

- A Court and declare that section 111(2) of the Elections Act 1985, is unconstitutional and, therefore, devoid of any legal force *ab initio*, that is to say, from the date of its enactment. For the avoidance of doubt, it must be distinctly stated that, since the subsection has been so declared,
- B the provisions of rule 11(3) of the Elections (Elections Petitions) Rules 1971, as amended, are still in force and, therefore, the powers conferred upon the High Court by those provisions may, in appropriate cases, be invoked by the Court in favour of petitioners. One of the results of
- C section 111(2) being struck down for being unconstitutional is that the sum of money which a petitioner is required to pay as security for costs in a parliamentary election petition is still five hundred shillings. Bearing in mind the decline of the value of the shilling which has taken place since 1971, when the Rules were made, it cannot be disputed that
- D that sum is now too little to serve any useful or practical purpose in terms of providing security for costs, but it is not within the competence of this Court or any other Court, for that matter, to amend the Rule.

E

**JUDGE-IN-CHARGE, HIGH COURT AT ARUSHA AND
THE ATTORNEY GENERAL v. NIN MUNUO NG'UNI**

F

**COURT OF APPEAL OF TANZANIA
AT ARUSHA**

(Makame, Ramadhani and Lugakingira, JJ.A.)

G

CIVIL APPEAL No. 45 OF 1998

(Appeal from the Judgment of the High Court of Tanzania at Arusha, (Mapigano, Mchome, and Rutakangwa, JJ.A.), dated 17 March 1998, in Civil Cause No. 3 of 1993, reported in [1998] T.L.R. 464)

H

Civil Practice and Procedure – Appeal – Cross appeal – Notice of Cross Appeal to the Court of Appeal – Respondent files Notice of Cross Appeal seven days after the Notice of Appeal is filed and well before the Memorandum of Appeal is filed – Whether the Notice of Cross Appeal is properly filed – Rule 87 of the Tanzania Court of Appeal Rules 1979.

I

Natural Justice – Right to be heard – Suspension without first being heard – Advocate suspended from practice – Whether the advocate had the right to be heard before being suspended – Section 22(2) of the Advocates Ordinance Chapter 341.

A

Advocates – Suspension from practice – Advocate suspended from practice without first being heard – Whether section 22(2) of the Advocates Ordinance dispenses with the right to be heard.

B

Basic Human Rights – Right to a just remuneration for one's work as guaranteed under the Constitution – TZS. 500 prescribed as the maximum remuneration to an advocate for legal representation in the High Court – Whether an infringement upon the constitutional right – Section 4(2) of the Legal Aid (Criminal Proceedings) Act 1969 and Article 23(2) of the Constitution of the United Republic.

C

Civil Practice and Procedure – Damages – Special damages – Special damages awarded where they are not specifically pleaded – Whether the award is proper.

D

E

Constitutional Law – Separation of Powers – Administration of justice – Final authority in the administration of justice – High Court finds an action or enactment invalid or unconstitutional – Whether the Court should not declare it invalid or unconstitutional but should refer the matter to some other organ of state for remedy – Section 13(2) of the Basic Rights and Duties Enforcement Act 1994 and Article 107A of the Constitution of the United Republic.

F

The respondent, an advocate of the High Court based in Arusha was assigned six Court briefs to represent accused persons at a High Court criminal session in Babati. He refused to accept them, whereupon the first appellant suspended him from practice, pending a reference to the High Court. He petitioned the High Court asking for, *inter alia*, an order that his suspension was illegal for breach of natural justice, a declaration that section 4(2) of the Legal Aid (Criminal Proceedings) Act 1969 prescribing a maximum remuneration of TZS. 500 to an advocate for a legal aid brief was *ultra vires* the Constitution, and an award of damages. He was successful in the High Court [1998] T.L.R. 464, and hence this appeal.

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H

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A Seven days after the appellants had filed their Notice of Appeal the respondent filed a Notice of Cross Appeal. At the hearing the appellants contended that the respondent should not have filed his notice until after the Memorandum of Appeal was filed as rule 87(2) of the Tanzania Court of Appeal Rules 1979 provided for the right to file a cross appeal within a period of 30 days after the filing of the Memorandum of Appeal. The Court heard submissions on the preliminary objection as well as on the merits of the appeal.

