IN THE HIGH COURT OF TANZANIA
(MAIN REGISTRY)

AT DAR ES SALAAM

(CORAM: MGETTA, MASOUD, AND KAKOLAKI, JJJ.)

MISCELLANEOUS CIVIL CAUSE NO. 19 OF 2021

JORAN LWEHABURA BASHANGE..... PETITIONER

VERSUS

THE CHAIRMAN OF NATIONAL ELECTORAL COMMISSION.....1st RESPONDENT

THE ATTORNEY GENERAL.....2nd RESPONDENT

JUDGMENT

19/04/2022 & 29/03/2023

Masoud, J.

The petition was brought by the petitioner, Joran Lwehabura Bashange, by way of originating summons. It was supported by affidavit verifying the pleaded facts as well as affidavit for admissibility, both sworn by the said petitioner. The respondents replied to the petition and filed counter affidavits sworn by Fausta Mosses Mahenga by the petitioner in

respect of the affidavit verifying pleaded facts and the affidavit of admissibility. In doing so, the respondents, on their part, opposed all of the allegations constituting the petition.

The petition challenges the constitutional validity of section 44 of the National Elections Act, Cap. 343 (herein after Cap. 343) and sections 45(5) and 13(7) of the Local Government (Elections) Act, Cap. 292 (hereinafter Cap. 292). It is alleged that the impugned provisions allow unopposed candidate for member of parliament and councilor to represent the constituency and the ward respectively, whilst a sole presidential candidate is elected by vote in a secret ballot and is not as such declared elected unopposed or uncontested.

In doing so, it was contended that by allowing unopposed candidates as afore said, the impugned provisions violate rights of citizens to vote, to elect representatives, and to participate in public affairs through elected representatives to the parliament and the local government authorities. It is therefore alleged that the provisions contravene articles 21(1) and (2) and article 26(1) of the Constitution.

The impugned provisions are for such reasons unconstitutional, null and void, and they should be expunged from the statute books, the petitioner so contends. With regard to article 26(1) of the Constitution, it was specifically alleged that the parliament contravened the provision by enacting such law and hence failure to protect the Constitution.

It was further alleged that the impugned provisions also violate the provisions of international instruments. It was in this respect that the petitioner contended that the provisions violate articles 13(1) of the African Charter on Human and Peoples' Rights, 1981, article 25(a) and (b) Of the International Covenant on Civil and Political Rights, 1966, and article 21(1) & (3) of the Universal Declaration of Human Rights, 1948.

On the part of the respondents, it was the thrust of their pleading that the impugned provisions are constitutional in that they serve a legitimate purpose and enhance democratic election. They are, for such reason, in compliance with the Constitution. As to the sole President candidate, they contended, he is subjected to vote and not declared elected unopposed or uncontested because of the national responsibilities attached to the position which are unlike the responsibilities of members of parliaments and councilors.

The central issue that arises from the record as above shown is whether the impugned provisions violate the invoked provisions of the Constitution. Incidental to this issue is whether the Constitution requires a member of parliament or a councilor to be elected by vote in a secret ballot, and in that respect it does not permit unopposed or uncontested candidate to be declared as elected when no election has in this respect been held.

Before answering the above issues, it was imperative for us to look at the affidavit evidence on the record verifying the pleading and the corresponding rival arguments made in the respective submissions by the learned counsel for both sides. We should at the outset state that Mr Mpale Mpoki, Mr Melchzedeck Joachim, and Daimu Halfani, learned Advocates represented the petitioner, while Mr Hangi Chang'a, learned Principal State Attorney, represented the respondents.

Our perusal of the affidavit evidence by the petitioner showed that the petitioner told the court that the category of unopposed or uncontested candidates for members of parliament and councilors of a ward is a creation which is not found in the Constitution. The petitioner deposed in the said affidavit that the Constitution requires such candidates nominated by their respective political parties to be elected by casting votes in a secret ballot

box by eligible voters of a particular constituency or ward as the case may be and not to be appointed.

The petitioner, accordingly, deposed that since the Constitution does not provide for the category of unopposed or uncontested candidate as afore stated, the impugned provisions are violative of the Constitution and the international conventions already mentioned herein above. They contravene the right to vote, and the principle requiring members of constituencies and wards' councilors to be elected members and representatives and not merely imposed by their political parties.

The petitioner's affidavit evidence had it that, the impugned provisions do not have any safeguard against abuse when they are implemented. Thus, there is nothing in place to avoid the provisions being used in a manner that encourages breach and corrupt practices in electoral processes, and the impugned provisions could not, for such reason, pass the proportionality test principle.

In addition, it was deposited that the impugned provisions are discriminatory in nature as the sole presidential candidate is subjected to vote and is elected, whilst other sole candidates are subjected to different

treatment. We were told in the same affidavit that, the impugned provisions encourage undue and unfair treatment of opponents and malpractices.

It was also deposited in the affidavit evidence that, the category of unopposed or uncontested candidates means that the candidates declared elected unopposed are not vetted by people through campaigns and voting and therefore not accountable to the people. In enacting such provisions, it was further deposed, the parliament exceeded its legislative powers.

