. When challenging the constitutionality of a law, the petitioner is required to make arguments, not to provide factual proof, to demonstrate that a particular law has violated constitutional principles. Therefore, Sections 4(2), 4(3), 4(4), and 4(5) of the Basic Rights and Duties Enforcement Act are not saved under Article 30(2)(a) and (b) of the Constitution.

Regarding the State Attorney's proposition that Section 4(4) of the Basic Rights and Duties Enforcement Act creates no immunity, the counsel for the appellant submitted that if a petition challenges an Act of Parliament and the relevant officials are not impleaded, the court may order the amendment of that law. However, the appellant raised the concern that, in such circumstances, there is no guarantee that the order will be implemented. The order would not be directed at Parliament, the body responsible for enacting laws, but rather to the Attorney General. This would undermine the effectiveness of the court's order, as the implementation could be delayed or thwarted without the direct involvement of the Parliament.

Additionally, Section 4(2) and 4(3) of the Basic Rights and Duties Enforcement Act require the petitioner to file an Affidavit. This requirement goes beyond simply showing how the petitioner has been personally affected; it compels the petitioner to demonstrate how the violation of the law results in personal injury under Article 30(3) of the Constitution. The counsel for the appellant emphasized that filing a public interest case is not just a personal matter, but constitutes the performance of a public duty. Under Article 26(2) of the Constitution, the cause of action stems from the performance of a public duty. In contrast, under Article 30(3), the cause of action arises from personal injury. The distinction between these two provisions is crucial in understanding the nature of public interest litigation.

Furthermore, the appellant's counsel submitted that Mtikila's case of 1995 on the standard of proof was a High Court decision. Under the doctrine of stare decisis, the Court of Appeal is not bound by this judgment, as it originates from a lower court, and it may, therefore, overrule it.

In conclusion, the counsel for the appellant submitted that the appeal should be allowed and that the amendments to the Basic Rights and Duties Enforcement Act should be declared unconstitutional.

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