

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LEVIRA, J.A. RUMANYIKA, J.A. And NGWEMBE, J.A.)

CIVIL APPEAL NO. 134 OF 2022

ONESMO OLENGURUMWA APPELLANT

VERSUS

ATTORNEY GENERAL RESPONDENT

**(Appeal from the Judgment of the High Court of Tanzania, Main
Registry at Dar es Salaam)**

(Luvanda, Mlyambina, Magoiga, JJ)

dated the 15th day of February, 2022

in

Miscellaneous Civil Cause No. 9 of 2021

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JUDGMENT OF THE COURT

13th May & 13th June, 2025

LEVIRA, J.A.:

This appeal originates from a matter of constitutional significance which was filed by the appellant in the High Court of Tanzania, Main Registry at Dar es Salaam in Miscellaneous Civil Cause No. 9 of 2021. In that petition, the appellant was challenging the constitutionality of the provisions of the Written Laws (Miscellaneous Amendments) (No. 3) Act,

2020 (the Written Laws) which amended section 4 of the Basic Rights and Duties Enforcement Act, Cap 3 R.E. 2019 (the BRADEA). The main contentious issue raised by the appellant before the High Court was that, the amendment of section 4 of the BRADEA by introducing subsections (2), (3), (4) and (5) to that provision through the Written Laws, discriminates and bars individual Tanzanian from petitioning to the court to protect basic rights and freedoms enshrined in the Constitution of the United Republic of Tanzania 1977 (the Constitution).

Among the adverse effects of the amendment claimed by the appellant were as follows: **One**, the requirement of demonstrating personal interest when filing a case under Article 26 (2) of the Constitution, was not contemplated by the framers of the Constitution for that would defeat the very essence and or purpose of human rights redress and protection guaranteed under the Constitution. **Two**, the amendment through the backdoor, in effect amended Article 26 (2) of the Constitution and subjected it to Article 30 (3), contrary to the intention of the framers of the Constitution. **Three**, the amendment has undermined the crucial constitutional role of the Judiciary of Tanzania as the sole interpreter of the Constitution through case law. **Four**, the amendment has undermined the

principle of separation of powers, rule of law and good governance as enshrined in the Constitution and various International Treaties for which the United Republic of Tanzania is a party. **Five**, it has limited the responsibility of the citizenry, whether individually or through their associations, to protect the Constitution and the laws of Tanzania lawfully enacted.

Six, the amendment has undermined the unique role and function and the neutrality of the position of the Attorney General. **Seven**, it has expanded the substantive constitutional role of the Attorney General beyond what is provided for in the Constitution. **Eight**, the amendment has restricted the enjoyment of fundamental rights and freedoms of the citizenry to seek constitutional redress provided for in the Constitution by introducing the requirement of exhaustion of available remedies which are non-existent. **Nine**, the amendment has the effect of discriminating between Tanzanians, especially the disadvantaged groups, as far as their right to protect the Constitution and take legal action individually, or in association with others, is concerned. And **ten**, that the amendment has the effect of undermining citizens' right to enjoy fundamental human rights in Tanzania in total disregard of the state's constitutional role to respect,

protect and ensure realization of the rights in accordance with the existing international and regional human rights treaties and domestic laws.

Thus, as demonstrated above, the appellant's firm position was that, the amendment of section 4 of the BRADEA was a clear violation of the constitutional doctrine of equality before the law and an unrestricted right of every citizen to protect and defend the Constitution and law as provided under Articles 13 (2), 13 (4), 13 (6) (a), 26 (1) and 26 (2) of the Constitution.

Briefly, through his petition, the appellant sought the following declaratory reliefs from the High Court:

- 1. That section 4 (2), (3), (4) and (5) of the BRADEA is inconsistent with the Constitution for violating Articles 13 (2), 13 (4), 13 (6) (a) 26 (1) and 26 (2) of the Constitution.*
- 2. That section 4 (3) of the BRADEA is inconsistent with the Constitution by violating Article 26 (2) of the Constitution.*
- 3. That section 4 (4) of the BRADEA is inconsistent with the Constitution by violating Article 26 (1) of the Constitution.*
- 4. Section 4 (5) of the BRADEA is inconsistent with the Constitution for violating Articles 13 (6) (a) and 26 (1) of the Constitution.*

5. That parties who intend to file a constitutional petition under Article 26 (2) need not show or demonstrate personal interest.

The respondent opposed the appellant's grounds of petition stating that the amendment referred to by the appellant in that petition does not contravene any provision of the Constitution. Instead, it provided for safeguards against violations of basic rights and fundamental freedoms. As such, the position of the respondent was that, the requirement of exhausting available remedies was there even before the amendment. According to the respondent, what the amendment did, was only to amplify the provision in relation to exhaustion of alternative remedies as was the position before the amendment. To the respondent, the impugned amendment is meant to curb abuse of the court process by those wishing to initiate frivolous and vexatious petitions.

It is not insignificant to note that, the appellant's petition before the High Court was found without merit and was dismissed. The appellant has preferred the present appeal contesting that decision. The appeal is hinged on eight (8) grounds challenging the amendment to the BRADEA as unconstitutional as will be discussed in the course.

Before we proceed any further, we find it necessary to point out that parties to this appeal did not file any written submissions in support of or against the appeal. They relied solely on their oral submissions at the hearing of the appeal where, the appellant was represented by a team of four learned counsel namely, Prof. Issa Shivji, Mr. Mpale Mpoki, Dr. Rugemeleza Nshala and Mr. John Beniel Seka; whereas, the respondent, the Attorney General was represented by Mr. Hangi Chang'a, learned Principal State Attorney, Ms. Narindwa Sekimanga, learned Senior State Attorney and Mr. Stanley Mahenge, learned State Attorney.

In the cause of submission in support of the appeal, Prof. Shivji addressed the Court in respect of the 1st, 2nd, 3rd and 7th grounds of appeal. The 4th and 5th grounds were argued by Dr. Nshala and the 6th and 8th grounds were argued by Mr. Mpoki and Mr. Seka, respectively.

Prof. Shivji argued the 1st, 2nd and 3rd grounds together to the effect that, the amendment of section 4 of the BRADEA was in violation of the Constitution. In particular, subsections (2) and (3) of that provision are unconstitutional because they violate Article 26 (2) of the Constitution in that; **first**, they compromise the independent character of Article 26 (2) of the Constitution; **second**, they introduce a requirement which does not

exist in the Constitution; and **third**, they destroy a special character of public interest litigation by effectively abolishing it through introduction of a requirement of filing an affidavit along with a petition.

In addition, Prof. Shivji submitted that, under subsection (3) of section 4 of the BRADEA, the applicant is required to abide by Article 30 (3) of the Constitution which relates to a person whose interest has been infringed or personally affected. This requirement, he argued, subsumes Article 26 (2) into Article 30 (3) of the Constitution. In so doing, he added, the requirement does not consider that Article 26 (2) of the Constitution provides for an independent right for every person seeking to protect and defend the Constitution against any violation by any person to do so. Reliance was made on **Rev. Christopher Mtikila v. Attorney General** [1995] T.L.R. 31, which was followed by **Attorney General v. Jeremiah Mtobesya** (Civil Appeal No. 65 of 2016) [2018] TZCA 347 (2 February 2018). In elaboration, Prof. Shivji contended that Article 26 (2) of the Constitution provides for an independent source of *locus standi*. To him, Article 30 (3) and Article 26 (2) of the Constitution are completely independent of each other and were enacted for realization of completely different objectives.