The learned counsel for the petitioner relied on the same affidavit evidence to build up his submissions and arguments in support of the petition. The arguments were to the effect that while enacting the impugned provisions, the parliament exceeded its legislative power since the provisions are contrary to, in negation of, and in contravention of the Constitution. The excess of the said power would, according to the learned counsel, not have happened had the provision of article 26(1) of the Constitution been observed. Indeed, article 26(1) vests in every person a duty to abide by the Constitution.

Expounding on the category of unopposed candidates under the impugned provisions which according to the petitioner violates the

Constitution, the learned counsel for the petitioner brought to the attention of the court that franchise right, namely, the right to vote, in our country is, firstly, a statutory right provided for under the two pieces of legislation in which the impugned provisions were enacted; secondly, a constitutional right under article 5 and 77(1) of the Constitution; and thirdly, a fundamental basic right under article 21 of the Constitution.

It was argued that discrimination in treatment between sole presidential candidate and the sole parliamentary candidates and sole candidates in respect of ward councilors is not justified and hence discriminatory. Regard was in respect of this argument had on the provision of section 34 of the National Elections Act on election of a sole presidential candidate, section 44 of the National Election Act and section 13(7) and 45(2) of the Local Government(Elections) Act, cap.292 on sole candidates for election or by-election in a ward.

It was insisted that in a case like the present one, where the provisions are alleged to be in contravention of the Constitution, the alleged contravention is proved by affidavit and arguments. In this respect, the court was told through plethora of authorities from within and outside the jurisdiction, that the standard of proof ought to be on balance of probabilities

as opposed to beyond reasonable doubt as was very well held by the Court of Appeal in the case of **Attorney General v Dickson Paulo Sanga**, Civil Appeal No. 175 of 2020, and shown in several other cases relied on by the petitioner's counsel.

In relation to the foregoing, we were told that our duty is, in a case like the present one, to look at and compare the contravened provisions of the Constitution and the impugned provisions. And that, in doing so, this court has to take judicial notice of the said provisions pursuant to section 58 and 59 of the Evidence Act, cap. 6 R.E 2019.

In so far as categories of members of parliament and how they are obtained are concerned, we were told that the relevant provision is article 66(1) of the Constitution which provides a list of categories of members of parliament. Our attention was specifically drawn to article 66(1)(a) with regard to elected members of parliament representing the constituencies which, in Kiswahili, reads, "*Wabunge waliochaguliwa kuwakilisha majimbo ya uchaguzi*".

Our further attention was drawn to articles 76 (1) and 77(1) & (2) of the Constitution in which such category of members of parliament was

clearly mentioned in relation to by-election and election of such members of parliament by the people in accordance with the Constitution and law enacted by the parliament to regulate the election. The submission by the learned counsel for the petitioner underlined the fact that such members of parliament are to be elected by the people, the relevant election has to be held in accordance with the Constitution and procedure established by the law enacted by the parliament, which according to **Attorney General vs Lohay akonaay and Joseph Lohay** [1995] TLR 80 "*...must not be inconsistent with the Constitution*".

We saw it fit to reproduce the provisions of article 77(1) and (2) of the Constitution given its importance in this petition while we underlined its marginal note which in Kiswahili reads: "*Utaratibu wa uchaguzi wa wabunge wa majimbo ya uchaguzi,*" and which translated in English reads: "*procedure for election of members of parliament representing constituencies.*" The provision in Kiswahili reads, and we hereby quote thus:

> ***77***.*-(1) Wabunge wanaowakilisha majimbo ya uchaguzi watachaguliwa na wananchi kwa kufuata masharti ya Katiba hii na vile vile masharti ya sheria iliyotungwa na Bunge kwa mujibu wa*

Katiba hii inayoweka masharti kuhusu uchaguzi wa Wabunge wanaowakilisha majimbo ya uchaguzi.

(2) Isipokuwa pale ambapo Tume ya Uchaguzi, kwa mujibu wa masharti ya Katiba hii au Sheria iliyotungwa na Bunge kwa ajili hiyo, itaagiza vinginevyo, kutachaguliwa Mbunge mmoja tu katika jimbo la uchaguzi

The stance that the learned counsel sought to communicate in their submission in relation to the above provision of the Constitution was that the election of members of parliament by the people embraces a true democracy and that such members of parliament constitute a democratic parliament referred in the preamble to the Constitution. The relevant part of the preamble reads: "...*legislature composed of elected members and representative of the people*", and which in Kiswahili reads: "*Bunge lenye wajumbe waliochaguliwa na linalowakilisha wananchi.*"

It was in addition shown that articles 76 and 77 of the Constitution discussed herein above are further clarified by article 5 of the Constitution to the effect that every citizen of the United Republic who has attained the age of eighteen years is entitled to vote in any election in Tanzania. Again

given the significance of article 5 we decided to reproduce the entire provision of article 5 of the Constitution in view of its significance in this petition and understanding the import of articles 76 and 77 as alluded to by the learned counsel for the petitioner. The provision reads thus:

> ***5***.*-(1) Kila raia wa Tanzania aliyetimiza umri wa miaka kumi na minane anayo haki ya kupiga kura katika uchaguzi unaofaywa Tanzania na wananchi. Na haki hii itatumiwa kwa kufuata masharti ya ibara ndogo ya (2) pamoja na masharti mengineyo ya Katiba hii na ya Sheria inayotumika nchini Tanzania kuhusu mambo ya uchaguzi.*
>
> *(2) Bunge laweza kutunga sheria na kuweka masharti yanayoweza kuzuia raia asitumie haki ya kupiga kura kutokana na yoyote kati ya sababu zifuatazo, yaani raia huyo-*
>
> *(a) kuwa na uraia wa nchi nyingine;*
>
> *(b) kuwa na ugonjwa wa akiii;*
>
> *(c) kutiwa hatiani kwa makosa fuiani ya jinai;*
>
> *(d) kukosa au kushindwa kuthibitisha au kutoa kitambulisho cha umri, uraia au uandikishwaji kama mpiga kura,*
>
> *mbali na sababu hizo hakuna sababu nyingine yoyote inayoweza kumzuia raia asitumie haki ya kupiga kura.*

(3) Bunge litatunga Sheria ya Uchaguzi na kuweka masharti kuhusu mambo yafuatayo-

(a) kuanzisha Daftari la Kudumu la Wapiga kura na kuweka utaratibu wa kurekebisha yaliyomo katika Daftarl hilo;

(b) kutaja sehemu na nyakati za kuandikisha wapiga kura na kupiga kura;

(c) utaratibu wa kumwezesha mpiga kura aliyejiandikisha sehemu moja kupiga kura sehemu nyingine na kutaja masharti ya utekelezaji wa utaratibu huo;

(d) kutaja kazi na shughuli za Tume ya Uchaguzi na utaratibu wa kila uchaguzi ambao utaendeshwa chini ya uongozi na usimamizi wa Tume ya Uchaguzi.

We were subsequently shown how articles 5, 76, and 77 of the Constitution interpret and clarify the exercise of the right under article 21(1) of the Constitution. This is, it was argued, in line with the principle of interpretation of the Constitution which is to the effect that the primary aids to interpretation of the Constitution must be found in the Constitution itself, and the principle which requires all provisions of the Constitution concerning

an issue at stake to be read and considered together in order to get a proper interpretation, and give effect to the purpose of instrument.

With regard to such principles, we were referred to **Supreme Court Reference (No.**2 of 1995): **Reference by Western Highlands Provincial Executive** [1996] 3LRC 28 by the Supreme Court of Papua New Guinea; **Centre for Right Education and Awareness (CREAW) and Another vs Attorney General** [2011] 1 EA 83 at page 92; and **Foundation for Human Rights Initiatives vs Attorney General** [2008] 2 EA 120. All such authorities, in one way or the other, reflected and/or applied the above principles.

In line with the above principles of interpretation of the Constitution, we were told that members of parliament are the representatives of the people. They are, we were further told, a result of election in the constituencies in which the right to election and entitlement to vote under article 21 of the Constitution relate.

As to how the provisions of articles 5(1), 76, and 77 of the Constitution interpret and clarify article 21 of the Constitution, the latter provision was reproduced to us whilst underlining the phrase in the very provision which

in Kiswahili reads: "*...wawakilishi waliochaguliwa na wanangchi kwa hiari yao.*", and which in English reads: "*...representatives freely elected by the people.*" The provision, it was also submitted, envisages, inter alia, the right to elect a representative, and the right to represent as was affirmed in **Christopher Mtikila vs Attorney General** [1995] TLR 31, at pages 63-64 as implying citizen's right to participate in the government. At this juncture, we saw it fit, to let the provision of article 21 of the Constitution speaks for itself for want of clarity. It reads:

> *21.-(1) Bila ya kuathiri masharti ya ibara ya 39 ya 47, na ya 67 ya Katiba hii na ya sheria za nchi kuhusiana na masharti ya kuchagua na kuchaguliwa, au kuteua na kuteuliwa kushiriki katika shughuli za utawala wa nchi, kila raia wa Jamhuri ya Muungano anayo haki ya kushiriki katika shughuli za utawala wa nchi, ama moja kwa moja au kwa kupitia* ***wawakilishi waliochaguliwa na wananchi kwa hiari yao,*** *kwa kuzingatia utaratibu uliowekwa na sheria au kwa mujibu wa sheria.*

Translated in English, the above provision reads:

21 (1) Subject to the provisions of Article 39, 47 and 67 of this Constitution and of the laws of the land in connection with the conditions for electing and being elected or for appointing and being appointed to take part in matters related to governance of the country, every citizen of the United Republic is entitled to take part in matters pertaining to the governance of the country, either directly or through ***representatives freely elected by the people****, in conformity with the procedures laid down by, or in accordance with, the law.*

With the above submission as to the scheme of the provisions of the Constitution which according to the petitioner does not provide for the category of unopposed candidates, the petitioner's counsel took the court through the impugned provision. In doing so, the learned counsel compared them with the relevant provisions of the Constitution which were discussed herein above. They did so in bid to clearly show this court the extent to which the impugned provisions are violative of the Constitution as alleged in the petition and verified by the affidavit of the petitioner.

The crux of the submissions by the counsel for the petitioner was to the effect that the impugned provisions of the National Elections Act (supra) and the Local Government (Elections) Act, [cap. 292 R.E 2002] respectively refer to candidates proposed by political parties under article 67(1)(b) of the Constitution in respect of those contesting for a seat of member of parliament for people to vote for one of them to represent them in the parliament, and under section 39(2(f) of the Local Government (Elections) Act in respect of those contesting for a seat of a counselor in a ward for people in a relevant ward to vote for one of them.

