

**REV. Christopher Mtikila v. Attorney General 1995 TLR
31 HC (Supremacy of Parliament)**

REV. CHRISTOPHER MTIKILA v ATTORNEY GENERAL 1995 TLR 31 (HC)

Court: High Court of Tanzania - Dodoma

Judge Lugakingira J

Flynote

Constitutional Law - Supremacy of Parliament - Power of Parliament to amend the Constitution - Whether limitless

Constitutional Law - Fundamental Rights enshrined in the Constitution - Whether Parliament can amend constitutional Provisions safeguarding fundamental rights

Litigation - Locus standi - Sufficient personal interest in the subject of litigation - Extent of interest in private law and public law litigation distinguished

Locus Standi - Constitutional Rights - Locus Standi in litigation for basic constitutional rights - No particular right of Petitioner is infringed - Whether Petitioner has locus standi - Article 30(3) of the Constitution.

Litigation - Public Interest Litigation - Whether sufficient interest is necessary in public interest litigation - Article 26(2) of the Constitution

Civil Practice and Procedure - Stay of proceedings - Suit brought on an issue already pending before another court - Whether subsequent suit may proceed - Section 8 of the Civil Procedure Code, 1966.

Statutory interpretation - Interpretation of Constitutional provisions - Constitutional Provision being in conflict with another provision of the Constitution - Use of the harmonisation principle of statutory interpretation

Constitution - Constitution of the United Republic of Tanzania - Union Matters under the Constitution - Appointment of persons from Zanzibar to offices of non-union matters on the Mainland - Whether Constitutional.

The petitioner was a human rights campaigner and political activist. In his petition he invited the High Court to consider whether certain amendments to the Constitution were validly made as they appear to infringe the right to participation in national public affairs and freedom of association, both of which are guaranteed by the Constitution. The petitioner also invited the Court to declare a number of statutory provisions unconstitutional for infringing rights and freedoms guaranteed under the Constitution. These were some provisions of the Political Parties Act 1992 which, the petitioner claimed, infringed freedom of association; some provisions of the election laws which made it impossible for independent candidates to contest in elections; certain provisions of the Newspapers Act 1976 which he claimed were arbitrary and liable to abuse, and an infringement to freedom of expression; and certain provisions of the Police Force Ordinance, Cap 322, and the Political Parties Act 1992 which, he claimed, infringed the constitutional right to peaceful assembly and public expression by requiring a permit to be obtained before one can hold a public meeting or a rally. The petitioner also sought a declaration whether or not the appointment of people from Zanzibar to offices in Mainland Tanzania dealing with non-union matters was constitutional. Besides opposing the petition on substantive grounds, preliminary objections were raised for the Respondent regarding whether the petitioner had locus standi, whether he had a cause of action, and whether the issues he raised were justiciable.

Held:

(i) The orthodox common law position regarding locus standi no longer holds good in the context of constitutional litigation in that the notion of sufficient personal interest over and above the interest of the general public has more to do with private law rather than public law; in matters of public interest litigation the Court will not deny standing to a genuine and bona fide litigant even where he has no personal interest in the matter;

(ii) In the circumstances of Tanzania, if a public spirited individual springs up in search of the Court's intervention against legislation or actions that pervert the Constitution, the Court, as guardian and trustee of the Constitution, must grant him standing;

(iii) The principles of public interest litigation are expressed in the Constitution of Tanzania by vesting in every person the capacity of an individual by virtue of articles **12 to 24 of the Constitution**, and the capacity of a member of the community by virtue of articles 25 to 28 of the Constitution, thereby equipping the individual with double standing to sue;

(iv) The petitioner in this case has locus standi by virtue of **article 30(3) of the Constitution** which entitles a person who alleges that a basic right is being or is likely to be contravened in relation to him to institute proceedings for relief in the High Court, as well as by virtue of **article 26(2) of the Constitution** which entitles every person to institute proceedings for the protection of the Constitution and of legality;

(v) **Article 26(2) of the Constitution** is an independent and additional source of standing according to which personal interest is not necessary in order to institute proceedings; the article is tailored for the community and it enacts into the Constitution of Tanzania the doctrine of public interest litigation