He thus faulted the High Court's failure to appreciate the independent character of those constitutional provisions. According to him, Articles 26 (2) of the Constitution was enacted to protect the Constitution generally, while Article 30 (3) of Constitution is specific for an individual complaining of a potential or real violation of his constitutional right. As a result of the merging of Articles 26 (2) and 30 (3) of the Constitution, the learned counsel argued, there is no procedure in place to enforce Article 26 (2) of the Constitution.

Prof. Shivji submitted vigorously that, what has been done is an amendment of Article 26 (2) of the Constitution through the backdoor. He added that, had it been that the Legislature's intention was to amend the Constitution, a resort should have been to the procedure under Article 98 of the Constitution. He added further that, subsection (2) and (3) of the BRADEA impose a new requirement in Article 26 (2) of the Constitution which did not exist under the Constitution that a petitioner must show personal interest in the matter. This is, he submitted, tantamount to amending the Constitution by imposing a requirement which does not exist in the constitution. According to him, if an applicant under Article 26 (2) of the Constitution has personal interest, he or she cannot proceed because

under Article 26 (2) of the Constitution the interest has to be public not personal. Therefore, he argued, one does not need to go to other jurisdictions to see how to handle public interest litigations because it is already provided for in our Constitution, that is under Article 26 (2) of the Constitution.

Elaborating, Prof. Shivji submitted that the provision of Article 26 (2) of the Constitution provides for a right to take legal action in protection of the Constitution to a person who is public spirited to perform his duty to the society. It involves a notion of a public duty, or a right which is personal entitlement, he added. Prof. Shivji also insisted that, Article 30 (3) of the Constitution is distinct from Article 26 (2) because Article 30 (3) is personal entitlement while Article 26 (2) of the Constitution provides for means to perform a public duty as per **Christopher Mtikila's** case (supra). He went on to argue that, the remedy under Article 26 (2) of the Constitution is a remedy *in rem* while under 30 (3), is a remedy *in persona*. However, he said, the High Court failed to appreciate that distinction. He faulted the High Court for referring to Article 30 (3) of the Constitution as procedural as it can be seen at page 663 of the record of appeal. It was his argument that, the procedure should facilitate exercise of a right and

performance of a duty but not impede it. However, he said, subsections (2) and (3) of section 4 of the BRADEA impede realization of the import of Article 26 (2) of the Constitution.

In reply, Ms. Sekimanga submitted that, subsections (2) and (3) of section 4 of the BRADEA provide for a procedure to enforce Article 26 (2) of the Constitution. According to her, there is no difference in the procedure of enforcement of the rights created under the disputed Article of the Constitution. She argued that, both provisions, that is, Articles 26 (2) and 30 (3) of the Constitution are enforceable through the BRADEA and thus, subsections (2) and (3) of section 4 of the BRADEA provide for the procedure of enforcing them.

In complementing Ms. Sekimanga's argument, though somehow on the contrary, Mr. Mahenge submitted that the provision under consideration, that is, subsection (2) of section 4 of the BRADEA requires an applicant to swear an affidavit to show how he or she has been affected personally by the contravention of Articles 12 to 29 of the Constitution. He submitted further that, under Article 26 (2) of the Constitution which provides for public interest litigations, it is not necessary for the petitioner

to show how he has been affected personally. His conclusion was that, subsections (2) and (3) of the BRADEA are not unconstitutional as alleged.

On his part, Mr. Chang'a submitted that institution of a constitutional action under Article 26 (2) of the Constitution has to be done in accordance with the procedural law which is provided under the BRADEA. Regarding Prof. Shivji's argument that, amendment of the BRADEA has also amended the Constitution through the backdoor, Mr. Chang'a opposed the argument. He argued that, the amendment only introduced a procedure as to how public interest litigations under Article 26 (2) of the Constitution may be instituted.

We have carefully considered the rival arguments by the counsel for the parties and thoroughly examined the record of appeal. The main issue calling for our determination is whether Articles 26 (2) and 30 (3) of the Constitution are similar in terms of their applicability or whether they can be enforced through the same procedure. Before we go any further, we find it appropriate to reproduce the contested provisions of Articles 26 (2) and 30 (3) of the Constitution hereunder:

Articles 26 (2) of the Constitution provides:

"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."

[Emphasis added]

Whereas, Article 30 (3) of the Constitution reads:

"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]

It is apparent from the wordings of the above provisions that, the Articles referred are different. We note that Article 26 (2) of the Constitution provides for a right to "every person" to take legal action to ensure protection of the Constitution and the laws of the land. The protection envisaged under this provision does not suggest to be in relation to the petitioner's personal rights but public rights violation as per **Jeremia Mutobesya's** case (supra). On the contrary, Article 30 (3) gives option to "any person" who is personally affected by the infringement of any of his

right or duty owed to him, to institute proceedings for redress in the High Court (personal interest litigations). These provisions existed in our Constitution from when the Basic Rights and Duties were introduced in 1984. They have all along been enforced to protect public and personal rights, respectively; see: **Director of Public Prosecutions v. Daudi Pete** [1993] T.L.R. 22.

However, as intimated earlier, the amendment of the BRADEA introduced subsections (2) to (5) of section 4. Specifically, in respect of the main issue we have just raised, the arguments have been that those subsections (2) and (3) of section 4 the BRADEA are aimed at hindering enforcement of the right of every person to take legal action to ensure protection of the Constitution and the laws of the land. Professor Shivji's arguments were weakly opposed by the counsel of the respondent who, however had contradictory positions as shown above.

At this juncture, we think it is opportune to consider what was the decision of the High Court in respect of the arguments of the parties regarding the contested provisions. For ease of reference, we reproduce hereunder the provision of section 4 of the BRADEA as amended. It provides:

"4 (1) 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.

"(2) without prejudice to the provisions of the Commission for Human Rights and Good Governance Act, relating to powers of the Commission to institute proceedings, an application under subsection (1) shall not be admitted by the High Court unless it is **accompanied by an affidavit** stating the extent to which the contravention of the provisions of Articles 12 to 29 of the Constitution **has affected such person personally.**

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

(4) Notwithstanding any provisions to the contrary, where redress is sought against the **President, Vice-President, Prime Minister, the Speaker, Deputy Speaker or Chief Justice** for any act or omission done in the performance of their duties, a

petition shall only be brought against the Attorney General.

*(5) A petitioner shall, prior to seeking redress under this Act, **exhaust all available remedies under any other written laws.***"

[Emphasis added]

As it can be observed from the above provisions, subsection (2) introduced two mandatory requirements for a citizen who wishes to enforce his right created under Article 26 (2) of the Constitution. They are; **first**, to present an affidavit stating how he has been affected personally by the contravention of the Constitution, and; **second**, such citizen or applicant must comply with the requirements of Article 30 (3) of the Constitution. At page 664 of the record of appeal, the High Court had the following to say:

"As pointed out, the fusion of the two Articles is in respect [of] the procedure of institution of the proceedings under the Basic Rights, Freedoms and Duties under BRADEA and not what the petitioner purports it to be.