Thus, it was argued and submitted that both candidates have, pursuant to article 21 of the Constitution, to be "*representatives freely elected by the people*" and not proposed by political parties and only deemed elected without holding the actual election. It is so because, it was argued, the Constitution requires election to be held by people casting votes even where only there is only one candidate is nominated for election for a seat of member of parliament or for election in a ward.

The learned counsel for the petitioner brought home to us their understanding of the interpretation of article 21 in the regulation of election, by forcefully and ingeniously arguing that the proper interpretation of article

21 of the Constitution as regard to the requirement of parliament or legislature to constitute "*representatives freely elected by people*" is as signified by section 34 of the National Election Act (supra) which regulates election of a President in a situation where there is a sole presidential candidate, and which is, in their opinion and as was equally averred in the affidavit verifying the petition, in compliance with article 21 of the Constitution as is with articles 26(1), 76, and 77 of the same Constitution. The provision of section 34 of the said Act, illustrative as it is, reads and we hereby quote extensively thus:

> *"34.(1) Where there is only one validly nominated Presidential candidate, the Commission shall declare such person as the sole Presidential Candidate*
>
> *(2) The Presidential candidate declared under subsection (1) shall be duly elected to the office of the President if he obtains more than fifty percent of the total votes cast.*
>
> *(3) Where the sole Presidential candidate has failed to secure the required percentage of votes, the Commission shall declare another nomination day for the purpose of Presidential election."*

We equally noted the corresponding argument by the learned counsel for the petitioner that the provision of section 34 likewise signifies the proper interpretation and meaning of article 13(1) of the African Charter on Human and Peoples Rights, 1981, article 25(a)&(b) of the International Covenant on Civil and Political Rights, 1966; and article 21(1) and (3) of the Universal Declaration of Human Rights, 1948 as for a requirement or legislature to constitute "*representatives freely elected by the people*" and of which the provision is in compliance with without causing any difficult or prejudice to the society. We took the trouble of perusing the referred provisions of the above mentioned international instrument, and clearly understood the learned counsel's point of view.

It was the petitioner's learned counsel's argument that there is no convincing reason why the substance and contents of section 34 of the National Election Act (supra) were not adopted and enacted in respect of the impugned provisions. In addition, it was argued that section 34 defeats any explanation defending the category of unopposed or uncontested candidates on reason of avoiding costs and expenses as it is costly to hold an election of a sole Presidential candidate compared to holding election and casting votes for a sole candidate for a ward or a constituency.

We were reminded of the meaning of election, and referred to section 2(1) of the National Election Act (supra), and various authorities about what election is all about, and insightful observations on the right to vote which were made in such authorities. They included the case of **Moohan and Another vs The Lord Advocate** [2014] UKSC 67, para. 44, in which the Supreme Court of the United Kingdom had it that "*an election is a ballot where people choose between more than one candidate*", a Supreme Court of Canada decision in **The reference re. Prov. Electoral Boundaries (Sask.)**, [1991] 2 S.C.R 158, page 170 in which it was held, among other things, that *"the right to vote is fundamental to a democracy,"* and the South African Constitutional Court decision in **August and Another v Electoral Commission and Others** [2000]1LRC 608, page 617-618, in which the court, partly, emphasized that the "*right to vote may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.*"

In light of the above authorities, we were taken once again through article 5(1) of the Constitution. We were told that the article envisages formal group decision making process in which individuals are guaranteed the right to choose an individual to hold office in their behalf, save for the

constitutional limitation provided for under article 5(2) which was quoted herein above.

We were reminded that besides those limitations disqualifying an individual from voting, a proviso to article 5(2) of the Constitution is categorical that *"...no other grounds shall disqualify a citizen from exercising the right to vote."* In Kiswahili, the phrase reads *"...hakuna sababu nyingine yeyote inayoweza kumzuia mtu asitumie haki yake ya kupiga kura."* It was accordingly argued and submitted that enactment of laws is only competent in matters specified in article 5(3) of the Constitution.

It was convincingly in our view argued that pursuant to article 5(1) of the Constitution, the parliament may only legislate to disfranchise on the four categories of people specifically mentioned in that provision and no other or further limitations would competently apply for purposes of legislation. Emphasizing on the argument, the learned counsel for the petitioner contended that, *"...the Constitution proscribes enacting and prescribing other grounds to disqualify a citizen from exercising the right to vote and elect leaders."* It was also argued that as the parliament is enjoined to observe and abide by the provisions of article 5 and the other relevant provisions of the Constitution, the failure to observe, and abide by the

Constitution, which resulted to enactment of the impugned disenfranchising provisions amounted to contravention of article 26(1) of the Constitution and violation of article 21 of the Constitution.

As if the forgoing arguments were not enough, dictionary meanings of the phrase "*kupiga kura*" which may literally be taken in English to mean "*voting*" and the word "*kura*" which may literally be taken in English to mean "*vote*" were employed using **Kamusi ya Kiswahili Sanifu,** Taasisi ya Uchunguzi wa Kiswahili, Dar es salaam, Oxford University Press, 1981, pg 139, and **Kamusi Fasaha**, Baraza la Kiswahili Zanzibar (BAKIZA), Oxford University Press, 2010 at pg 203. They were employed with reference to the usage of the word/phrase under article 5(3) in relation to the specific matters over which the parliament may competently legislate.