(vi) In this petition the dispute is over the validity of various laws and that suffices to constitute a cause of action; it is not always necessary for powers under those laws to be exercised first so as to give rise to a cause of action;

(vii) Fundamental rights are not gifts from the state but they inhere in a person by virtue of birth, and they are prior to the state and the law; the enactment of those rights in the Constitution is mere evidence of their recognition and the intention that they should be enforceable in a court of law, and an intention that those rights should not be arbitrarily restricted by the state;

(viii) Parliament is given very wide powers to amend constitutional provisions, including those providing for basic human rights, but those powers of Parliament can only be exercised subject to the limits imposed by **articles 30(2) and 31 of the Constitution**;

what is beyond the powers of Parliament to amend is only the ethic of human rights but not the letter by which those rights are expressed;

(ix) The constitutional amendments which brought **article 20(2) and (3) of the Constitution** laying conditions for registration of political parties, and those in article 39 of the Constitution relating to qualifications to contest in presidential, parliamentary and local government elections, were all validly enacted; the amendments do not abrogate, beyond the limits set by **article 30(2) of the Constitution**, freedom of association and the right to participate in national public affairs which are guaranteed under the Constitution;

(x) As the issue of the constitutionality of certain provisions of the Political Parties Act 1992 is also substantially an issue in an appeal already pending before the Court of Appeal, in terms of **s 8 of the Civil Procedure Code 1966**, decision on that issue is stayed until the outcome of the said appeal;

(xi) The constitutionality of a statutory provision is not found in what could happen in its operation but in what it actually provides for; the mere possibility of a statutory provision being abused in actual operation will not make it invalid;

(xii) **Section 40 of the Police Force Ordinance, Cap 322, and s 11(1) of the Political Parties Act 1992**, hi-jack the right to peaceful assembly and procession guaranteed under the constitution and place it under the personal disposition and absolute discretion of the District Commissioner without adequate or any safeguard against arbitrary exercise of that discretion; they infringe the right to freedom of peaceful assembly and procession, and are therefore unconstitutional;

(xiii) **Section 41 of the Police Force Ordinance** does not take away the right to hold assemblies or processions but only empowers the Police and the magistracy to step in for preserving peace and order whenever the holding or continuance of an assembly or procession is likely to cause a breach of the peace; it seeks to ensure public safety and public order, and is therefore a valid provision saved by **article 30(2)(b) of the Constitution**;

(xiv) **Sections 42 and 43 of the Police Force Ordinance**, which define an unlawful assembly and punish it, are constitutionally valid provisions which seek to ensure public safety and order, and to ensure that the rights and freedoms of others, and the public interest, are not prejudiced by the misuse of an individual rights and freedom;

(xv) As **article 21(1) of the Constitution** entitles every citizen to participate in the government of the country, either directly or through freely elected representatives, it is illogical for that Constitution to provide, as it does in **articles 20(4) and 39, 67 and 77** as amended, that no person shall be compelled to belong to a political party and in the same breath to provide that no person shall run for office except through a political party;

(xvi) The right of every citizen to participate in government **under article 21(1) of the Constitution** is to be exercised according to a procedure set by or under a law; while participation through a political party is a procedure, the requirement that participation shall be through a political party only is not a procedural matter but a substantive condition taking away the right to participate for citizens who do not belong to political parties;

(xvii) In interpreting the Constitution when a constitutional provision enacting a fundamental right appears to conflict with another constitutional provision, the Court is enjoined to incline to the realisation of the fundamental rights and may disregard the other provision if its application would result in injustice; it is the fundamental rights, and not the restrictions on them which are fundamental, and it is the fundamental rights which the Court is enjoined to guard jealously, not the restrictions.

(xviii) The amendments made in **articles 39, 67 and 77 of the Constitution**, restricting the right to contest in elections to political party candidates only, are capable of being abused to confine the right of governing to a few and to render illusory the emergence of a truly democratic society; notwithstanding those restrictions, it shall be lawful for private candidates to contest elections along with political party candidates;

(xix) Breach of the Constitution is such a grave and serious matter that cannot be established by mere inference but by proof beyond reasonable doubt; in this case it has not been proved that the appointment of persons from Zanzibar to offices in non-union departments in Tanzania Mainland is in breach of the Constitution of the United Republic