It is not strange, even the petitioner has cited Article 26 (2) and 30 (3) of the Constitution (supra) among others, to show that the two provisions may be fused as a matter of procedure in the institution of the proceedings under the BRADEA. Since the

*BRADEA sets the procedural requirements and that the petitioner herein complied by moving this court under Article 26 (2) and 30 (3) of the Constitution (supra) and section 4 (1) of the BRADEA (supra) at the same time supported [by] the originating summons with the affidavit which speaks on the interest of the deponent and the Public at large and the Petition was admitted, **the Petitioner cannot come forward to challenge the provision under which the petition has based without objection and no question of locus standi have been raised in respect of Article 26 (2) of the Constitution (supra) and section 4 of the BRADEA (supra).** [Emphasis added]*

With respect, we fail to comprehend the above reasoning of the High Court which was seemingly based on the fact that the application before it was preferred under the impugned provisions. In the first place, how could it be possible for the applicant to succeed in lodging the petition without complying with the requirements of the law currently in force. It is therefore not surprising that there was no objection and or any issue regarding *locus standi* in his petition, which was essentially a public interest petition. Nonetheless, the question remains: What would happen if the

appellant had no personal interest in the matter but wanted to defend public interests?

In our considered view, it was a misdirection on the part of the High Court to fault the appellant because of his obedience to the procedural law in force. As we intimated earlier on, there is no guarantee that every petitioner will be able to demonstrate personal interest in all circumstances. What is apparent from the excerpt above is that, with respect, the High Court erroneously gave the impugned provisions a very limited interpretation.

It is common knowledge that, Article 26 (2) of the Constitution deals with public interest litigations. Thus, if a petitioner who petitions under this provision is subjected to the requirements of subsection (2) of section 4 of the BRADEA, he or she must state in his affidavit how he was personally affected by the contravention of the Constitution. This requirement, as correctly submitted by Prof. Shivji, in our view, defeats the spirit of Article 26 (2) of the Constitution which confers to every person or individual citizen of the country, a right and duty to protect the Constitution and the laws of the land, whether affected personally or defending public interests.

We are unable to go along with the reasoning of the High Court that, the introduction of subsections (2) and (3) of section 4 of the BRADEA has not affected realization of the right created by Article 26 (2) of the Constitution. We need not over emphasize that, Article 30 (3) of the Constitution deals with personal interest litigations. Therefore, by subjecting a public interest petitioner to a procedure which requires him to prove his personal interests, is tantamount to giving him a right by one hand, and taking it away by another. We say so because, it is common knowledge that, in public interest litigations, a petitioner does not have to demonstrate the manner or extent of his being affected by the violation of the Constitution he wants to challenge. With the provisions of subsections (2) and (3) of section 4 of the BRADEA in place as part of our law, it is evident that the Constitution remains exposed to abuse and violation with no hope of being protected by any person as it used to be before enactment of the contested amendments.

The doctrine of supremacy of the Constitution that all democracies cherish and uphold, is exhibited by the high moral duty of all citizens to faithfully preserve, protect and defend their Constitution. That ideal suggests that all provisions of the Constitution seeking to preserve, protect

and defend the very Constitution, are strictly protected and construed by courts of law liberally and permissively, rather than restrictively, with no chance of taking them away either directly or indirectly.

Before amendment of the BRADEA, the right under Article 26 (1) and (2) of the Constitution had no restriction, condition or limitation towards realization of its objective. The restriction was put in place by the said amendment to section 4 of the BRADEA. In our view, the impugned amendment is not in any way making it any easier for every person who seeks protection of the Constitution, to access the court and challenge its violation. Perhaps, it is not insignificant to note that the enforcement of the rights under Article 26 (2) of the Constitution has been all along through case law as is evident in **DPP v. Daudi Pete** (supra), where this Court stated:

*"... We may only add that by commencing with the expression "Every person..." as distinguishable from "an aggrieved or interested person", **the Article (26 (2)) confers standing on a desirous petitioner to seek to protect the rights of another or the general public at large despite having no sufficient interest on the impugned contravention.** The Article is, in itself, a departure*

from the doctrine of locus standi as we know it in the common law tradition.”

See also, **The Attorney General v. Jeremia Mtobesya** (supra).

In the light of the above discussion and having considered the nature of the impugned provisions, we entertain no doubt that the requirement of an affidavit by the petitioner showing personal interest in public interest litigation; and the requirement to comply with the provisions of Article 30 (3) of the Constitution, before pursuing a public right created under Article 26 (2) of the Constitution, means that subsections (2) and (3) of section 4 of the BRADEA, are not only inconsistent with the Constitution but also, a deliberate impediment to protection and defense of the Constitution, hence, unconstitutional. We therefore, allow the 1st, 2nd and 3rd grounds of appeal.

In respect of the 7th ground of appeal, Prof. Shivji submitted that this ground relates to immunity conferred on our Constitutional office bearers under subsection (4) of section 4 of the BRADEA. It was his argument that, the immunity conferred by that provision is unconstitutional because the named office bearers cannot be impleaded in petitions against their wrongful actions which is contrary to rule of law and accountability. In other words, he argued, their wrongful actions cannot be challenged

directly through them. Thus, the immunity conferred under subsection (4) of section 4 of the BRADEA impairs accountability, equality before the law and brings about improper joining of parties, hence, unconstitutional.

He insisted that, the only way such office bearers can be held responsible is through legal action in a court of law as proper parties. Our country (Tanzania) is a Republic and thus its President and those other constitutional office bearers should be accountable for their acts. In the circumstances, he insisted, a wrong doer, if for instance is the President, should be impleaded as a proper party and the Attorney General as a necessary party.

According to Prof. Shivji, the implication of not impleading the mentioned constitutional office bearers under subsection (4) of the section 4 of the BRADEA is that, the proper party will not appear in the pleadings and before the court. As a result, no effective relief can be sought from a person who does not appear in court and no court will grant a remedy against a person who is not impleaded. He argued that, those office bearers can be impleaded and the Attorney General appear in two capacities; to wit, as a necessary party and as counsel for the proper party. Failure to implead those office bearers, he argued, could lead to impunity.

He concluded by insisting that, subsection (4) of section 4 of the BRADEA is unconstitutional, null and void. He, thus, urged us to declare it so and order the same to be struck off the statute book with immediate effect.

Ms. Sekimanga's reply to the 7th ground of appeal was that, subsection (4) of section 4 of the BRADEA does not provide for any immunity to the mentioned constitutional office bearers. Instead, she said, it only provides for the procedure through which one can sue them in case they violate the Constitution and the rationale is traceable under Article 30 (5) of the Constitution. In addition, Mr. Chang'a submitted that, by virtue of the impugned provision, the Attorney General will be sued as a proper party for their violation.

Having heard the submissions by both parties and scrutinized the record of appeal, the issue calling for our determination is whether subsection (4) of section 4 of the BRADEA creates immunity shielding the mentioned constitutional office bearers against legal actions. The impugned provision is reproduced for clarity as follows:

*"(4) Notwithstanding any provisions to the contrary, where redress is sought against **the President**,*

Vice President, Prime Minister, the Speaker, Deputy Speaker or Chief Justice of any act or omission done in the performance of their duties, a petition shall only be brought against the Attorney General. [Emphasis added]

As it can be clearly observed, the above provision provides for a list of the six office bearers who cannot be taken to court for their actions or omissions in the performance of their duties. In case they commit any wrong, the 'only' person to be sued is the Attorney General. While arguing in respect of the provision under consideration, Prof. Shivji emphasized on the rule of law and accountability. Conceivably before we go any further, we need to consider what the Constitution provides for in relation to those two principles. Article 26 (1) of the Constitution provides:

"Every person has the duty to observe and to abide by this Constitution and the laws of the United Republic."[Emphasis added]

In terms of the above provision, the obligation to abide by the Constitution and the laws of the land is put to every person. Meaning that, it includes those listed in subsection (4) of section 4 of the BRADEA.