Based on the meaning ascribed to the term "*kura*" in both dictionaries as read together with the meaning ascribed to the term "*voting*" in **Merriam Webster Online Dictionary** (www.merriam-webster.com), **Online Cambridge English Dictionary** (www.cambridge.org) and **Online Oxford Learners Dictionary**, it was argued that in essence whenever the word/phrase "*kupiga kura*" is used in the relevant provisions of the Constitution, namely, article 5(1),(2) and (3) by necessary implication it

means to choose someone amongst the two or more. This argument was made in our understanding with a view to showing that the category of uncontested candidates under the impugned provisions were alien to the Constitution.

Consistent with the above argument, the preambles to the relevant pieces of legislation relating to the impugned provision were highlighted. In doing so, we were shown that the two pieces of legislation underlined the fact that they were meant to provide for a mechanism of regulating election, which is in their view a process of choosing one person from many for a position.

The averments in the respondents' counter affidavit that the restriction of the right to vote and elect representatives brought about by the impugned provisions is for economic reasons as it was cost effective and inclusive, and is for legitimate purpose and/or public interest and necessary for a democratic state was disputed. It was argued in this respect that none of the reasons given, namely, cost effectiveness, and public interest is reflected under article 30(2) of the Constitution to justify the enactment of the impugned provisions. It therefore meant, it was argued, that the respondents failed miserably to show any specific aspect envisaged under

article 30(2) of the Constitution which they relied on, and the should as such not expect the court to come into their aid as it is their duty to clearly show the derogation clause which is applicable.

The case of **DPP vs Daudi Pete** [1993] TLR 22, **Kukutia Ole Pumbun vs Attorney General** [1993] TLR 159, and **Mbushuu alias Dominic Mnyaroje** [1995] TLR 97, were cited to support the learned counsel's argument that the impugned provisions do not fit the test in respect of which the impugned provisions could be saved. With this argument, it was contended that the impugned provisions do not meet the test set forth in the above mentioned cases, and in particular, **Kukutia Ole Pumbun**, as they do not meet the proportionality test.

It was so argued because there is, according to the learned counsel, no safeguard in place to curb abuse of nomination of sole candidates by the National Electoral Commission. The said nomination is, we were made to understand, preceded by filling and submission of prescribed forms as prescribed by section 38 of the National Election Act, and section 42(6) of the Local Government (Elections) Act which lacks any safeguard. It means that in the absence of such safeguard, there is nothing in place to prevent other candidates from returning nomination forms or unauthorized persons

from filling in the forms negligently and presenting them to the Returning officers so that he is disqualified for submitting defective nomination form. We were also told that the law does not require the Commission to verify or scrutinize nomination forms or process to satisfy itself that foul play did not prevent a person from submitting defective forms for improper motive of favouring sole candidate.

We were once again taken through the provisions of article 13(1) of the African Charter on Human and Peoples' Rights (supra), and article 25 of the International Covenant on Civil and Political Rights, 1966, and article 21(1) and (3) of the Universal Declaration of Human Rights, 1948 in relation to article 21 of the Constitution. It was then argued that the provisions of the afore mention instruments have been incorporated and domesticated into our laws through article 21 of the Constitution. Thus, contravention of article 21 of the Constitution is also a contravention of the provisions of the above mentioned international instruments. In fortification, the cases of **Okunda and Another vs Republic** [1970] EA 453, at page 356; **Operation Dismantle vs The Queen** [1985]1 SCR 441, page 484; **AG vs Rebeca Z. Gyumi**, Civil Appeal No. 204 of 2017, page 29; **DPP vs Daudi Pete** [1993] TLR 22; and **AG vs Rev. Christopher Mtikila** [2010] 2EA 13,

page 21 were cited to support the argument as to incorporation and domestication of the provisions of the relevant international instrument specifically mentioned herein above.

It was thus argued that this court is empowered in the circumstances to declare that the impugned provisions are contrary to the international instruments to which Tanzania is a party. It was further contended that pursuant to such authorities, the above mentioned instruments should also be taken into account in interpreting the Constitution and the law and thus in making such finding.

At the end of their submission, the learned counsel for the petitioner, called upon the court to grant the reliefs sought by the petitioner. They so maintained as they were of the solid view that; the impugned provisions are ultra vires as the parliament under article 64(1) of the Constitution exceeded its legislative powers, and thus acted in violation of article 21 read together with articles 5, 66(1)(a), and 77 of the Constitution; they deny peoples' fundamental rights to vote and elect representatives as entrenched under article 21 of the Constitution read together with article 77 of the Constitution; they undermine the authority of the Constitution, will of the people and

democracy by failure to observe and abide by article 26(1) of the Constitution.

As maintained in their counter affidavit verifying the averment in the reply to the petitioner, the respondents through Mr. Hangi Chang'a, learned Principal State Attorney, disputed the submissions and arguments made in support of the petition. The hallmarks of the entire submission in reply could best be summarized as hereinafter.

Firstly, the argument that the burden of proof in the constitutional matters is not beyond reasonable doubt, as argued by the petitioner's counsel was disputed by the respondents' counsel. In this regard, the court was referred to **Rev Christopher Mtikila v Attorney General** [1995] TLR 31, **Jebra Kambole v AG** (supra), and **Centre for Strategic Litigation Ltd & Another vs Attorney General & Others** (supra), which were also relied on by the learned counsel for the petitioner. Mr Chang'a's argument in brief was that this petition as is every constitutional petition deals with serious allegation of breach of the constitution which needs not be taken lightly but proved beyond reasonable doubts.

Surprisingly, however, Mr Chang'a, did not distinguish or say a word on the import of the recent decision of the Court of Appeal in the case of **Attorney General v Dickson Paulo Sanga** (supra) and the earlier decision of the Court of Appeal in **Julius Ishengoma Francis Ndyanabo** (supra) which were heavily relied on by the petitioner's counsel in support of the petitioner's submission that the burden of proof on the part of the petitioner is not beyond reasonable doubt. Of significance to the petitioner's submission, it is what the Court of Appeal said in the former case at page 38 which we hereby quote thus:

> *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 premises, we do not agree with the appellant that in constitutional petitions, it is incumbent on the petitioner to prove his case beyond reasonable doubt.*

Secondly, the other submission by the respondents' Principal State Attorney in relation to the petitioner's case was that the petitioner has failed

miserably to prove his case on the standard required by the law which is beyond reasonable doubt. In support of the submission, the learned Principal State Attorney had it that the affidavit supporting the petition bears no factual evidence showing that the impugned provision resulted to violation of the complained rights enshrined under the Constitution.

In addition, we were referred to paragraph 15 of the said affidavit which implied that the impugned provision encourages undue and unfair treatment of opponents and malpractices while there was no evidence to substantiate the claim. According to the respondents, such claims were to be proved by the petitioner beyond reasonable doubts which burden was never discharged.

Thirdly, it was the submission of the respondents through the learned Principal State Attorney that the impugned provisions envision the system chosen by the country which is a democratic nation, and which system provides for voting, candidates being elected unopposed, and special seats and those nominated by the President. Thus, unless it is sufficiently proved that the system is unconstitutional, the allegation remains speculation which should not be considered in any way. It was added that right to vote under article 21(1) and (2) of the Constitution cannot be held to be offended unless

it is shown that the processes relating to nomination and declaration of the unopposed candidates was inconsistent with the election laws.

Fourthly, it was further submitted that the allegation against the impugned provisions stipulating for rendering uncontested and unopposed candidates as elected could not simply be raised by the petitioner alone since they relate to the majority voters who do not seem to have any complain with the said provisions. Unless the allegations were established, the court must desist to grant the reliefs sought. This argument, however, did not have any regard to the right of the petitioner to challenge a legislative provision which in his view contravenes the Constitution.

And fifthly, it was submitted in reply that the impugned provisions do not violate the Constitution in so far as they save public interests by saving costs of election in uncontested or unopposed election. It was further argued that since the petitioner did not show and prove any mischief caused by the impugned provisions, he has failed to discharge his burden of proof which means that the reliefs sought cannot be granted.

In relation to the foregoing submissions, we were told that the provisions, seemingly, if we were minded to find that they were violative of

the Constitution as alleged, they were legitimately saved under article 30(1) and 30(2) of the Constitution. In so doing, and with reference to sub-article 30(2), it was argued that dispensing with voting in uncontested or unopposed elections is for the economic benefits, and wider public interests as the approach saves the government from incurring unnecessary election expenses. It was argued that the only exception is the presidential seat, which necessarily requires voting as the candidate for such seat would assume the position of Commander in Chief once so elected.

Reinforcing his submission in reply, the learned Principal State Attorney took trouble of demonstrating that the approach taken by the country as to uncontested or unopposed candidates under the impugned provisions is not uncommon in other foreign jurisdictions. We were, accordingly, invited to consider the experience obtaining from Uganda, Pakistan, Malawi, Kenya, Zambia, Zimbabwe, and Ghana as to the system of uncontested or unopposed candidates similar to the one under the impugned provisions. However, the learned Principal State Attorney did not show how the system of uncontested or unopposed candidates in such jurisdictions is reflective of, and inconformity to, their respective constitutional provisions of such jurisdictions.

In relation to the petitioner's submission that the impugned provisions are ultra vires the provisions of article 65 of the Constitution, Mr Chang'a, the learned Principal Attorney, had it that the contention by the petitioner's counsel is unmerited as article 77(1) of the Constitution empowers the Parliament to enact laws to regulate election processes. Accordingly, it was further argued, the impugned provisions are a part of the law which was enacted to govern the conduct of elections. The provisions apply only where and when other candidates fail to meet the requisite nomination conditions such that only one candidate remains and qualify for the election.

It was also in respect of allegation and submission that the impugned provisions are discriminatory because they allow such candidates to be deemed elected uncontested or unopposed, while the only candidate for the Presidential seat would be elected by voting under section 34 of the National Elections Act, it was argued in reply that the alleged discrimination is differential and does not fall within the purview of the alleged discrimination alleged.

We subjected the petition and the rival arguments to serious consideration. We did so as we reflected on the authorities relied on by the parties and the relevant articles of the Constitution allegedly violated by the

impugned provisions. We are aware of the issue of burden of proof of which it was not in dispute that in so far as this case is concerned, it rested on the petitioner. We were nonetheless mindful that the respondents, first and foremost, maintained that the provisions are not violative of the constitution.

