

A attack on the so called thief. Their common intention may be inferred from *their presence, their actions* and the omission of any of them to dissociate himself from the attack... [emphasis supplied].

B Furthermore, we also think that the sentence of 21 years imprisonment meted out to the second appellant was too severe particularly in the light of the mitigating factors that were presented to the Court.

C In the event, we allow the appeal, quash the convictions and set aside the sentence. The appellants are to be released from prison unless they are lawfully held therein.

D **ELIZABETH STEPHEN AND ANOTHER v. ATTORNEY GENERAL**

E HIGH COURT OF TANZANIA
AT DAR ES SALAAM
(Massati, Shangwa and Mihayo, JJ)

F MISCELLANEOUS CIVIL CAUSE No. 82 OF 2005

Constitutional Law – Interpretation of constitutional provisions – Context of the constitution is essential in interpreting constitutional provisions.

G *Constitutional Law – Basic Rights – Enforcement of basic rights – Whether it is appropriate to seek enforcement of every basic right infringed by petitioning the High Court.*

H The two petitioners were widows. Their uncontroverted depositions showed that by operation of the provisions of certain paragraphs of the Second Schedule to the Local Customary Law (Declaration) (number 4) Order, Chapter 358 RE 2002, their basic rights were infringed, in that they were denied to benefit from the estates of their late husbands and to participate in the administration of those estates. They petitioned the High Court praying for a declaration that those paragraphs are unconstitutional and

A thus null and void, and for an order striking out the paragraphs. Counsel for the respondent conceded that the impugned paragraphs give preferential treatment to men as opposed to women but counsel contended, however, that other adequate means of redress for the contraventions alleged were available to the petitioners, and should have been exhausted first instead of petitioning the High Court. B

Held: (i) The impugned paragraphs are discriminatory in ways more than one, and are unconstitutional;

(ii) Other adequate means of redress for the alleged contraventions were available to the petitioners and should have been pursued; C

(iii) A judicial process is not the appropriate medium for tackling the problem of bias against women posed by the impugned provisions;

(iv) A constitution must not be construed in isolation, but in its context which includes the history and background to its adoption. D

Orders accordingly

Cases referred to: E

- (1) *China Heman International Cooperation Group v. Slavand K.A. Rwegasira*, [2006] T.L.R. 193
- (2) *Aloyce Msella v. Consolidated Holding Corporation*, CAT - Civil Appeal number 11 of 2002 (unreported) F
- (3) *Habiba Industries Limited and Two others v. Tanzania Investment Bank and Another*, CAT - Civil Application number 159 of 2004 (unreported)
- (4) *Director of Public Prosecutions v. Daudi Pete*, [1993] T.L.R. 22 G
- (5) *Kukutia Ole Pumbun and Another v. Attorney General and another*, [1993] T.L.R. 159
- (6) *Julius Ishengoma Francis Ndyababo v. Attorney General*, [2004] T.L.R. 13 H
- (7) *Ephraim v. Holaria Pastory and Another*, HC-MZA-(PC) Civil Appeal number 70 of 1989 (unreported) I

- A** (8) *D.P.P. v. Ally Haji Ahmed and Ten others*, CAT - Criminal Appeals number 44 and 45 of 1985 (unreported)
- (9) *Maseba Gandhi v. Union of India*, (1978) 2 SCR 621
- B** (10) *Leorance Mutalindwa v. Mariadimu Edward*, [1985] T.L.R. 120.
- (11) *Kabuye s/o Essore v. Mturi Nyegeri*, [1989] T.L.R. 172
- (12) *Kagembo s/o Nilalita v Daudila s/o Bigura*, [1967] HCD, n.1
- C** (13) *Scholastica Benedict v. Martin Benedict*, [1993] T.L.R. 1
- (14) *Christopher Mtikila v. Attorney General*, [2006] T.L.R. 246
- (15) *Attorney General v. W. K. Butambala*, [1993] T.L.R. 46
- D** Statutory provisions referred to:
- (1) The Notaries Public and Commissioners for Oath Act, Chapter 12 RE 2002, section 8
- E** (2) The Constitution of the United Republic, Articles 12(1) and (2), 13(1), (2) and (5), 29(1) and (2), 30 (3)
- (3) The Basic Rights and Duties Enforcement Act 1994, Chapter 3, RE 2002, sections 4, 8(1) and (2)
- F** (4) The Local Customary Law (Declaration) (number 4) Order, Chapter 358 RE 2002, paragraphs, 1-3, 5, 19-23, 25, 27 – 38, 41, 42, 44, 47-51
- (5) The Judicature and Application of Laws Act, Chapter 358 RE 2002, section 12
- G** *Ms Genevieve Kato* and twelve others, for the Petitioners