Article 13 (1) and (6) (a) of the Constitution emphasizes on the doctrine of equality before the law. It provides also that, State authority is

required to put in place procedures which are appropriate to ensure that the doctrine of equality before the law, thrives. The question that follows is whether the procedure under subsection (4) of section 4 of the BRADEA falls squarely within the purview of the mandatory obligations provided for under the cited constitutional provisions. The answer to this question is not far-fetched. Ms. Sekimanga had taken the view that, although the impugned provision provides that such a petition can only be brought against the Attorney General for the wrongs of the mentioned office bearers, it does not mean that they are immuned to any court action and that the rationale behind it is provided under Article 30 (5) of the Constitution. With respect to Ms. Sekimanga, Article 30 (5) of the Constitution has nothing to do with the contested point. The provision directs what the High Court should do in case it finds that one of the provisions of Articles 12 to 29 has been violated. It is clear to us that the submission in this respect by Ms. Sekimanga was, respectfully, beside the point, for the leaned Senior State Attorney utterly failed to respond to the argument put forth by Prof. Shivji.

In respect of the response by Mr. Chang'a as noted above, we need to pause and ask, who is a proper party? In the Academic, Legal Dictionary

as quoted in **Alphonse Buhatwa v. Julieth Rhoda Alphonse** (Civil Application No. 209 of 2016) [2016] TZCA 900 (26 October 2016; TANZLII), the Court stated:

"A proper party is one in whose absence an effective order can be made, but whose presence is necessary for a complete and final decision on the question involved in the proceedings."

By that definition and the submission by Mr. Chang'a, it means that the Attorney General, once sued is able to play a full role of being accountable for every wrong committed by any of those office bearers mentioned in the impugned provision. Although that is what he intended to be his position, Mr. Chang'a did not sufficiently clarify to us how the Attorney General can carry out the orders or directives that the High Court may make to the office bearers mentioned in the impugned provision for enforcement. Our point here is this; the Attorney General does not have mandate to discharge any legal or constitutional duties of the office bearers mentioned in subsection (4) of section 4 of the BRADEA. In the circumstances, it is clear in our mind that, by stating that the petition can "only" be brought against the Attorney General, there is a possibility of having a petition in court whose end result may revolve around the issue

between the parties to its finality, without enforceable order. For the enforceable order requires presence of a necessary party to whom the order of court should be directed. In **Abdullatif Mohamed Hamis v. Mehboob Yusuf Osman and Another**, Civil Revision No. 6 of 2017 (unreported), the Court reasoned and came up with the following position:

"There is no gainsaying the fact that the presence of a necessary party is, just as well, imperatively required in our jurisprudence to enable the courts to adjudicate and pass effective and complete decrees."

Being guided by the position above, we are unable to agree with Mr. Chang'a that the Attorney General is sued as a proper party without considering his or her constitutional mandate to comply with the court orders which may be issued for compliance to any office bearer under consideration.

At this juncture, we need to consider how the High Court dealt with the issue under consideration. At page 681 of the record of appeal, the High Court had this to say:

"Needless, as pointed out by the respondent, there is nowhere section 4 (4) (supra) has barred suit against the Head of State. Instead, the procedure

*has been changed from instituting proceedings under BRADEA directly against them and the same be brought against the Attorney General. What the petitioner has failed to understand is the fact **that proceedings under the BRADEA are not normal civil proceedings involving private persons.** To be precise, the procedure of preferring suit against Heads of State in civil and criminal remains intact under the Constitution and other laws."*

While making reference to what is provided under Article 30 (5) of the Constitution, the High Court went on to state at page 683 of the record of appeal as hereunder:

*"Our reading [of] the above provision, justify the reason as to why the parliament wants **the Attorney General to be impleaded instead of the Heads of State in order to facilitate the implementation of court order when the Government is ordered to rectify the defect.** The Attorney General who initiates legislative drafting, will be a realistic person to champion legislative drafting as in the instant petition. The practice of impleading or having the Attorney General be accountable to the court of*

*law for the action or omission of the Government and its organ is not strange. In East African Court of Justice, suits are brought against Attorney General of each partner state and at the African Court on Human and Peoples Rights, applications are brought against the United Republic of Tanzania; and the Attorney General (supra) is responsible to defend the actions or omission of the state concerned. **This applies where the action or omission challenged have been committed by one of the Heads of State organs.***

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

[Emphasis added].

The above three excerpts raise some questions, which unfortunately, were not answered by that court before arriving at its conclusion. With respect, we should first state our position that, we are unable to go along with the reasoning of that court due to the following: **One**; we fail to understand what the High Court was referring to by the phrase "*the*

proceedings under the BRADEA are not normal civil proceedings involving private persons." We have thoroughly perused the record of appeal, but could not find anywhere the petitioner, now appellant referred to a private litigation. All along, the matter before the High Court was a public interest litigation. Besides, if the BRADEA has its peculiar procedure which needs to be followed, the High Court failed to reveal the said procedure. In our view, the High Court misunderstood the petitioner's complaint.

Two, the High Court took a view that, *"the Attorney General is impleaded instead of the Heads of State in order to facilitate the implementation of the court order to rectify the defect."* This finding takes us back to the above discussion regarding proper and necessary parties. The High Court was of the stance that the Attorney General is a necessary party who should enforce court orders even those directed to the office bearers mentioned in subsection (4) of section 4 of the BRADEA. Nonetheless, as per our previous discussion, we still do not see how the Attorney General can carry out effectively any directive of the court directed to any office bearers in case, for instance, the court orders the latter to perform a particular statutory or constitutional function conferred to that office bearer. We are alive that under the Constitution, the Attorney

General is a Chief Adviser of the Government on matters of law. But that role, does not vest into his office any mandate to perform any day-to-day functions of any of the office bearers referred to in subsection (4) of section 4 of the BRADEA, such that he is in a position to comply with any court directives that may be issued to any of such office bearers.

Three, the examples relied upon by the High Court like the African Court on Human and Peoples Rights and the East African Court of Justice, in our considered opinion were cited out of context, for those are regional courts and none of them is a national court, neither do continental or regional blocs have Attorney Generals or Constitutional leaders like the office bearers who are the subject of the issue we are urged to resolve. In any event, it does not indicate the status of the Heads of State as far as public interest litigations is concerned. We also do not find any compelling reason to discuss the practice in other countries, for we have a properly functioning constitutional order that every person, institution and state organ in this country has to respect and protect vigilantly. We stress that Tanzania is a Republic; it is not a Regional Bloc although it is a member of several of them. Suffices here to state that, the petitioner in the present

matter focused on public interest litigation in the light of the amendment of section 4 of the BRADEA.

Four, in making reference to other jurisdictions, and indeed, responding to the appellant's arguments, the High Court referred to only the Head of State, not other office bearers. What is not clear to us is whether the High Court trimmed down the list of the office bearers to retain only the Head of State by design or by default. If it was by design, what was the court's determination in respect of those who are not Heads of State, but they are in the list. If it was by default, then the issue is whether all office bearers mentioned are also Heads of State. These questions are not insignificant.