We are also aware that in this case, the respondents, apart from saying that the impugned provisions are not violative of the Constitution, have invoked the provisions of article 30(1)&(2) of the Constitution arguing that they save the impugned provisions on public interests relating to saving costs and expenses of election. By virtue of the authority of **Attorney General v Dickson Paulo Sanga** (supra) and the earlier decision of the Court of Appeal in **Julius Ishengoma Francis Ndyanabo** (supra), the burden of proof shifted to the respondent to show that the impugned provisions are indeed saved by the relevant provisions of the Constitution. In view of the setup of the respondents' defence, we endevoured to first consider whether the impugned provisions are indeed violative of the Constitution, and if the answer is in the affirmative whether the impugned provisions would be saved by the provisions of article 30(1) and (2) of the Constitution as alleged.

Before proceeding further, we wondered whether the petitioner's burden of proof is beyond reasonable doubt. It should be noted that whilst

the petitioner's argument is that it is on the balance of probability, the respondents are saying that it is beyond reasonable doubt. The statement of principle, seemingly, emerging from the case of **Attorney General v Dickson Paulo Sanga** (supra) on the standard of proof by a petitioner in a constitutional petition was not disputed by the respondents' learned Principal State Attorney, neither were the arguments advanced in relation to such principle. The only reference was made in the statement of this court in **Rev Christopher Mtikila v Attorney General** [1995] TLR 31 and other decisions of this court which were inspired by the former.

We herein above reproduced the relevant part of the decision of the Court of Appeal in **Dickson Paulo Sanga** in which the statement of principle emerged and which in part had it that "..... *We need not say more. In the premises, we do not agree with the appellant that in constitutional petitions, it is incumbent on the petitioner to prove his case beyond reasonable doubt.*" Whilst the case was neither disputed nor distinguished by the respondents, the only reference by the respondents' counsel was on earlier and recent decisions of this court which were inspired by the position that was taken by this court in **Rev Christopher Mtikila v Attorney General** (supra) with regard to burden of proof.

We are settled that the position in **Rev Christopher Mtikila v Attorney General** (supra) as to proof beyond reasonable doubt in constitutional cases would no longer hold in view of the position held by the recent decision of the Court of Appeal in **Dickson Paulo Sanga**. We thus agree with the submission by the petitioner's counsel that the Court of Appeal has clarified in **Dickson Paulo Sanga** (supra) that the burden of proof in constitution petitions is not beyond reasonable doubt. This suffices to dispose of the issue on the burden of proof.

The question now is whether the petitioner has ably shown that the impugned provisions are indeed violative of the Constitution. We were settled that the nature of the complains in the instant petition reflect claims that could, in terms of burden of proof, be discharged with by mere arguments showing violation as was in **Legal and Human Right Centre and Two others vs Attorney General** [2006] TLR 240.

In our scrutiny, we pondered on the provision of articles 5, and 21(1) and (2) of the Constitution as to their constitutional implication on the impugned provisions stipulating on the right of being declared elected unopposed or uncontested. In doing so, we had no doubt that article 21(1) and (2) of the Constitution provides for, among other things, the right to

vote which is very well captured by the phrase "*.....every citizen....is entitled to take part in matters pertaining to the governance of the country .... through representatives freely elected by the people.* ", and which phrase in Kiswahili reads "*.....kila raia ....anayo haki ya kushiriki katika shughuli za utawala wa nchi..... kwa kupitia* ***wawakilishi waliochaguliwa na wananchi kwa hiari yao.....***" The import of the provision of article 21(1) was not contested if we go by the rival submissions by both sides. Rather, the dispute was on whether the impugned provisions are inconsistent with article 21 of the Constitution.

In view of the submissions made, it was clear to us that the impugned provisions, if we were to lay the said provisions besides the provision of article 21, are inconsistent with the latter as they curtail the right of a citizen in Tanzania to participate in governance through representatives that they freely elected. In other words, the import of the impugned provisions is to restrict a citizen from exercising the right to vote where there is only one candidate contesting in any given election of a member of parliament for a given constituency or councilor for a given ward.

The respondents' learned State Attorney is in a nutshell of the view that the procedure providing that a candidate would be deemed elected

unopposed or uncontested as elaborated earlier, is consistent with the Constitution as it was in compliance with the election law enacted by the parliament in accordance with the Constitution. On the other hand, the petitioner is saying that the procedure is inconsistent with the whole concept of election and voting under the Constitution if one were to consider it in relation to the provision of article 21 and in the light of other relevant provisions of the Constitution referred to us by the petitioner. These include article 5 which prescribes conditions which may restrict a citizen from exercising the right to vote, article 66(1) which enlists categories of members of parliament which do not include unopposed or uncontested members declared uncontested, but under article 66(1)(a) includes members of parliament representing the constituencies, which in Kiswahili version of the Constitution reads, *"wabunge waliochaguliwa kuwakilisha majimbo ya uchaguzi."*, articles 76 and 77(1) which provide for election of member of parliament in a constituency.

Without much ado, we straight away and closely looked at article 5 of the Constitution. We were clear that it states conditions or grounds which may under a law enacted by the parliament restrict or curtail a citizen from exercising the right to vote. We herein above fully reproduced the relevant

provision of article 5 and in particular article 5(2)(a),(b),(c),&(d) which enlists those conditions or factors as the only ones that may restrict a citizen from exercising the right to vote. There is in that provision nothing which reflect the impugned provisions.

In relation to the petition and the rival submissions, we similarly looked at articles 76 and 77(1) of the Constitution concerning the requirement of holding of election in every constituency, and election of members of parliament by the people in such election in detail. We were convinced that the above provisions of the Constitution reinforce the submissions by the petitioner's counsel in support of the petition. The same is to the effect that a member of parliament for any given constituency must be freely elected by the citizens unless there is a restriction allowed by the Constitution proscribing a citizen from exercising the right to vote.

In so far as article 77(1) is concerned, for instance, it points out that members of parliament representing constituencies must be '***elected by the people***' in accordance with the Constitution, and a law enacted by Parliament pursuant to the Constitution to regulate the election of members of parliament representing constituencies. We agree with the petitioner that a law enacted to regulate the election of members of parliament representing

constituencies ought to comply with the dictates of the Constitution which mandatorily provide for the right to vote as a means of getting members of parliament representing constituencies. Indeed, our reading of the provisions of the Constitution could not find anything reflecting the procedure requiring unopposed or uncontested candidates to be deemed elected and be so declared despite being not elected by the citizens pursuant to the requirements of article 21 of the Constitution which are similarly reflected in other provisions of the Constitution mentioned herein above.

Our finding from the foregoing is that the petitioner has sufficiently shown that the impugned provisions offend the provisions of article 21 of the Constitution as they introduce new factors or situations restricting people from exercising the right to vote to freely elect a candidate nominated by a party in a constituency or ward where there is a sole candidate. We thus agree with the petitioner that the impugned provisions are contrary to the constitutional guarantee for the right to vote enshrined under article 21. The impugned provisions have thus and we so find introduced another category of members of parliament deemed to be elected by virtue of only being the sole nominated candidates, which category is not provided for under article 61(1) of the Constitution.

As earlier shown, the respondents relied on the provision of article 30(1) and (2) of the Constitution, inviting us to find that the impugned provisions are necessary and saved by and falls within the purview of article 30(2) of the Constitution. We are at the outset satisfied that the impugned provisions are not saved by the said provisions of the Constitution. We were not shown how the impugned provisions fit within any purpose of the scope and the purview of the provision.

To be sure, it was not shown how the saving of costs by the government by not engaging in costly election where a nominated candidate is not opposed or contested is within any of the elements of article 30(2) of the Constitution. Even if it were so shown, we are still not persuaded that what the petitioner is seeking in this petition in relation to the impugned provision prejudices the interests of the public.

Besides, it was not shown by argument how the impugned provisions meet the proportionality test propounded in **Ole Pumbun** (supra) which comes into play to establish whether the impugned provisions are not unreasonable, not arbitrary, and are necessary for societal good. While the learned counsel indicated how the provisions do not meet the test in respect of which the said impugned could be saved by article 30(1) and (2), there

was nothing from the respondents in reply in that respect other than their only averments in the counter affidavit which do not in any way address the proportionality test. We do not as such see any lawful object which was intended to be achieved by the provision, other than introducing a new category of members of parliament and councilors declared elected unopposed or uncontested, which category is not envisaged under the Constitution.

The law, as restated in **Julius Inshengoma Francis Ndyanabo case** (supra) and **Attorney General vs Dickson Sanga** (supra), is now settled that once it is established that a certain law is violative of a basic right, the burden of proof as to the necessity of the limitation shifts to those who rely on the limitation. The above principle as to burden of proof would equally apply in the instant petition in which the impugned provisions have been successfully shown by the petitioner that they violate article 21 of the Constitution of the Constitution.

Going by the shortfalls in the respondents' case on the applicability of the saving provisions and the failure to show how the provision meets the proportionality test, we hold that the impugned provisions are not saved by

article 30(1) and (2) of the Constitution as alleged by the respondents. The saving provisions are accordingly not applicable in the instant case.

We have already held that the impugned provisions are violative of the Constitution and the respondents could not discharge the burden of proof in showing that the said provisions are necessary and saved by article 30(2) of the Constitution. In this respect, we do not have any other option but to hold in terms of article 64(5) of the Constitution of the United Republic of Tanzania in relation to the impugned provisions. Our holding would in our considered view suffice to effectively dispose of the matter in the favour of the petitioner.

In the event and for the reasons herein above stated, we find merit in the petition before us. We accordingly proceed to declare and hold that the provisions of section 44 of the National Elections Act, Cap. 343 (herein after Cap. 343) and sections 45(2) and 13(7) of the Local Government (Elections) Act, Cap. 292 (hereinafter Cap. 292) are unconstitutional, and therefore null and void for offending the provision of article 21(1) and (2) of the Constitution of the United Republic of Tanzania, as amended from time to time. We henceforth proceed to strike out the said provisions from the

statute book. We decline to make any order as to costs since, the petition was conducted as a public interest litigation.

We order accordingly.

DATED and DELIVERED at Dar es Salaam this 29th day of March 2023.

J. S. Mgetta
JUDGE

B.S. MASOUD
JUDGE

E. E. KAKOLAKI
JUDGE