C **Held:** (i) Rule 87 of the Tanzania Court of Appeal Rules 1979 does not prohibit the filing of a Notice of Cross Appeal before filing, or before receipt of a copy of, the record and Memorandum of Appeal; the respondent, therefore, was entitled to file his Notice of Cross Appeal as he did;

D (ii) section 22(2)(b) of the Advocates Ordinance, which gives a judge of the High Court power to suspend an advocate, does not dispense with the right to be heard, and current trend and tempo of human rights demand that there should be a right to be heard even for such interim decision;

E (iii) The first appellant's letter was not a mere "show cause" notice but an ultimatum showing that the first appellant had made up his mind to take disciplinary action against the respondent should the latter not take up the briefs assigned to him; the respondent, therefore, was not given any opportunity to be heard;

F (iv) section 4(2) of the Legal Aid (Criminal Proceedings) Act 1969, which prescribes a maximum of TZS. 500 as remuneration to an advocate for a legal aid brief, infringes the provisions of Article 23(2) of the Constitution which provides for the right to a just remuneration for one's work;

G (v) Following the Court of Appeal remarks in *Attorney General v. W.K. Butambala* (7) about the remuneration payable under section 4 of the Legal Aid (Criminal Proceedings) Act 1969 being grossly inadequate and out of date, the High Court was justified to hold that there was neglect on the part of the Attorney General in failing to initiate amendments to section 4 of the Act;

I (vi) Although, ordinarily, special damages have to be specifically pleaded and proved, in a case founded on breach of basic fundamental rights like this one, a mere statement or prayer of a claim for such damages may suffice for the Court to consider awarding them;

(vii) After finding that section 4(2) of the Legal Aid (Criminal Proceedings) Act 1969 offends the Constitution the High Court cannot stop short of declaring it invalid or unconstitutional and then refer the matter to Parliament or to some other authority as provided for under section 13(2) of the Basic Rights and Duties Enforcement Act 1994 because to do so would amount to giving "the final say in the administration of justice" to some authority other than the judiciary, and would also cause delay in the rendering of justice contrary to articles 107A(1) and 107A(2)(b) of the Constitution respectively;

C (viii) As striking the whole of section 4(2) of the Legal Aid (Criminal Proceedings) Act 1969 abolishes any sort of remuneration to advocates taking legal aid briefs and because it is not the entire section 4(2) that is unconstitutional but only the amounts stipulated therein, the High Court erred in striking out the whole of section 4(2) of the Act.

Appeal dismissed; cross appeal on quantum of damages allowed

Cases referred to:

- (1) *Rawal v. Mombasa Hardware* [1968] EA 392 E
- (2) *Mauji v. Arusha General Stores* [1968] EA 137
- (3) *Cooper Motors Cooperation (T) Ltd v. Arusha International Conference Centre* [1991] T.L.R. 165 F
- (4) *General Marketing Company Ltd v. A.A. Shariff* [1980] T.L.R. 61
- (5) *The Sste (Irish Pharmaceutical Union) v. Employment Appeals Tribunal* [1987] ILRM 36 G
- (6) *Irish Family Planning Association v. Ryan* [1979] IR.295
- (7) *Attorney General v. WK Butambala* [1993] T.L.R. 46
- (8) *Grace Ndeana v. Consolidated Holding Corporation*, CAT – Civil Appeal Number 76 of 1999 (unreported) H
- (9) *Cooper Motor Cooperation Ltd v. Moshi/Arusha Occupational Health Services* [1990] T.L.R. 96
- (10) *Dr Ally Shabhay v. Tanga Bohora Jamat*, CAT – Civil Appeal Number 40 of 1997 (unreported) I

- A (11) *Rev. Christopher Mtikila v. Attorney General* [1995] T.L.R. 31
- (12) *Smith v. East Elloe Rural District Council* [1956] AC 736
- (13) *DC Kiambu v. Republic and others* [1960] EA 109
- B Statutory provisions referred to:
- (1) Tanzania Court of Appeal Rules 1979, GN 102/1979, r.87(1) and (2)
- (2) Advocates Ordinance Chapter 341, section 22(2)
- C (3) Legal Aid (Criminal Proceedings) Act 1969, Act Number 21 of 1969, section 4(2)
- (4) Basic Rights and Duties Enforcement Act 1994, Act Number 33 of 1994, section 13(2)
- D (5) The Constitution of the United Republic of Tanzania 1977, articles 23(2), 107A(1) and 107A(2)(b)

Mr. Kamba, PSA for the Appellants

JUDGMENT

(Dated 5 March 2002)

- F **Ramadhani, J.A.:** The respondent, NIN Munuo Ng'uni, is an advocate of the High Court of Tanzania based at Arusha. On 4 November 1993 the High Court of Tanzania, Arusha Registry, assigned him six Court briefs for a criminal session in Babati. He did not accept them. So,
- G the learned Judge in charge of the High Court, Arusha, suspended his practice pending a reference to the High Court. He filed a suit claiming a number of things: That his suspension was illegal and that it should be lifted, that the Court should make a declaration
- H that the Legal Aid (Criminal Proceedings) Act 1969, Act Number 21 of 1969, (hereinafter referred to as Act Number 21 of 1969) is *ultra vires* article 23 of the Constitution of the United Republic of Tanzania, 1977, (hereinafter referred to as the Constitution), and
- I that he should be awarded damages.

A He was successful in the High Court before a panel of three judges since it was a claim under the Basic Rights and Duties Enforcement Act 1994, Act Number 33 of 1994, (hereinafter referred to as Act Number 33 of 1994). The appellant filed a Notice of Appeal on 20 March 1998 and the respondent filed a Notice of Cross Appeal on 27 March 1998, that is, seven days afterwards. B

At the hearing Mr Kamba, Principal State Attorney, represented the appellants while the respondent appeared in person. The appellants raised a preliminary objection which we heard but reserved our ruling to the present. We now give it. C

The appellants claimed that the notice of cross-appeal by the respondent was filed contrary to rule 87(2). Mr Kamba submitted that the respondent was required to file a notice of cross-appeal after a copy of Memorandum of Appeal by the appellants was served on him and that he had thirty days in which to do so. Mr Kamba contended that the respondent jumped the gun, so to speak. D

The respondent simply said that the moment he received a copy of the Notice of Appeal by the appellants, he knew that he was the respondent and, therefore, he could only file a cross-appeal. He pointed out that rule 87(2) does not bar a person from filing a cross-appeal before service of a Record of Appeal and a Memorandum of Appeal. E He submitted that rules should not be used to thwart substantial justice. F Mr Kamba admitted that the appellant has not been prejudiced in any way by the filing of the notice of cross-appeal before the respondent was served with a copy of the record and Memorandum of Appeal. G Now, it is trite law that procedural irregularity should not vitiate proceedings if no injustice has been occasioned; see: *Rawal v. Mombasa Hardware (1)*; *Mauji v. Arusha General Stores (2)* and *Cooper Motors Corporation (T) Ltd. v. Arusha International Conference Centre (3)*. So, this ground is lame. H

Then we agree with the respondent that rules should not be used to thwart justice. In fact a prominent judge in this jurisdiction, the late Biron, J. said in *General Marketing Co. Ltd. v. A.A. Shariff (4)* I

A at page 65, that rules of procedures are handmaids of justice and should not be used to defeat justice.

B To clinch it all, the thirteenth Amendment to the Constitution has promulgated article 107A which provides, in sub-article (2)(e), as follows:

(2) Katika kutoa uamuzi wa mashauri ya madai na jinai kwa kuzingatia sheria, mahakama zitafuata kanuni zifuatazo, yaani:

C [(a) ... to (d) not relevant]

(e) kutenda haki bila ya kufungwa kupita kiasi na masharti ya kiufundi yanayoweza kukwamisha haki kutendeka.

D That can be translated as follows:

(2) In the determination of civil and criminal proceedings according to law, the Courts shall have regard to the following principles, that is to say:

E [(a) ... to (d) not relevant]

(e) administering justice without being constrained too much by technical requirements, which are capable of stopping justice from being done.

F In this case we are totally convinced that apart from affording the appellants a win by knock out, the appellants are not in any way prejudiced, and granting their objection would only deny the respondent an opportunity of cross-appeal.

G Rule 87(1) and (2) provides as follows:

H 87(1) A respondent who desires to contend at the hearing of the appeal that the decision of the High Court or any part of it should be varied or reversed, *either in any event or in the event of the appeal being allowed in whole or in part*, shall give notice to that effect ...

I A notice given by a respondent under this rule ... shall be lodged in quadruplicate in the appropriate registry not more than thirty days

after service on the respondent of the Memorandum of Appeal and the Record of Appeal. [emphasis supplied] A

It is clear to us that there are two possibilities under this Rule. One, a party wants to appeal but is forestalled because the opposite party or parties has/have filed a Notice of Appeal first. So, the only venue open to him is to file a cross-appeal. In this case Mr Kamba conceded that the respondent was aware of the Notice of Appeal of the appellants and so, he could only file a cross-appeal. The second possibility is where a party is not intending to appeal at all but is wary of the appeal of the other party and is afraid of the consequences of the success of that appeal, in whole or in part; so he files a cross-appeal. B C

It appears to us that in the first instance, the party need not wait for the memorandum and Record of Appeal to be served on him. His cross-appeal has not been prompted by the appeal of the other party. However, a party in the second category needs to know the grounds of appeal of the intended appellant before he files his notice of cross-appeal. For such a person the rule provides that he files his notice of cross-appeal not later than thirty days after service on him of the memorandum and Record of Appeal. D E

It is our considered opinion that the aim of the rule is not to prevent the first type of an intended cross-appellant from filing his notice of cross-appeal but it protects the intended appellant from being ambushed by the second type of an intended cross-appellant. Hence the rule prescribes this period of thirty days as the outermost time limit for a person in the second category to file his notice of cross-appeal. Our opinion is that that rule does not prohibit a person to file a notice of cross-appeal before he is served with the record and Memorandum of Appeal. For the reasons given above we dismiss the preliminary objection. F G H

Mr Kamba had seven grounds of appeal and decided to combine the first two. In grounds one and two the complaint was that the learned judges erred in holding that the first appellant had a duty to give the respondent a right of hearing before exercising his powers I

A of suspending an advocate under section 22(2) of the Advocates Ordinance Chapter 341 as amended by Act Number 10 of 1990 (hereinafter referred to as the Ordinance).

B Mr Kamba, in our opinion, argued in the alternative: first he submitted that there was no need to give a right of hearing under the Ordinance and in any case the respondent was accorded that right by the first appellant. The learned Principal State Attorney reiterated the argument at the trial that Exhibit P3, a letter from the first appellant to the
C respondent, was a Notice to Show Cause and that the respondent ignored the opportunity to be heard. The respondent said that he gave evidence in Court and was not challenged. He submitted that Exhibit P. 3 was not a Notice of Hearing but it was a threat of administering
D an unspecified disciplinary action.

Section 22(2)(b) of the Ordinance provides as follows:

E Any judge of the High Court shall have power to suspend any advocate in like manner [i.e. from practising], temporarily, pending a reference to, or disallowance of such suspension by the High Court.

Does that paragraph dispense with the principle of natural justice of *audi alteram partem*, that is, hear the other side? We think not.
F Admittedly, the action of a High Court judge under that paragraph is purely interim and awaits the decision of the High Court, it nevertheless affects the rights of an individual. We agree with the learned trial judges that the current trend and tempo of human rights demands that there should be a right to be heard even for such interim decision.
G

In fact, nowadays, Courts in some jurisdictions, like the Eire Republic, demand not only that a person be given a right to be heard but that he be given an "adequate opportunity" to be heard; see: **The Irish Constitution**, by JM Kelly, (3 ed), by Gerald Hogan and Gerry Whyte (Butterworths, 1994) at page 350. We also agree with the judgment of McCarthy, J., in *The State (Irish Pharmaceutical Union) v. Employment Appeals Tribunal* (5) that:
I

... it is a fundamental requirement of justice that a person or property should not be at risk without the party charged being given adequate opportunity of meeting the claim, as identified and pursued. If the proceedings derive from statute, then, in the absence of any set or fixed procedures, the relevant authority must create and carry out the necessary procedures; if the set and fixed procedure is not comprehensive, the authority must supplement it in such a fashion to ensure compliance with constitutional justice.

We are aware that the *audi alteram partem*, like all legal rules, have exceptions. For instance, the whole object of censorship legislation would be defeated if a censorship board would be required to give adequate opportunity to be heard to a publisher who could not be readily traced: *Irish Family Planning Association v. Ryan* (6). But this case was not in that category.

To come back to the appeal, was the respondent given an opportunity to meet the claim of the first appellant? Was such opportunity given in Exhibit P3? Was it notice to show cause and that the respondent let go? The first appellant wrote to the District Registrar Exhibit P3 saying:

Following the discussions we had in my chambers yesterday, please write to Mr Munuo, Advocate, to inform him that I have seen his letter to you and I *have satisfied myself* that he has no good reasons for not taking the dock briefs assigned to him and that refusal by him to take them will result in immediate disciplinary action against him under Chapter 341 of the Laws. *He should signify acceptance by tomorrow.* [emphasis supplied]

We have no flicker of doubt in our minds, and we agree with the respondent, that this letter was nothing but an ultimatum. The first appellant had already made up his mind to take disciplinary action. He was not even in a position to accommodate a hearing, let alone giving that opportunity. So, whatever the appellant would have done, except taking up the briefs, would have been window dressing. So, we dismiss these two grounds of appeal.

A In the third ground of appeal the appellants averred that the learned trial judges erred in finding that the suspension order violated article 13(6)(a) of the Constitution:

B When the rights and duties of any person are being determined by the Court or any other agency, that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the decision of the Court or of the other agency concerned;

C We do not think that this ground should take much of our time. Entitlement to a fair hearing includes the principle of *audi alteram partem*. So, that principle is part of the Constitution. Since, we have found that the suspension order violated the principle of *audi alteram partem*, then, it has also violated the Constitution. So, this ground of appeal also fails.

E In the fourth ground, the appellants sought to fault the learned judges in holding that section 4(2) of Act Number 21 of 1969 has violated the basic rights of the respondent secured under article 23(2) of the Constitution. Mr Kamba conceded that a maximum remuneration ceiling of TZS. 500 imposed by section 4(2) is low. Nevertheless, he argued that it is not necessarily unconstitutional. The respondent merely acknowledged the admission of Mr Kamba that the amount is low and added that that was so in 1993.

F Admittedly the Act was enacted in 1969 and at that time TZS. 500 was substantial. But at the present time that amount is peanuts. G As such we entertain no doubt at all in our minds that that amount obviously infringes article 23(2) which provides:

Every person who works is entitled to a just remuneration.

H Now, the **Pocket Oxford Dictionary** defines the word "just" as:

Equitable, fair; deserved, due; well-grounded; right in amount; proper; exact.

I We are of the considered opinion that that definition speaks for itself and it needs no elaboration on our part. A remuneration of

A TZS. 500 for defending a serious criminal case like murder does not compare with any of the above quoted adjectives. We agree with the learned judges that section 4(2) of Act Number 21 of 1969 infringes article 23(2) of the Constitution. We, therefore, dismiss this ground of appeal. Of course, there is what is to be done to that offensive subsection. The learned judges struck it out. There is no ground of appeal challenging that though Mr Kamba addressed us on it. We shall deal with it shortly. B

C In the fifth ground the appellants sought to fault the learned judges for holding that the second appellant was to blame for his negligence to take steps to amend section 4(2) of Act Number 21 of 1969. Again Mr Kamba conceded that the Attorney General is duty bound to initiate amendments but argued that the respondent has also an obligation to draw the attention of the Attorney General to pieces of legislation needing revisiting. The respondent submitted that the Attorney General is the principal legal adviser to the Government under article 59(3) of the Constitution and contended that it was his duty to amend the offending section. Their lordships had this to say in their judgment: D

F In actual fact a number of repeals and amendments of the law have been made since the commencement of Act 16 of 1984. But nothing has been done to the impugned provision in order to bring Act 21 of 1969 into conformity with the basic rights provisions of the constitution. There being no evidence that the Attorney General has taken any steps in that direction, the reasonable inference is that he has been remiss in his duty and a charge of neglect, not negligence, has thus to stick. G

H For the sake of clarity we have to point out that Act 16 of 1984 referred to by their Lordships is the Constitution (Consequential, Transitional and Temporary Provisions) Act 1984. That Act gave the Government three years in which to bring existing laws into conformity with the basic rights provisions of the Constitution and thus stalling any action in that period of time.

I We are at one with the learned judges and, we wish to add, that this Court prompted the Attorney General into action in *Attorney*

- A *General v. WK Butambala* (7), which dealt also with section 4(2) of Act Number 21 of 1969. This Court said at page 54:

By way of post-script we desire to add that the fees payable under section 4 of the Legal Aid (Criminal Proceedings) Act 21 of 1969, may be grossly inadequate and out of date. We think something positive must be done...

- B This Court said that on 14 June 1991, yet up to 9 November 1993, when the cause of action in this matter arose, a period of almost thirty months, nothing was done by the Attorney General. In that appeal, just as in this one, the Attorney General was very ably represented. We, therefore, find that the learned judges were justified to hold that the charge of neglect was correctly placed at the door of the second appellant. We cannot fault them. This ground, too, fails.

- D The sixth ground was that the learned judges erred in holding that the reputation of the respondent was injured by the wrongful acts of the appellants. The learned judges said:

- E In relation to the first respondent, we take it [injury to reputation] to have reference to his failure to give the petitioner a hearing and so his decision to suspend the petitioner from legal practice; and in relation to the second respondent we understand it to have reference to his failure to have section 4(2) of Act 21 of 1969 amended appropriately.

- F Both Mr Kamba and the respondent reiterated their submissions for grounds one and four. However, the respondent added, and correctly so, in our opinion, that to an advocate with a blameless record for the sixteen years of practice, an illegal suspension is obviously injurious to his reputation. We agree with Mr Kamba that the second appellant has not in any way injured the respondent the neglect to amend section 4(2) of the Act did not in any way injure the respondent's reputation.
- G So, we have only to consider the first appellant,

We agree with the learned judges that:

- I We have come to the conclusion that this complaint has substance. It is certainly an infliction of great harm on the reputation of an advocate to call him undisciplined, as it was done in the *Majira* article... Mr Songoro

[learned Senior State Attorney] contends that there is no corroborative evidence that the petitioner has suffered such injuries, probably forgetting that a Court is entitled to believe the word of a complainant and to apply common sense.

However, the learned judges made it abundantly clear that "upon the evidence it cannot be held that the first respondent was behind the publicity given to the suspension order". Nevertheless, they found it as a fact that the *Majira* newspaper published it and their lordships were satisfied that "the suspension was bound to be known by the members of the public". But, we ask, would that have injured the respondent's reputation?

For the avoidance of doubt, we reiterate that the learned judges were emphatic that the first appellant was not behind the publication in the *Majira* newspaper. We agree with their lordships that the public was bound to know of the suspension. However, the public would only have known that the respondent was suspended because he refused to take up dock briefs protesting the payment of TZS. 500 per brief. We do not think that that would have injured his reputation even though the suspension was illegal. What injured the respondent's reputation was what *Majira* wrote, that he was undisciplined. That was not the work of the first appellant.

Thus even the first appellant did not injure the respondent's reputation and we, therefore, allow this ground of appeal.

The last ground was that the learned judges erred in law in their assessment of special and general damages. Mr Kamba pointed out that special damages have to be specifically pleaded and proved and that neither of the two was done. Mr Kamba said that the learned judges accepted a document produced by the respondent as evidence that his income was TZS. 300 000 per month (Exhibit P4). The learned Principal State Attorney pointed out that the respondent himself conceded that Exhibit P4 was not signed by its maker and therefore, it should not have been relied upon.

A The respondent, on the other hand, pointed out that damages were specifically pleaded in paragraph 17 of the Amended Plaintiff. The respondent also said that a lawyer is entitled to more than what was awarded him. He referred us to the decision of this Court in *Grace Ndeana v. Consolidated Holding Corporation*, (8) where this Court awarded a Head Teacher of a Primary School TZS. 50 million for defamation.

C In paragraph 17 of the Amended Plaintiff the respondent merely said:

That the petitioner's reputation has been injured by the respondent act or omissions and he claims damages amounting to TZS. 100 million.

D He did not say whether what he claimed was special or general damages. We agree with Mr Kamba that special damages have to be specifically pleaded and they were not in this case, even loss of earnings as an advocate. The learned judges were, of course, aware of this and they addressed themselves on the matter. This is what they said:

F The omission to plead the damages specifically is however, not fatal. The rule has been judicially evolved, and we consider it a sensible one, that a Court should take a liberal approach to rules of practice and procedure where basic rights and freedoms are invoked, so as to give to the complainant a full measure of his rights: see *Jaundoo v. AG*, [1971] AC 972 at 983; and *Rev. Longwe and others v. AG and another*. Miscellaneous Civil Appeal Number 11 of 1993 of the Malawi High Court (unreported). The rationale is that since the rights guaranteed by the Constitution are effectively enforced, and that to decline to examine the merits of a petition on the basis of a procedural technicality would be an abrogation of that duty. We wholly subscribe to that view.

H We have not been given any reason, let alone a good one, and we do not see any, why we should differ from our learned brothers in the view they have wholly subscribed to.

I But even this Court has been very liberal on the question of pleadings in respect of damages. We have held in *Cooper Motor Corporation*

Ltd. v. Moshi/Arusha Occupational Health-Services (9) at page 100 that it suffices in the case of general damages merely to aver that such damage has been suffered. We reiterated that in *Dr Ally Shabhay v. Tanga Bohora Jamat* (10). However, this Court said in *Cooper Motor Corporation* (9) that:

It is abundantly clear from the above quoted passage that *only general damages can be asked for by a "mere statement or prayer of a claim" and this is what has been done in this case.* [Emphasis supplied]

It is clear that this Court excluded asking specific damages by a mere statement or prayer. But since this is a claim on basic and fundamental rights, from above cited persuasive authorities from sister jurisdictions, we are duty bound to admit a mere statement and prayer in asking for specific damages, like loss of earnings from the practice as an advocate for the 17 months the respondent was suspended.

It is true that the respondent produced a document in support of his monthly income, which was not signed by the auditor, and so, it should not have been acted upon. However, we agree with the learned judges' opinion that an income of TZS. 300 000 per month for an advocate is rather on the low side. So, we fail to fault the learned judges on that score.

The respondent had six grounds in his cross-appeal but he decided to abandon the first four grounds and argued the last two, that is, grounds five and six. In ground five he averred that TZS. 5 million was not a fair compensation and that damages for injury to reputation should be enhanced. He asked us to consider his arguments in reply to ground five of the appeal. Mr Kamba also recapitulated what he had submitted in his appeal and concluded by saying that he was leaving the issue of general damages to the Court.

As we have already upheld the learned judges in their finding of injury to the reputation of the respondent, we have to consider whether or not TZS. 5 million is adequate compensation. In *Grace Ndeana* (8) the appellant borrowed some money from the National Bank of

- A Commerce and when she failed to pay, the respondent's agents went around Singida town in a van saying "*kukopa harusi kulipa matanga*" while they were advertising the auction of the mortgaged house. This Court awarded TZS. 50 million to the appellant, a Primary School Head Teacher, as compensation for defamation. Mr Kamba properly pointed out that in *Grace Ndeana* (8) defamation on the part of the respondent was proved. This case, therefore, is distinguishable from *Grace Ndeana* (8) as we have found that the action of the first appellant did not injure the respondent's reputation.

- C Even then we are prepared to find that the seventeen months suspension did cause mental pain and suffering to the respondent. We think also that a compensation of TZS. 5 million leans more on the low side since the respondent has been an advocate based in Arusha and Moshi for sixteen years and has a family. So, we think a compensation of TZS. 10 million may be adequate in the circumstances. So, we allow ground five of the cross-appeal to that extent.

- E In ground six of the cross-appeal, the respondent was claiming that the order of stay of execution granted to the appellants in their Civil Application Number 4 of 1998 perpetrated his pain and suffering. This ground was dropped because the respondent conceded that he ought to have sought a reference from that order of a single judge and that the order should not be a subject of cross-appeal because it was not a decision of the learned trial judges.

- G Now, we have to go back to what should be done to section 4(2) of the Act Number 21 of 1969 once we have upheld the learned judges that it infringes article 23(2) of the Constitution. We ask this in view of section 13(2)(a) of the Basic Rights and Duties Enforcement Act 1994. Subsection (2) and paragraph (a) of that section provides as follows:

- I (2) Where an application alleges that any law made or action taken by the Government or other authority abolishes or abridges the basic rights, freedoms or duties conferred or imposed by sections 12 to 29 of the Constitution and the High Court is satisfied that the law or

action concerned to the extent of the contravention is invalid or unconstitutional then

- (a) the High Court shall, instead of declaring the law or action to be invalid or unconstitutional, *have the power and discretion in appropriate case* to allow Parliament or other legislative authority concerned, as the case may be, to correct the defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it, and the law or action impugned shall until the correction is made or the expiry of the limit set by the High Court which ever be shorter, be deemed to be valid [emphasis added].

The learned trial judges considered that section and had this to say in their judgment:

Section 13(2)(a) is an extremely strange and curious provision, to put it mildly. It is certainly pregnant with problems, some of which are fundamental.... We consider that provision as an absurdity. It is impossible for the Court to apply it with any judicial candour. We have, therefore, to invoke the principle of harmonization, like the learned judge did in *Mtikila's case*. We also have to invoke the principle that fundamental rights provisions should be construed as to make them meaningful and effective, like it was done by the Supreme Court of Zimbabwe in *Salem v. Chief Immigration Officer and another* [1994] 1 LRC 343. With that we must proceed to declare that section 4(2), and not the whole Act, is unconstitutional, and nullify the same to the extent that it provides for unjust and unfavourable remuneration to the advocates who render services under the Act. We so do.

We have to reiterate what we have already said earlier that of the seven grounds of appeal by the appellants, and especially by the second appellant, the Attorney General, there is none seeking to fault their Lordships in making the above declaration. Was that an oversight? But could the Attorney General overlook such a stark declaration? Can we make an "adverse inference" of that omission, that is, silence signifies agreement with the declaration? However, Mr Kamba, in a by-the-way mood, when arguing ground three, that is, contesting that

- A section 4(2) of Act Number 21 of 1969 contravenes article 23(2), said "It was not proper for the learned judges to nullify that section 4(2) ... they should have given directions to appropriate authority ...". Since the declaration goes against the unambiguous provisions of 13(2) of Act Number 33 of 1994, we are duty bound to address it.

- Our first observation is that that subsection gives the Court "power and discretion in appropriate case to allow" the relevant organ to correct the defect impugned. The provision does not oblige the Court to refer the matter to the relevant organ in all cases but leaves it with "discretion" and then only in "appropriate case". Now, in the case of section 4(2) of Act Number 21 of 1969, our opinion is that it was not an "appropriate case" to refer the matter to the Attorney General after the same had been referred to him in *Butambala's* case (7), though not expressly, thirty months ago and after the expiry of the three years' period of grace under the Constitution (Consequential, Transitional and Temporary Provisions) Act 1984.

- E But is that subsection really necessary or is it "extremely strange and curious" or "absurd" as their Lordships found?

- F We have no doubt in our minds that that provision seeks to circumscribe the powers of the High Court in dealing with issues of fundamental rights. This was an overreaction on the part of the executive after the decision of the High Court in *Rev. Christopher Mtikila v. Attorney General* (11). But, with respect, the Courts have generally, and particularly in that case, demonstrated maturity in judicial restraint. So, we endorse what our brothers said about principles of harmonization and that of construing fundamental rights provisions so as to make them meaningful and effective. We would add two other reasons of departing from section 13(2) of Act Number 33 of 1994.

- H It was decided in *Smith v. East Elloe Rural District Council* (12), at pages 750-1, that Courts will not lean towards a construction which will oust their jurisdiction, though they must, of course, give effect to plain words. That was cited with approval in *DC Kiambu v. Republic and others* (13) at 114:

My Lords, I think that anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the Court, whether in order that the subject may be deprived altogether of remedy or in order that the grievance may be remitted to some other tribunal. But it is our plain duty to give the words of an Act their proper meaning...

Those observations are backed by the Thirteenth Constitutional Amendment of February 2000, introducing article 107A(1) and (2)(a), which provide that:

- (1) Mamlaka ya utoaji haki katika Jamhuri ya Muungano itakuwa mikononi mwa Idara ya Mahakama na Idara ya Mahakama ya Zanzibar, na kwa hiyo hakuna chombo cha Serikali wala cha Bunge au Baraza la Wawakilishi la Zanzibar kitakachokuwa na kauli ya mwisho katika utoaji haki. [emphasis supplied]
- (2) [already cited at p...above]
 - (a) ...
 - (b) kutochelewesha haki bila sababu ya kimsingi;

That can be translated as follows:

- (1) The authority of administering justice in the United Republic is vested in the Judiciary and the Judiciary of Zanzibar, and, therefore, no organ of the Government or of the Parliament or of the House of Representatives of Zanzibar shall have final say in the administration of justice. [emphasis supplied]
- (2) [already cited at p...above]
 - (a) ...
 - (b) not to delay justice without a good reason;

So, when section 13(2) of Act Number 33 of 1994 requires the High Court to stop short of declaring that an enactment or an action is invalid or unconstitutional and demands the Court to refer the matter to Parliament or another relevant authority to remedy the wrong, it

A is in our considered opinion, giving "the final say in the administration of justice" to that other organ. And that is contravening the express provision of the Constitution.

B Of course, compliance with the provisions of Act 33 of 1994 would also cause delay in rendering justice and that is also contrary to the article quoted above. This is because time will elapse between the decision of the Court and the action by the relevant organ and also during all this time the offensive law or action is allowed to go on. We dare point out that justice would be delayed for no apparent good reason.

However, if we uphold the decision of our learned brothers to strike out section 4(2) of Act Number 21 of 1969, then we are going to seal the abolition of any sort of remuneration to advocates for Court briefs. We dare say that the High Court erred in making that decision. We agree with their lordships that the whole of Act Number 21 of 1962 cannot be declared unconstitutional. But on the same reasoning we disagree with them in declaring the whole of section 4(2) unconstitutional. What contravene the constitution are only the amounts stipulated. But let us see what exactly section 4(2) provides:

F 4(2) Remuneration payable under this section shall not be less than *one hundred and twenty* shillings nor more than *three hundred shillings* in respect of each proceeding, or in respect of each accused where the certifying authority certifies that accused persons jointly tried should be separately represented:

G Provided that in the case of a proceeding before the High Court the Judge hearing the proceeding and, in the case of a proceeding before any other Court, the Chief Justice may, for special reasons, regard being had to the complexity of the proceeding or the duration thereof, authorize the payment of a higher remuneration not exceeding *five hundred* shillings in respect of each proceeding, or in respect of each accused person, as the case may be. [emphasis supplied]

I So, we strike out the amounts "one hundred and twenty", "three hundred" and "five hundred". However, since Court briefs will continue to be

assigned, we cannot leave a vacuum. We have to provide for remuneration for Court briefs to advocates at least until such time as the office of the Honourable Attorney General deems it fit to revisit that subsection.

B What criteria we use for fixing, at least the maximum amount of fees has exercised our minds a great deal. It is clear from section 4(2) quoted above that the fees payable for a dock brief is between TZS. 120 and TZS. 300. The payment of TZS. 500 is only for extraordinary cases. The fact that that amount is now the standard payment for Court briefs is a clear testimony, on the part of the Judiciary, that the stipulated fees are extremely low. So, to ameliorate the situation the Court administration has been giving the maximum amount under the current law, TZS. 500, which, too, we have already said is grossly inadequate and unconstitutional.

E When the Act was enacted in 1969 TZS. 500 was a substantial amount. At that time that sum was equivalent to USD 69 989, according to the Bank of Tanzania exchange rate of TZS. 7 1439 for one dollar. We think that justice will be done if we stick to the payment of USD 69, 989, that is, approximately USD 70. That amount, in terms of Tanzanian shillings, is TZS. 65 457-91 at the rate of TZS. 93 526 per dollar. So, we order that an advocate on Court brief be paid TZS. 65 500 in respect of each accused person. However, that is a substantial amount of money which has not been budgeted for. So, the new fees shall be payable from 1 July 2002. For the avoidance of doubt, the respondent was not seeking a relief on this issue because he had not taken up the Court briefs assigned to him, unlike in the *Butambala* case (7).

H So, we dismiss all the grounds of appeal with costs. We allow one ground of cross-appeal regarding quantum of general damages, also with costs.