Before winding up our deliberation on this complaint, we find it apposite also to put it on record that we tried during the hearing of the appeal to inquire from the counsel for the respondent as to what was the mischief that the legislature intended to cure by the introduction of section 4 (4) of the BRADEA in 2020, such that it is only the Attorney General who has to be sued, as opposed to the previous position for all the years since 1984 when the Bill of Rights was introduced in the Constitution. Unfortunately, we did not get any useful answer from any of them.

Nevertheless, we examined the record of appeal to see whether there was anything of legal or constitutional significance which might have been brought before the High Court to show how the respondent might have been affected by the old position. Instead, what we came about was that there were numerous cases where the Head of State of this Country was sued together with the Attorney General, but it did not occasion any apparent upheaval. See for instance, **Ado Shaibu v. Honourable John Pombe Magufuli** (President of the United Republic of Tanzania) & Others (Misc. Civil Cause No. 29 of 2018) [2019] TZHC 3 (20 September 2019); **Zitto Zuberi Kabwe v. The President of the United Republic of Tanzania & Others** (Misc. Civil Cause No. 1 of 2020) [2020] TZHC 72 (18 March 2020); **Henry Zephyrnyne Kitambwa v. President of the United Republic of Tanzania and Others** (Misc. Civil Application No. 33 of 2018) [2019] TZHC 16904 (19 December 2019); **Emmanuel S. Stephen v. President of the United Republic of Tanzania and Others** (Misc. Civil Application No. 12 of 2019 [2020] TZHC 1850 (17 June 2020); **Godwin Bernad Kagaruki v. The Hon. President of Tanzania & Others** (Civil Appeal No. 270 of 2020) [2022] TZCA 188 (5 April 2020); **Godfrey M. Makori v. His Excellency The President of the United**

Republic of Tanzania and Another (Civil Appeal No. 67 of 2008) [2013]

TZCA 2295 (5 July 2013) to mention but a few.

We are settled in our minds, and agree with Prof. Shivji that, subsection (4) of section 4 of the BRADEA contravenes Articles 26 (1) and 13 (6) (a) of the Constitution which advocates on accountability and equality before the law. Also, we may add here that, it interferes with the powers of the court conferred under Article 107A of the Constitution by limiting who should appear before it. We say so because, in dispensation of justice, it is useless if the court can make orders that are incapable of being complied with or cannot be enforceable, see: **21st Century Food and Packaging Ltd v. Tanzania Sugar Producers Association and 2 Others** (Civil Appeal No. 91 of 2003) [2005] TZCA 31 (15 June 2005) and **Abdullatif Mohamed Hamis** (supra). Finally, we wish also to restate the unwavering position of this Court that, in this country all persons are equal before the Constitution and other laws of the land.

For the foregoing reasons, we allow the 7th ground of appeal and declare subsection (4) of section 4 of the BRADEA, unconstitutional.

In respect of the 4th and 5th grounds of appeal, Dr. Nshala faulted the High Court for imputing ulterior motive of *inter alia* private gain or publicity

or bad faith to public interest litigation without a shred of evidence derived from a credible study and consequently holding that the purpose of the impugned subsections (2) and (3) of section 4 of the BRADEA, as amended was to weed out such persons from filing applications under Article 26 (2) of the Constitution. He added that, it was wrong for the High Court to conclude that the purposes of the above referred subsections were to weed out frivolous and vexatious applications without taking cognizance of section 8 (2) of the BRADEA which gives power to the High Court to strike out frivolous and vexatious applications after due process of the law. This provision (section 8 (2) of the BRADEA), he insisted, existed even before the contested amendment and therefore, it was superfluous for the legislature to purport doing it under subsections (2) and (3) of section 4 of the BRADEA as amended. It was Dr. Nshala's firm submission that, in any case, whether or not an application is frivolous or vexatious cannot be determined *a priori* by a piece of legislation.

According to him, subsection (2) of section 4 of the BRADEA has changed public interest litigations to personal interest litigation by requiring the application to be accompanied by an affidavit stating the extent to which the contravention of the provisions of Articles 12 to 29 of the

Constitution has affected the petitioner personally. Such amendment, he argued, aimed at annulling the rights conferred by the Constitution, which is not acceptable. In support of his arguments, Dr. Nshala cited the following decisions of the Court. **The Attorney General v. Jeremia Mtobesya** (supra); **Paulo Revocatus Kaunda v. The Speaker of the National Assembly & The Attorney General**, Civil Appeal No. 167 of 2021 [2025] TZCA 183 (7 March 2025) and **Zitto Zuberi Kabwe v. The President of the United Republic of Tanzania and 3 Others** (supra). Finally, Dr. Nshala urged us to allow the appeal on the discussed grounds.

Ms. Sekimanga had nothing useful to reply to the arguments by Dr. Nshala on the above grounds of appeal. She only reiterated her submission in respect of the 1st, 2nd and 3rd grounds of appeal.

The main argument by the appellant calling for our determination is that, section 4 (2) of the BRADEA has changed public interest ligation to personal interest ligation by requiring the petitioner to express how he is/was personally affected by the contravention of the provisions of the Constitution, particularly basic rights and duties under Part III of Chapter One of the Constitution. This provision as quoted above, provides in mandatory terms that no application shall be admitted by the High Court

unless it is “accompanied by an affidavit stating the extent to which the contravention of the provisions of Articles 12 to 29 of the Constitution has effected such person personally”. The way we look at the appellant’s complaint, we think, and indeed, it is the position, the respondent misunderstood its gist. The issue, in our considered view, is not on affidavit as a document, the issue is the objective it seeks to achieve or undermine. It is very unfortunate that even the High Court fell under the same trap. We say so because, having traced this issue from the record of appeal, we have realized that before the High Court, the respondent misconstrued the whole concept of *locus standi* from an Indian perspective where in public interest litigations, the petitioner is not required to show that he has personal interest and if he will be acting on personal interest, his petition will be rejected by the court. In the present matter, they twisted it to justify that, he actually has to show personal interest as provided for under subsection (2) of the section 4 of the BRADEA. At page 646 of the record of appeal, the High Court quoted and relied on the decision of the Supreme Court of India in **S. P. Gupta v. Union of India**, AIR 1982 SC 149, 1981; where, while dealing with the issue regarding public interest litigations, it said:

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

The excerpt above is very clear and does not require application of other rules of interpretation except the literal meaning as it uses a very plain and simple language. It is so surprising that immediately after that quotation, the High Court remarked as follows:

*"The respondent maintained that the impugned provisions are intended to limit or deter the busybodies from filing cases in courts of law **even where there is no infringed right by respective petitioner. Further, it is trite law and leaning that, for one to institute a case he has to demonstrate locus***

*stand/his rights which constitute a cause of action, thus filing of [a] case. Thus, it is by so doing the filing of cases, be it civil or constitutional **will be legally regulated and the Court is not put to pressure of having many cases from Busybodies** who have either no task to do or searching for publicity nor any other hidden goal from themselves or someone else. The amendment of the BRADEA accommodate the challenges under which the Public Interest Litigation may be faced and accord locus to the bona fide and litigant with sufficient interest under section 4 (2) of the BRADEA (Supra)."*