JUDGEMENT OF THE COURT

(Dated 8 September 2006)

- H**
- I** **Mihayo, J:** The two petitioners, Elizabeth Stephen and Salome Charles are both widows. They have filed this petition under the provisions of Article 30(3) of the Constitution of the United Republic of Tanzania

(the Constitution) sections 4,5 and 6 of the Basic Rights and Duties Enforcement Act, 1994 (the Act) “*together with any other enabling provisions of the law.*” They are praying to this Court to declare unconstitutional paragraphs 1, 2, 3, 5, 19, 20, 21, 22, 23, 25, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 41, 42, 44, 47, 48, 49, 50 and 51 (the paragraphs) of the Second schedule to the Local Customary Law (Declaration) (No. 4) Order, 1963, G.N. 436 OF 1963 for violating their basic rights as guaranteed under Articles 12(1) and (2), 13 (I), (2) (4) and (5) and 24 (I) of the Constitution and various international Articles and conventions that Tanzania is a party. They are also praying to this Court to consequently strike out the said paragraphs. They are also praying for costs and any other reliefs.

The petitioners are being advocated for by a team of thirteen advocates namely, Ms Genevieve Kato, Ms Nakazael Lukio Tenga, Mr. Julius Ndyababo, Mr. Eugene Mniwasa, Mr. Bahame Nyanduga, Mr. Alphonse Katemi, Mr. Mohamed Tibanyendera, Ms Athanasia Soka, Mr. Alex Mgongolwa, Ms Magdalena Rwebangira, Ms Jessie Mnguto, Ms. Maria Kashonda and Dr. R.W. Tenga. The respondent is the Attorney General.

Before going further, we would like to put a few matters in their proper perspective. The Basic Rights and Duties Enforcement Act, 1994 is now [cap 3 R.E. 2002]. The Local Customary Law (Declaration) No. 4) Order is [Cap 358 R.E. 2002] (Subsidiary Legislation). The phrase “and any other enabling provisions of the laws” is now a useless embellishment. The law has now been settled that in all applications, if one does not cite the enabling provisions of the law which give the power to the Court to do what it is requested, or if one cites the wrong provisions, the Court is not properly moved and the application would be struck out. (See (C.A) *China Heman International Cooperation Group v. Salvant K.A. Rwegasira* (1), *Aloyce Msella v. The Consolidated Holding Corporation* (2), and *M/s Habiba Industries Ltd. and 2 others v. Tanzania Investment Bank & another* (3). The phrase may have been useful once upon a time, but surely not now.

A The petition is supported by two affidavits one deposed by each applicant. For purposes of this petition the central paragraphs in the affidavit of Elizabeth Stephen are saying the following:

- B 4. That I contracted a customary marriage with one Masesa Malge, now deceased, which took place in 1989 at Tambukareli Shinyanga and my husband died in 1999 and was buried at Mshikamano area in Shinyanga.
- C 1. That during the lifetime of our marriage, my husband and I, through our joint efforts acquired several properties which later formed part of the estate of my deceased husband and one of such properties is a house situated at Tembukareli within Shinyanga township.
- D 2. That immediately my husband died my brother in law ordered me to vacate the said house and after I had vacated he rented the same and is collecting and spending and rent collected for his personal use.
- E 3. That my resistance to vacate the house failed because I was told that according to customary law of the Sukuma a widow and/or daughter cannot inherit the estate of her deceased husband and/or father.

F On her part, Salome Charles made oath and stated the following, *inter alia*:

- G 4. That on the 1 January 1999 I contracted a customary marriage with one Richard Machalo which took place at Ngokolo within Shinyanga Township and continued to live peacefully until the 28 August 2000, when my husband died.
- H 5. That when we married, my deceased husband had already built a house at Ngokolo area within Shinyanga township and that house was the matrimonial house for lives (*sic*) in the said house together with our child.

I That through our joint efforts we also acquired a motor vehicle salon car (*sic*).

A That when the husband died my brother-in-law and mother-in-law ordered me to vacate the matrimonial house on the ground that I never contributed on the said house and the other properties forming the estate of the deceased therefore I had to leave and went to live in rented house. B

C That currently the motor vehicle has been sold and the house is being rented and nothing has been allocated to both me and my child because my brother in law has taken over the whole estate for his personal use.

D That I lost my rights over my husbands estate because the customary laws of inheritance of the Sukuma do not allow the widowed and/or daughters to inherit estates of their beloved deceased husband/father.

E The Attorney General was represented by one Alice Chingwile who deposed a counter affidavit in that behalf. We are however not sure in what capacity Alice Chingwile "swore" that counter affidavit. And, as if that is not bad enough, the counter affidavit is incurably defective for offending the provisions of section 8 of the Notaries Public and Commissioners for Oaths Act [Chapter 12 R.E. 2002] which has this to say:

- F 8 Every Notary Public and Commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made.

G The counter affidavit in question does not show the place and the date, it was made nor taken. This document therefore is a nothing and we so hold.

H The hearing of this petition was conducted by way of written submissions. Learned counsel for the petitioners argued in effect, that by operation of the impugned provisions of the Local Customary Law (Declaration) (number 4), Order, 1963, (the Order) the petitioners have been denied to benefit from their late husbands' estates and to participate in the administration of the estates. I

A Learned counsel for the petitioners opened their arguments by referring the Court to the general principles governing constitutional interpretations as held in the cases of *Director of Public Prosecution v. Daudi Pete* (4); *Kukutia Ole Pumburn and Another v. Attorney General and Another* (5) and *Julius Ishengoma Francis Ndyana v. Attorney General* (6). They concluded by saying that the provisions touching on fundamental rights should be interpreted in a broad and liberal manner so as to ensure the peoples' enjoyment of these rights.

C First, learned counsel submitted that the impugned provisions are unconstitutional because they discriminate women on the basis of gender. They violate human rights principles against discrimination, equality and equal protection as guaranteed under Articles 12(i), (2) 13(i) and 29(i) and (2) of the Constitution, because the impugned provisions are discriminative as defined in Article 13(5) of the Constitution.

E The advocates for the Petitioners carried us through the impugned provisions. On paragraph i, which reads:

Urithi kufuata upande wa ukoo wa kiume

F Learned counsel said the paragraph discriminates against women and has the effect of giving an impression that family property is entirely owned by men. Further, they said that this provision binds people into a clan without considering that wives do not belong to that clan.

G Secondly counsel attacked the provisions under paragraphs 27, 47, 48 and 49 the totality of which deny women equitable share of inheritance because:

H widows are not allowed to inherit from the estate of their husbands (27) mothers are not allowed to inherit from their sons (47) uncles are given preference (48) and male relatives are given preference over females and discrimination of widows *vis-a-vis* the female members of the deceased husband's clan (49).

I

A Thirdly counsel for the petitioners complained about paragraphs 20, 31 and 51. Learned counsel said these limit women to conduct their ways of life. Under paragraphs 20 and 31 women are not allowed to dispose clan land, they are forced to be perpetual dependants of their children and male relatives while men are not. Moreover widows B are practically forced to marry a clan member to enable her to reside in the matrimonial house, otherwise, marrying a male outside that clan will most likely result into her being kicked out of the home.

C Fourthly they complained about paragraphs 19, 22, 23, 25, 30, 32, 33, 34 and 35. These, learned counsel submitted, are discriminatory as they propagate the beliefs about the inferior state of women. The law places heirs in classes, the women in the last class their age notwithstanding. And as per paragraphs 2, 3, 5 and 29, the men are D given the duty to administer the estate of the deceased.

E Learned counsel referred the Court to the next set of paragraphs as 38, 41, 42 and 44 where men are given the right to legitimise children and experience has shown that male children are legitimized more than girls. However, learned counsel said, women are not allowed to legitimize heir illegitimate children. And finally, that there is no equality of inheritance among the children irrespective of gender and age which operates in favour of older male childrent F

G All these paragraphs fall within the ambit of discrimination as defined in Article 13(5) of the Constitution, learned counsel went on to submit and sought to move the Court under Article 30(3) of the Constitution to adjudicate on the matter before it.

H The advocates for the petitioners also referred the Court to a litany of International Treaties (Treaties) that Tanzania has ratified which provide, among others, for the elimination of discrimination against women. They invited the Court to find that these Treaties are an additional obligation to Tanzania to enforce the fundamental rights as outlined in the Constitution as their ratification was not a mere formality. Learned counsel further told the Court that as a I reason of Tanzania recognizing the right to equal protection of the

- A laws (*sic*) as fundamental and because Article 29(i) of the Constitution states that all citizens of the country have the right to enjoy fundamental human rights, Tanzania is bound, under Article 29(i) of the Constitution to ensure that women enjoy the rights (*sic*) to equality and equal protection or (*sic*) the laws.

Among the highlighted international treaties the Court was referred to are (i) The Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) which calls upon states to remove all affronts to women (ii) The African Charter on Human and People's Rights where Article 18(3) thereof states:

The state shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declaration and conventions.

(iii) The convention on the Rights of the Child, which provides for the protection of children and (iv) the International Covenant on Economic Social and Culture Rights.

The advocates for the petitioners invited us to use these international treaties to interpret our laws as was done in *Ephraim v. Holaria Pastory and Another* (7) and *DPP v. Ally Haji Ahmed and 10 others* (8) where the Court of Appeal held:

in interpreting the constitution the Courts have to take into account the provisions of the Universal Declaration of Human Rights of 1948 and other treaties which Tanzania has ratified

Learned counsel also referred the Court to other decisions from this region, Africa and India where the case of *Maseba Gandhi v. Union of India* (9) as used with approval in *Daudi Pete* (4) was referred. They concluded by saying that the Bangalore Principles of 1988 encouraged the domestic application of International Human Rights norms and invited us to act the same Finally, learned counsel prayed for the following:

- (a) A declaration that the said paragraphs are null and void and are unconstitutional.

- (b) That the said paragraphs be struck out.
(c) That the respondent be given specific time to amend the law accordingly.

In reply, the Attorney General started by saying that probate administrators are not beneficiaries of the estate of a deceased but rather, overseers thereof. The beneficiaries are allowed to sue administrators who misuse the estate of the deceased. The Attorney General went further and said that in the present matter, letters of administration were granted to the male family members of the deceased, but their wives never went to Court to contest such grant as they should have done.

The Attorney General took the view that had the petitioners gone to Court, they could certainly have succeeded because "*Courts have always been sympathetic*" to member of the deceased's family who have been denied their rights. He referred the Court to the case of *Leorance Mutalindwa v. Mariadimu Edward* (10). The Attorney General submitted further that the petitioners did not exhaust all available remedies before filing this petition.

The respondent concedes to the principles of human rights on non discrimination. The Attorney General went on to argue:

In recognition of the fact that, certain groups of persons such as women and girl children are particularly vulnerable to discrimination, it has adopted corrective measures in order to safeguard their rights. One of those rights is the inclusion of the provisions in the Constitution which prohibits discrimination the basis (*sic*) of gender of other types of discrimination.

He went on to quote Articles 13(1) and 13(2) of the Constitution and concluded that as Attorney General, he is not responsible for what happened to the petitioners, because they failed to pursue their rights through the legal machinery under the civil law. It was the conclusion of the respondent that this petition be dismissed and petitioners be directed to pursue their rights through civil action.

Advocates for the petitioners countered in rejoinder that it is not the requirement of the law to exhaust every available avenue for an aggrieved person before filing a constitutional case in Court. Learned

A counsel referred the Court to section 4 of the Basic Rights and Duties Enforcement Act, 1994 and argued that the section does not place any restriction that a person shall only come to this Court in a constitutional matter when he/she has exhausted all available remedies.

B On the submission that Courts have always been sympathetic to women as was shown in the *Mutalindwa* case (10) learned counsel submitted that that was judicial activism which depended on the presiding judge. For example they said, in the case of *Kabuya s/o Essore v. Mturi Nyegeri* (11) the Court upheld the impugned customary law to be applicable. The Court was further referred to the case of *Kagombo s/o Nitalita v. Daudila d/o Bigura* (12) and a Court of Appeal decision in the case of *Scholastica Benedict v. Martin Benedict* (13) where the Court was not sympathetic and applied rule 27 literally. Learned counsel for the petitioners repeated their prayers as stated above.

E We would wish to state it from the outset that we acknowledge the serious work and research put in by learned counsel for the petitioners. They assisted us a great deal.

F This is a constitutional dispute and like in all disputes of this nature, certain principles have to be applied. These principles have evolved through case law and are now fully embedded in our jurisprudence. Therefore constitutional interpretation principles as stated in *Daudi Pete* (4), *Kukutia Ole Pumbun* (5) and *Julius Francis Ndyabo* (6) are now settled and need no repetition. For purposes of this petition, we wish also to add a few others. These were stated in a recent decision of this Court in *Christopher Mtikila v. The Attorney General Misc.* (14) as:

- H (i) A Constitution must not be construed in isolation, but in its context which includes the history and background to the adoption of the Constitution itself.
- I (ii) Courts do accept that civilization owes quite as much to those who limit freedom as to those who expand it.

- (iii) Until the contrary is proved, legislation is presumed to be constitutional. If possible a legislation should receive such construction should receive such construction as will make it operative and not inoperative.

B But we should always bear in mind that not every infringement of basis rights should be declared unconstitutional. The Court of Appeal in *Attorney General v. W.K. Butambala* (15) said at page 51 (Makame, J.A).

C We need hardly say that our Constitution is a serious and solemn document. We think that invoking it and knocking down laws or portions of them should be reserved for appropriate and really momentous occasions. Things which can easily be taken up by administration initiative are best pursued in that manner.

D Nine years latter the Basic Rights and Duties Enforcement Act (the Act) [Chapter 3, R.E. 2002] was enacted. Section 8(2) of the Act has this to say:

- E 8(1)
- F (2) The High Court shall not exercise its powers under this section if it is satisfied that adequate means or 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.

The powers stated in section 8 are provided in paragraph (a) of sub section (1) of that section which says:

- G 8(1) The High Court shall have and may exercise original jurisdiction:
- (a) To hear and determine any Application made by any person in pursuance of section 4.

H It may be proper at this stage to revisit section 4 of the Act which was a subject of interpretation in the arguments filed. This section says:

- I 4. If any person alleges that any of the provisions of sections 12 to 29 of the Constitution has been, is being or is likely to be contravened

A in relation to him, he may, without prejudice to any other action with respect to this same matter that is lawfully available apply to the High Court for redress.

B It appears to us that whereas under section 4, an aggrieved person may take two avenues for redress, this is qualified under section 8(2). If the Court is satisfied that other avenues for redress are or have been available those avenues had better be exhausted first before one comes to Court. We are satisfied that this is good for two main reasons. First, to preserve the sacrosanct nature of the Constitution and to bring to Court only matters of great importance and leave the rest to be dealt with by other authorities.

D Luckily, the issues in this petition are common ground. That the impugned provisions under the Order are discriminatory is not contested. That the impugned paragraphs under the Order place women as inferior to men is also not very much contested. It is also common ground that those paragraphs give preferential protection of men than women under the law. For example, under paragraphs 20, 31 and 51, the options of women to conduct their way of life are limited.

F The Attorney General argued that our Courts have always been sympathetic to members of the deceased family who have been denied their rights to the estates of their husbands or fathers, referring to the *Mutalindwa* case (10). We have gone through that judgment. The part of the judgment that impressed the Attorney General is where this Court (Katiti, J.) was deciding the issue as to whether a female has legal competence to dispose of clan-*shamba*. This Court said, *inter alia*:

H But I would like to add, may be in passing, that at any one time, we may have bad as well as good law, and I venture to say, without qualms, that this piece of customary law is bad, it discriminates against women, encourages expansionist greed on the part of males against female relative, and deprives female important resources for self assistance....

I

A We would wish to agree with learned counsel for petitioners that the decision in *Mutalindwa* was not out of sympathy but rather, the learned judge took what he thought was a fair and just position.

B If we may pose and state this, Courts will very rarely, and in unique situation act on sympathy, usually in matters where the Court is required to use its direction in arriving at a decision. Courts will always administer the law, even if heavens fall. In administering the law, sometimes, Courts use the principles of equity, which is defined in the **Black's Dictionary**, (7 ed) at page 560 as follows: C

The recourse to principles of justice to correct or supplement the law as applied to particular circumstances – the judge decided the case by equity because the statute did not fully address the issue.

D It is therefore not correct to say that the Court in *Mutalindwa* acted with sympathy. And in any case, the petitioners' learned counsel came up with a barrage of authorities showing that Courts have always stuck to the letters of the law.

E After agreeing that the impugned paragraphs are discriminatory in more ways than one we have thought whether it will be in the best interest to give the orders prayed for. In reaching our decision, we are guided by a number of factors. We are aware that what the Order did was to declare and recognize some of the customs of the people which were there for many years before. These customs evolve and change with time, a process that does not end, nor can it be ended.

G In some matrilineal societies today, uncles are running away from schooling their sister's children in favour of the children's biological fathers. In the Wasukuma tribe fifteen years ago the daughter of your aunt was called aunt number two. Now, she is called a cousin like in other tribes. There are tribes where at one time, cousins could marry, a custom now dead and buried. The wave of inter-marriages between tribes and races has dealt a serious blow to some and in fact, many, of our customs. A good number of these are dead and others are dying.

I

A What we are saying is this. It is impossible to effect customary change by judicial pronouncements. A legal decision must be able to take immediate effect, unless overturned by a higher Court. For customs and customary law, it would be dangerous and may create chaos if Courts were to make judicial pronouncements on their B Constitutionality. This will be opening the pandora's box, with all seemingly discriminative customs from our 120 tribes plus following the same path.

C The legislature saw this danger and in its wisdom, came up with section 12 of the Judicature and Application of Laws Act [Chapter 358 R.E. 2002] which has this to say:

D 12(1) A district council may, and where the Minister so requires shall, record in writing a declaration of what in the opinion of the Council is the local customary law relating to any subject either as applying throughout the area of the council or in any specific part thereof, and submit such declaration to the Minister.

E A district council may, if in the opinion of the council it is expedient for the good government and welfare of the area, submit for the consideration of the Minister a recommendation for the modification of any customary law, whether or not a declaration has been recorded.

F If the Minister is satisfied that a declaration recorded under sub section (1) accurately records the local customary law with respect to the subject to which it relates, or that a modification recommended under subsection (2) is expedient and that such local customary G law or modification is not incompatible in its terms or by necessary implication with any written law, he may by order direct such declaration or such modification to be the local customary law in respect of the subject and within the area to which it relates and shall cause such H declaration or modification to be published in such manner as he may deem expedient.

I Notwithstanding the foregoing provisions of this section, no declaration or modification shall include any provision purporting to declare any

A act or omission criminal, and the Minister may amend any declaration deemed to have been made under this section in order to remove any such provision.

..... [not relevant]

B We are of the considered opinion that the provisions of the foregoing section would provide the best avenue to remedy the situation now complained of. The advantage of this avenue is that it will start from the grass roots where any custom is felt and a decision will be acceptable C and implementable by the majority.

D On the foregoing and the reasons we have given, we decline to grant the order prayed for and advise that for now, as regards the petitioners, the normal legal process of administration of deceased's estates be followed. We make no order as to costs.

E
**ABDUL – KARIM HAJI v. RAYMOND NCHIMBI ALOIS
AND JOSEPH SITA JOSEPH**

F
**COURT OF APPEAL OF TANZANIA †
AT ZANZIBAR**

(Mroso, Nsekela and Msoffe, JJA)

G
CIVIL APPEAL No. 99 OF 2004

(From the judgment and decree of the High Court of Zanzibar at Vuga, Kihio, J.
dated 25 March 2004 in Civil Case number 33 of 2003)

H
Civil Practice and Procedure – Burden of Proof – Malicious Prosecution – Respondents failed to marshal strong and reliable evidence in the Trial Court to prove that appellant had maliciously prosecuted them – Whether Trial Court was entitled to find in favour of the respondents.
I