[Emphasis added]

We further note that, the High Court took a view that subsection (2) of section 4 of the BRADEA came as a procedural gadget purposely for filtering public interest petitions. At page 652 of the record of appeal, the High Court made an observation to the effect that:

*"The Court is of strong finding that, it is not only desirable but also reasonable in the interest of Justice to apply a "**public litigation petition filter rule**" or rather what we call "a*

*public litigation case filter doctrine” imposed under section 4 (2) of the BRADEA (Supra) for the petition of public litigation to be supported with an affidavit. Such requirement will serve the following purposes: **First**, [it] will safeguard [the] court to entertain litigation not or a false hypothesis of public interests but private interests brought in the umbrella of public interests. **Second**, it will [bar many] petitioners with the mala fide intention who are likely to file petition on public litigation basis which are not real of public interests. It is not easy for the Civil Court to establish mala fide intention of the parties unless there is an affidavit in support of such petition. **Third**, attachment of affidavit helps to avoid multiplicity of cases which are not based on public interests. As a result, help the Court to evade huge unnecessary backlog of cases. **Forth**, attachment of affidavit is a compliance of the law since the Constitutional Court is guided by BRADEA Procedural Rules to deal with cases fairly, within reasonable time and at a proportionate cost. **Fifth**, filtration of public litigation cases by way of affidavit attachment to the petition will avoid hindrance*

*to speedy disposal of other matters as the Court will have time to deal with other real cases. **Sixth**, it serves resources of the Court and of the parties. It follows, therefore, that the impugned provisions of the BRADEA (supra) are rationally connected to their objective and not based on unfair or irrational considerations.”*

With respect, we are not persuaded by the above finding of the High Court because by virtue of subsection (2) of section 4 of the BRADEA which purports to deal with public interest litigation, the petitioner is required to demonstrate how he has been affected personally instead of how the public has been affected or the Constitution has been violated by a certain act or omission.

The purported filtration of cases and its advantages as stipulated by the High Court, in our humble view, cannot be done in the manner expressed. It is common knowledge that, the court which receives and determines petitions, stands better position to gauge whether the petition falls squarely within the purview of public interest litigation than any other institution. The point is that, whether a constitutional petition raises frivolous or vexatious matters is an issue which has always all along been

determined by a single Judge of the High Court under section 10 (1) of the BRADEA, which provides that:

*"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 added].

That is to say, it could not be for the National Assembly to assist the court from the very outset to determine matters that are frivolous or vexatious. Rather, it is for the court to do so. We have, therefore, failed to find any justification of the enactment of such restrictive law. A good law in a democratic State should not hinder or prevent anyone from accessing the court to enforce any rights, leave alone, protection of the Constitution. We are also of the firm position that, filtration of cases cannot be done at the expense of baring people to come to court to access justice and question constitutional violations. Without prejudice, however, we find that the amendment of section 4 (2) of the BRADEA has taken away the jurisdiction

of the court to hear and determine public interest petitions from individuals who are committed to discharge their duty under the Constitution, and that, this Court cannot, under any circumstances, bless it.

It is, thus, our finding and we so hold that, the requirement of demonstrating personal interests by an individual intending to file public interest petition under subsection (2) of section 4 of the BRADEA and subsection (3) of section 4 of the same Act which subject a petitioner to the procedure of personal interest litigation as alluded to above, renders those provisions inconsequential and unconstitutional. They bar access to justice in the above explained context. In that respect, they contravene Article 26 (2) of the Constitution by ousting the powers of the court to deal with such matter. In the event, we allow the 4th and 5th grounds of appeal.

Mr. Mpoki submitted in respect of the 6th ground of appeal which challenged the decision of the High Court in respect of the standard and burden of proof required in Constitution petitions. He faulted the High Court for misconstruing the *obiter dictum* in the case of **Rev. Christopher Mtikila** (supra) and holding that the required standard is one beyond reasonable doubt. Currently, he argued, the position has changed following court's decisions in **Julius Francis Ishengoma Ndyanabo v. The**

Attorney General [2004] TLR 14 and **The Attorney General v. Dickson Paulo Sanga** (Civil appeal No. 175 of 2020) [2020] TZCA 371 (5 August 2020), where the Court stated categorically that, the standard of proof stated in **Rev. Mtikila's** case (*supra*) no longer holds water. He argued further that, since both decisions are the decisions of the Court, then the lower courts are bound to follow the most recent decision; insisting that the required standard in constitutional litigations is on balance of probability. In the circumstances, he, as well, faulted the High Court for holding that the appellant failed to prove his case to the required stand of establishing a *prima facie* case and not just to draw *inferences* on balance of probabilities as in normal civil cases, as it can be seen at page 655 of the record of appeal.

Further, Mr. Mpoki faulted the High Court for relying on the respondent's assertion that, the amendment of the BRADEA is saved by Article 30 (2) of the Constitution holding that the justification for the amendment of section 4 of the BRADEA, particularly subsection (2), is to limit individual or litigants who have their cases admitted in court. According to him, the respondent admitted that the amendment took away rights of prospective petitioners. He referred us to pages 30 and 31 of the

record of appeal where the respondent replied to the originating summons to the effect that, the impugned provisions of the BRADEA do not violate Article 26 (1) and (2) of the Constitution but rather are saved under the provisions of Article 30 (2) of the Constitution; and that what the impugned provisions have done, is to compliment what is in the Constitution. He, as well, referred us to paragraph 14 of the respondent's counter affidavit found at page 37 of the record of appeal where he intimated that, the respondent admitted to the existence of limitation brought by the amendment of the BRADEA without indicating what it is. For easy reference, the petitioner claimed under paragraph 9 of his affidavit that:

"That Constitution provides for the right to non-discrimination, the right to be heard and access to court, as well as the duty to respect the Constitution and laws of the land, the duty to protect the Constitution and the right to enjoy fundamental human rights by all individuals and state organs."

[see page 15 of the record of appeal].

In response, at page 37 of the record of appeal, the respondent stated:

"That the contents of paragraph 9 of the Petitioner's affidavit are noted. The respondent

*states that such rights are not absolute and **their limitations are permitted** under the provisions of the Constitution and that the amendment of the BRADEA has position objective towards protection against abuses of court process initiated by frivolous and vexatious petition.”*[Emphasis added].

Apart from that, Mr. Mpoki took us to page 77 of the record of appeal where, among the proposed issues by the respondent was:

"Whether the impugned provisions are saved by Article 30 (2) of the Constitution."

In addition, he said, the respondent did not indicate to us to which part of Article 30 (2) of the Constitution she was making reference to, because that sub-Article has six (6) paragraphs (a) to (f). Un expectedly, even the High Court made a similar conclusion that the violations complained of were made in good faith and thus are saved under Article 30 (2) of the Constitution with no mention of a specific part of the sub article referred.

The learned counsel also referred us to page 701 of the record of appeal where the High Court took the view that, the question as to whether or not the impugned provisions of the BRADEA are saved by Article 30 (2)

of the Constitution was not proved by the appellant in paragraph 3, 6 and 7 of the originating summons. Relying on the principle in the decision of **Julius Ndyanabo** (supra), Mr. Mpoki argued that, since the respondent admitted that there is restriction on fundamental rights, the appellant had no obligation to prove what had been admitted by the other side. In the circumstances, he argued, the High Court ought to have agreed with the appellant and show that there was an infringement of fundamental right because there was nothing to say otherwise in the record. Instead, he wondered, at page 702 of the record of appeal, the High Court advanced six reasons why the petition failed which he argued, were extraneous because they did not come from the record. Being guided by the decision in **Ndyanabo's** case (supra), it was his firm submission, that the High Court was wrong to rely on what was not stated by the respondent as they failed to show that the restriction was necessary under Article 30 (2) of the Constitution.

Mr. Mpoki brought to our attention the fact that, the petitioner raised an alarm to the High Court that the respondent did not show public interest that is saved through the provision of the law that discriminates ordinary persons seeking to vindicate the Constitution as required under Article 26

(2) of the Constitution, but the High Court did not consider it. However, ultimately, the High Court decided based on factors not stated by the respondent. He thus urged us to set aside the holding of the High Court that the appellant failed to prove the violation of fundamental right, to the required standard; instead, it was the respondent who failed to discharge her duty and allow the appeal.

Replying to the submission by Mr. Mpoki, Ms. Sekimanga submitted that, much as they are aware of the decision of the Court in **The Attorney General v. Dickson Paulo Sanga**, the Constitution is a mother law, so for such petition, the standard of proof has to be beyond reasonable doubt. According to her, the amendment of section 4 of the BRADEA to include subsections (2) to (5) is saved by Article 30 (1) and (2) (a) and (b) of the Constitution as stated by the respondent in her reply written submissions to the petitioner's written submissions, as it can be seen at page 91 of the record of appeal.

This ground of appeal invites us to determine what is the standard of proof required in constitutional matters and whether the contested amendment was saved by article 30 (1) and (2) (a) and (b) of the Constitution as was argued by Ms. Sekimanga. Mr. Mpoki addressed us at

length as to how the High Court misdirected itself by holding that the standard of proof required in constitutional matters is beyond reasonable doubt. However, we did not receive any response meriting our attention from Ms. Sekimanga or any one from her team. Her reply was merely that the standard of proof is beyond reasonable doubt because the Constitution is a Mother Law. We did not know why Ms. Sekimanga thought we would accept her reasoning to be the justification for imposing such a higher standard of proof in constitutional matters! At least, we were unable to fathom the reasoning. In determining this issue, the High Court at page 655 of the record of appeal, had this to say:

*"Needless the afore [mentioned] findings, we agree with the submission in reply by the Respondent on four points: **One**, the standard required in petition of this kind is that of establishing a prima facie case and not just to draw inferences on balance of probabilities as in normal civil cases. Our jurisprudence on standard of proof on constitutional case can be traced [in] the case of **Rev. Christopher Mtikila v. Attorney General** [1995] TLR 31 and later confirmed in several decisions including the case of **Centre for Strategic***

Litigation Limited & Another v. Attorney General & 2 Others, Misc. Civil Cause No. 21 of 2019 (unreported). A proof by establishing a prima facie case (Criminal) was also restated in the case of **The Attorney General v. Dickson Paul Sanga**, Civil Appeal No. 175 of 2020, Court of Appeal of Tanzania at Dar es salaam (unreported)".

With respect, we wish to state at once, as correctly submitted by Mr. Mpoki, that there was a serious misdirection on the part of the High Court because the cited High Court decisions set a different position from what the Court held in the case of **The Attorney General v. Dickson Paul Sanga** (supra). At the expense of clarity, we find it necessary to reproduce what the Court said in **Dickson Paul Sanga's** case (supra) while making reference to the case of **Julius Ndyanabo** (supra) here under:

*"In the light of the cited case, we agree with the respondent that, while the respondent had a duty to establish a prima facie case which he discharged, the burden shifted to the appellant who was duty bound to prove that the impugned provision is not violative of the Constitution. We need not say more. In the premisses, **we do not agree with the appellant that in constitutional petitions it is incumbent***

on the petitioner to prove his case beyond reasonable doubt. This renders the fifth ground of appeal not merited.” [Emphasis added]

As it can be observed from the excerpt above, the Court pronounced itself clearly that the standard of proof required in Constitutional Petitions is not beyond reasonable doubt. Besides, we are not amused by the argument by Ms. Sekimanga that the standard of proof in Constitutional Petitions is high because the Constitution is a mother law. In the same vein, we as well decline her invitation that we should depart from our position in **The Attorney General v. Dickson Paulo Sanga** (supra) for any reasons.

We will now address the issue of whether the disputed amendment is saved by Article 30 (1) and (2) (a) and (b) of the Constitution, as was contended by Ms. Sekimanga. Article 30 (1) and (2) (a) and (b) of the Constitution is to the following effect:

"30 -(1) The human rights and freedoms, the principles of which are set out in this Constitution, shall not be exercised by a person in a manner that causes interference with or curtailment of the rights and freedoms of other persons or of the public interest.

(2) It is hereby declared that the provisions contained in this Part of this Constitution which set out the principles of rights, freedom and duties, does not render unlawful any existing law or prohibit the enactment of any law or the doing of any lawful act in accordance with such law for the purposes of;

(a) ensuring that the rights and freedoms of other people or of the interests of the public are not prejudiced by the wrongful exercise of the freedoms and rights of individuals;

(b) ensuring the defence, public safety, public peace, public morality, public health, rural and urban development planning, the exploitation and utilization of minerals or the increase and development of property of any other interests for the purposes of enhancing the public benefit."

We will deal with the above provisions, one after the other. Article 30

(1) above saves the law whose objective would be to curb situations where a person's enjoyment of his rights and freedoms may interfere with or curtail other people from enjoying their rights. The objective of article 30

(2) (a), is to save only laws and actions which are meant to deter enjoyment of an individual's right which in the process of doing so, it may

interfere with interests of the public. Sub-article (2) (b) of article 30 saves laws and actions which are for the common good of society like ensuring communal defence and security, public safety, public peace, public morality, public health, rural and urban development and mineral exploitation and development projects.

In this case Ms. Sekimanga did not elaborate to us, how would unrestricted defending the Constitution under article 26 (2) of the Constitution, interfere with enjoyment of other peoples' rights (article 30 (1)), interfere with interests of the public (article 30 (2) (a)), or impede realization of the communal good (article 30 (2) (b)).

In summary, **firstly**, being guided by the doctrine of recent decision, we cannot casually depart from the position we set in **Dickson Paul Sanga** (supra) that, in constitutional petitions it is not incumbent on the petitioner to prove his case beyond reasonable doubt. **Secondly**, the amendment to section 4 of the BRADEA is not saved by article 30 (1) and (2) (a) and (b) of the Constitution. Having said so, we allow the 6th ground of appeal.

Regarding the 8th ground of appeal, Mr. Seka submitted that the High Court erred in holding that the exhaustion of available remedies as

provided for under subsection (5) of section 4 of the BRADEA was a condition precedent before seeking redress through a constitutional petition. He was of the firm position that if this provision is to be connected with Article 26 (1) of the Constitution, that provision is unconstitutional. He urged the Court to pronounce itself as to whether the BRADEA covers the right under Article 26 (1) and (2) of the Constitution. This, he said, is because we have no procedure to safeguard rights under that Article.

In addition, he said, this right has been exercised in adjudication of matters without problems for quite long and without a requirement of exhausting other remedies. He cited some examples including; **The Director of Public Prosecution v. Daudi Peter** (supra) and **Kukutia Ole Pumbun and another v. The Attorney General** [1993] TLR 159; **Chumchua Marwa v. Officer i/c Musoma Prison & The Attorney General**, Misc. Criminal Cause No. 2 of 1988 (unreported).

Therefore, for him the introduction of a requirement of exhaustion of other available remedies under any other written laws, is unconstitutional. Mr. Seka tried to evaluate whether there are other available remedies in other laws and it was his submission that, **first**, if one is to file a civil suit by plaint or petition, then will be required to show that he or she is

personally affected. As a result, the right under Article 26 (1) of the Constitution is not available. **Second**, if one thinks of an appeal, this is a right of a person aggrieved by a decision, thus, has a personal interest; and **third**, in judicial review, he said personal interest has to be shown in the sense that one has to show how he or she is affected personally. The learned counsel insisted that these are the only three ways he could think of. He challenged the counsel for the respondent for not mentioning any of the remedies envisaged or referred to under subsection (5) of section 4 of the BRADEA.

He opposed the submission by the respondent at the High Court where it was stated that one can approach the court through the Commission for Human Rights and Good Governance to enforce a public right. It was his argument that, if one has to approach the court through that route, he or she will not succeed because section 22 (4) (b) of the Commission for Human Rights and Good Governance Act requires first exhaustion of all available remedies. Therefore, he submitted that those are not available to a person who has no personal interest. He took the view that, the requirement of showing personal interest and exhaustion of other available remedies which do not exist constituted an overreaction by the

Parliament through the amendment. He faulted the legislature for not considering what is provided for by case law regarding exhaustion of available remedies. He supported his argument with the decision of the Court in **Kukutia Ole Pumbun** case (supra) at page 217 to 218, where it is stated that whoever wants to vindicate the Constitution is free to choose the venue and forum.

Mr. Seka submitted firmly that subsection (5) of section 4 of the BRADEA is vague by referring to all available remedies which do not exist. He went on to argue that the BRADEA contradicts what is provided in the Constitution. It was his further argument that currently, a person who knocks the door of the court under Article 26 (1) of the Constitution has to follow an unwritten procedure. He urged us to allow this ground of appeal.

Ms. Sekimanga responded that, the alternative available remedies referred to under subsection (5) of section 4 of the BRADEA are provided by other laws. Without disclosing to us which were those laws, she cited the case of **Freeman Aikael Mbowe v. The Director of Public Prosecutions and Others** (Civil Appeal No. 382 of 2021) [2024] TZCA 836 (30 August 2024), referring us to page 11 of that decision. Also, she referred us to page 698 of the record of appeal and concurred with the

decision of the High Court which held that the requirement of exhaustion of other available remedies was in existence in the BRADEA even before the amendment of section 4.

Having heard the rival arguments from the counsel for the parties, the issue as to whether subsection (5) of section 4 of the BRADEA is unconstitutional calls for our determination. Mostly, as it requires exhaustion of alternative available remedies before lodging constitutional petition. This issue need not detain us much. The impugned provision provides:

*"(5) A petitioner shall, prior to seeking redress under this Act, **exhaust all available remedies** under any other written laws."*

[Emphasis added]

The question that follows is: What are those available remedies? Mr. Seka submitted firmly that, there are no other available remedies for a constitutional petitioner acting under Article 26 (1) of the Constitution to enforce the rights under the Constitution, Ms. Sekimanga had nothing useful to respond. She referred us to the decision of the Court in **Freeman Aikael Mbowe's** (supra), which is by very far distinguishable from the matter at hand. The said case was not a public interest petition. The

appellant therein was fighting for his personal rights. On appeal, the Court distinguished between illegal conducts and those which are unconstitutional *per se* and came up with the conclusion that effective remedies to address the appellant's complaints exist within the ordinary law and thus the petition was premature for want of exhaustion of the available remedies.

Apart from that decision, Ms. Sekimanga referred us to page 698 of the record of appeal where the High Court said that, the requirement to exhaust local remedies was in existence in the BRADEA even before the amendment of that Act and that section 4 of the BRADEA is a replica of section 8 (2) of the same Act. It is relevant at this juncture to consider if that provision existed, why then was it necessary to have subsection (5) of section 4 of the BRADEA? According to Mr. Seka, the amendment of that provision to include subsection (5) of section 4 was unnecessary and an overreaction on the part of the Parliament. As such, he said, the impugned provision hinders a prospective petitioner who intends to exercise his right under Article 26 of the Constitution.

We had an opportunity to revisit section 8 (2) of the BRADEA which provides:

"(2) The High Court shall not exercise its powers under this section if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law, or that the application is merely frivolous or vexatious."

In the light of the provisions above, we agree with the High Court that the said requirement existed even before the amendment of section 4 of the BRADEA. We note that at page 699 of the record of appeal, the High Court agreed with the petitioner that exhaustion of [available] local remedies is a challenging component as it is not easy to make a clear and direct claim of exhaustion of available remedies. Nonetheless, through the discussion and determination, the High Court failed to answer the appellant's argument that there are no other available remedies to enforce the right under Article 26 of the Constitution except by way of petition to the High Court, as it has been the practice since the introduction of the Bill of Rights in the Constitution.

In the circumstances and having weighed the arguments by the counsel for the parties, we agree with the appellant's position. As such, in terms of Articles 26 and 30 (3) of the Constitution, the High Court is vested

with powers to deal with constitutional matters seeking to protect the Constitution or expose its violation. We are of the considered view that, the inclusion of subsection (5) of section 4 of the BRADEA was necessitated by the whole idea of requiring a public interest petitioner to file an affidavit demonstrating his personal interest in the petition as introduced by subsection (2) of the same Act which we have already declared unconstitutional. With that idea, it is possible to require a petitioner, since the petition will be on personal interest, to exhaust other available remedies before instituting a constitutional petition, as it was decided in the case of **Freeman Aikael Mbowe** (supra) cited to us by Ms. Sekimanga. Short of that, we must say, currently there are no known regulations to enforce Article 26 of the Constitution other than the practice which had existed for quite a number of years in our legal system. For that reason, we find that the amendment of section 4 of the BRADEA to include subsection (5) was superfluous and quite unnecessary in the circumstances. The 8th ground of appeal is thus, merited.

Having made the above findings that the impugned provisions of the BRADEA are unconstitutional, we allow the appeal, set aside the judgment of the High Court and reverse all the resultant orders that were issued by

that court. Finally, we direct that, within 12 (twelve) months from the date of this judgment, sections 6 and 7 of the Written Laws (Miscellaneous Amendments) (No. 3) Act, 2020, which amended section 4 of the BRADEA, be repealed by the Parliament of the United Republic of Tanzania; failure of which, the amendment under consideration in that Act shall have no legal force. We make no order as to costs.

DATED at DAR ES SALAAM this 12th day of June, 2025.

M. C. LEVIRA
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

P. J. NGWEMBE
JUSTICE OF APPEAL

The Judgment delivered this 13th day of June, 2025, via video link, in the presence of the Appellant in person who was also represented by Prof. Shivji Issa, Mr. John Seka, Mr. Rugemeleza Nshala, Mr. Paul Kisabo, all learned advocates for the Appellant and Ms. Narindwa Sekimanga, learned Senior State Attorney assisted by Ms. Lucy Kimaryo, learned State Attorney for the Respondent is hereby certified ~~as a true copy~~ of the original.



J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL

