

# **HUMAN RIGHTS IN TANZANIA:**

## **Selected Cases and Materials**

### **Table of Contents**

Human Rights and Fundamental Freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of governments

Vienna Declaration of the World Conference on Human Rights, 1993

I am not learned in law, but I fully appreciate the importance of having the independence of the judiciary entrenched in the Basic Law of the Land. It is an independence I will always support, encourage and protect. But I also believe that this is not intended to be an abstract independence, an independence of an aloof and detached legal fraternity suspended in mid-air without root or social and political context.

President Benjamin William Mkapa  
16th December, 1996

Foreword by Hon. Mr. Justice Robert H. Kisanga	VII
Acknowledgements	IX
Introduction	XI
Table of Contents	XVII
Abbreviations	XXX

### **CHAPTER ONE**

#### **Background to Human Rights in Tanzania**

A. The Constitutional Set-up in the United Republic of Tanzania	1
B. Human Rights in Colonial Tanzania	2
C. Independence and the Struggle for a Bill of Rights	3

- D. One-Party Political System and Refusal of Bill of Rights 4
- E. Alternative to the Bill of Rights: The Preamble to the Constitution and the Permanent Commission of Enquiry (PCE) 9
- F. The 1983 Constitutional Amendment Proposals 11
- G. The Enactment of the Bill of Rights of 1985 12
- H. Zanzibar Resolution and Loss of Political Direction 14
- I. The Nyalali Commission and Human Rights in Tanzania 15
  - (1). The Forty Plus Unconstitutional Laws 17
  - (2). Introduction of Multi-party Political System 18

## CHAPTER TWO

### The Right to Life

- A. Right to Life as the Basis of All Rights 25
- B. Right to Life in International Legal Instruments 25
- C. The Death Penalty 27
- D. Right to Life and Extradition 30
- E. Rights of the Child: The Right to Life 33
  - (1). International Legal Instruments on the Rights of the Child 33
  - (2). Various Types of Child Abuse 36
  - (3). The Child in Tanzania 38
- F. Right to Life in Tanzania 40
  - 1. *Republic v. Mbushuu and Another*, High Court of Tanzania at Dodoma, Original Jurisdiction, Criminal Sessions Case No. 44 of 1991, Mwalusanya, J. Reported in [1994] 2 LRC 335. 42
  - 2. *Republic v. Pancras Oteyo Okumu and Another*, District Court of Ilala at Dar es Salaam, Criminal Case No. 1059 of 1982 (Unreported), Korosso, Chief Resident Magistrate. 62
  - 3. *Chiku Lidah v. Adam Omari*, High Court of Tanzania at Singida, (PC) Civil Appeal No. 34 of 1991 (Unreported), Mwalusanya, J. 66
  - 4. *Athuman Ally Maumba v. The United Republic*, High Court of Tanzania at Dar es Salaam, Criminal Appeal No. 95 of 1989 (Unreported), Lugakingira, J. 72

### CHAPTER THREE

#### Protection Against Torture and Inhuman and Degrading Treatment or Punishment

- A. Defining Torture and Inhuman and Degrading Treatment or Punishment 84
- B. Reasons and Methods of Torture 85
  - (1). Physical Torture 86
  - (2). Psychological Torture 86
- C. Experience of Torture Victims 87
- D. International Combat of Torture 89
- E. Protection Against Torture and Inhuman and Degrading Treatment or Punishment in Tanzania 91
- 5. *Republic v. Godfrey Ihuya and 3 Others*, High Court of Tanzania at Mwanza, Original Jurisdiction (Mwanza Registry) Criminal Sessions Case No. 8 of 1980 (Unreported), Mnzavas, J.K. 95
- 6. *Thomas Mjengi and Another v. Republic*, High Court of Tanzania at Dodoma, Criminal Appeals No. 28 and 31 of 1991 (Unreported), Mwalusanya, J. 115

### CHAPTER FOUR

#### Protection Against Harassment

- A. Harassment in a Wider Perspective 129
- B. Security from Harassment 129
- C. Harassment Based on Belief in Witchcraft 130
  - (1). Witchcraft and the Law 132
  - (2). The Law on Witchcraft in Tanzania 136
- 7. *Nzinza s/o Lihoyo v. Gambason Chenge and 5 Others*, High Court of Tanzania at Mwanza, (PC) Criminal Appeal No. 14 of 1988 (Unreported), Sekule, J. 137
- 8. *Republic v. Sambo Chaba and 2 Others*, High Court of Tanzania at Tabora, Original Jurisdiction, Criminal Sessions Case No. 99 of 1985 (Unreported), Mchome, PRM (Extended Jurisdiction). 142

## CHAPTER FIVE

### The Right to a Clean and Satisfactory Environment

- A. Environment as a Common Heritage of Mankind 149
- B. Right to a Clean Environment as a Human Right 150
- C. Legal Protection of the Environment in Tanzania 152
- D. Tanzania's International Obligations in Environmental Issues 155
- E. Need for Seriousness in Environmental Protection 157
- 9. *Joseph D. Kessy and Others v. The City Council of Dar es Salaam*, High Court of Tanzania at Dar es Salaam, Civil Case No. 299 of 1988 (Unreported), Lugakingira, J. 157
- 10. *Festo Balegele and 794 Others v. Dar es Salaam City Council*, High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Cause No. 90 of 1991 (Unreported), Rubama, J. 163

## CHAPTER SIX

### Right to Work

- A. Underlining the Importance of the Right to Work 169
- B. Labour Legislation In Tanzania 170
- C. Criminalisation of the Labour Process 173
- 11. *Augustine Masatu v. Mwanza Textile Ltd*, High Court of Tanzania at Mwanza, Civil Case No. 3 of 1986 (Unreported), Mwalusanya, J. 173
- 12. *Obadiah Salehe v. Dodoma Wine Company Ltd.*, High Court of Tanzania at Dodoma Civil Case No. 53 of 1990 (Unreported), Mwalusanya, J. 181

## CHAPTER SEVEN

### Right to Fruits of One's Labour

- A. Labour as a Basic Source of Wealth 195
- B. The Policy of Socialism and Self-reliance 196
- C. Villagisation and the Use of Force 198
- D. Resistance to the Villagisation Programme 201
- E. Villagisation Programme and the Courts of Law 202
- 13. *Lalata Msangawale v. Henry Mwamlima*, High Court of Tanzania at Dodoma, Civil Appeal No. 99 of 1975, Mwesiumo, J., Reported in 1979 LRT No. 3 203

14. *Ntiyahela Boneka v. Kijiji Cha Ujamaa Mutala*, High Court of Tanzania at Tabora, (PC) Civil Appeal No. 21 of 1987 (Unreported), Chipeta, J. 211

## CHAPTER EIGHT

### Right to Communal Land Ownership

- A. Land Ownership in Tanzania 214
- B. Customary Land Ownership in Tanzania 216
- C. The Regulation of Land Tenure (Established Villages) Act, 1992 218
- D. Terrorization of the Peasantry by the State 220
- E. Minority and their Rights 223
- (1). International Law and Minorities 223
- (2). Minorities in Tanzania 226
15. *Mulbadaw Village Council and 67 Others v. National Agricultural and Food Corporation*, High Court of Tanzania at Arusha, Civil Case No. 10 of 1981 (Unreported), D'Souza, Ag. J. 228
16. *Attorney-General v. Lohay Akonaay and Another*, Court of Appeal of Tanzania at Arusha, Civil Appeal No. 31 of 1994, Nyalali, C.J., Reported in [1995] 2 LRC 399 236

## CHAPTER NINE

### Right to Own Private Property

- A. The Genesis of the Right to Private Property 248
- B. Right to Private Property in International Human Rights Instruments 249
- C. Right to Private Property in Tanzania 250
- (1). The Independence Constitution 250
- (2). The Investment Regime and Nationalizations 252
- (3). High-handedness of the State and its Functionaries 253
- D. Property Rights in the Bill of Rights Era 253
17. *John Mwombeki Byombalirwa v. The Regional Commissioner, Kagera and Another*, High Court of Tanzania at Mwanza, Miscellaneous Civil Cause No. 22 of 1986 (Unreported), Mwalusanya, J. 254
18. *Edward Mlaki and Another v. The Regional Police Commander Kilimanjaro Region and Another*, High Court of Tanzania at Arusha, Miscellaneous Civil Application No. 38 of 1979 (Unreported), Mwesiumo, J. 265

19. *Khimji Gangji Sisodya v. Republic*, High Court of Tanzania at Arusha, Appellate Jurisdiction, High Court Criminal Appeal No. 191 of 1978 (Unreported), Mwesumo, J. 269

## CHAPTER TEN

### Right and Freedom of Business

- A. The Right to a Self-Reliant Existence 275
- B. Private Investors and their Rights 276
- C. Indigenisation, *Machinga* and Freedom of Business 277
- D. Harassment of the Business Community by the State 280
20. *Mwanza Restaurant and Catering Association v. Mwanza Municipal Director*, High Court of Tanzania at Mwanza, Miscellaneous Civil Cause No. 3 of 1987 (Unreported), Mwalusanya, J. 280
21. *Palm Beach Inn Ltd and Naila Majid Jiddawy v. Commission for Tourism and 2 Others*, High Court of Zanzibar at Zanzibar, Civil Application No. 30 of 1994 (Unreported), Kannyonyele, J. 296

## CHAPTER ELEVEN

### Right of Access to Justice

- A. Access to Justice as Part of Rule of Law 304
- B. The King Can Do No Wrong - the Government Too? 306
- C. Insulating the Government from Legal Process 307
- D. Breaking the Myth - the Right to Sue the Government 308
22. *Peter Ng'omango v. Gerson M.K. Mwangwa and Another*, High Court of Tanzania at Dodoma, Civil Case No. 22 of 1992 (Unreported), Mwalusanya, J. 309
23. *Pumbun and Another v. Attorney-General and Another*, Court of Appeal of Tanzania at Arusha, Civil Appeal No. 32 of 1992, Kisanga, J.A., Reported in [1993] 2 LRC 317 319
24. *Himidi Mbaye v. The Brigade Commander of Nyuki Brigade*, High Court of Zanzibar at Zanzibar, High Court Civil Case No. 8 of 1981 (Unreported), Ramadhani, C.J. 326

## CHAPTER TWELVE

### Right to Legal Representation

- A. The Basis of the Right to Legal Representation 334
- B. Legal Counsel for the Indigent Accused 337
- C. Representation by a Para-legal or a Non-lawyer 340
- D. Can the State provide Counsel for all Indigent Accused Persons? 342
- E. Legal Aid Schemes and Legal Assistance to the Poor 343
- (1). Tanganyika Law Society (TLS) 343
- (2). Shirika la Uchumi la Umoja wa Wanawake wa Tanzania (SUWATA) 344
- (3). Tanzania Media Women Association (TAMWA) 345
- (4). The Legal Aid Committee of the Faculty of Law (UDSM) 345
- (5). Tanzania Women Lawyers' Association (TAWLA) 346
- (6). Legal and Human Rights Centre (LHRC) 347
- F. The Legal Counsel Should be Independent 348
25. *Khasim Hamisi Manywele v. Republic*, High Court of Tanzania at Dodoma, Criminal Appeal No. 39 of 1990 (Unreported), Mwalusanya, J. 349
26. *Protazi Kutaga v. Asteria Ndyamukama and Another*, High Court of Tanzania at Mwanza (PC) Civil Appeal No. 115 of 1983 (Unreported), Mwalusanya, J. 372
27. *National Bank of Commerce v. Vitalis Ayemba*, High Court of Tanzania at Mwanza, High Court Civil Case No. 37 of 1988 (Unreported), Mwalusanya, J. 375

## CHAPTER THIRTEEN

### Equality Before the Law: Gender and Status Discrimination

- A. Rule of Law and Discrimination 379
- B. Equality Before the Law and Discrimination 380
- C. Equality, Women Rights and Discrimination 381
- D. International Community and Gender Discrimination 381
- E. Gender Discrimination in Tanzania 383
- F. Customary Law and Gender Discrimination 384
- G. Discrimination on the Basis of Status 386
28. *Ephrahim v. Pastory and Another*, High Court of Tanzania at Mwanza (PC) Civil Appeal No. 70 of 1989, Mwalusanya, J., Reported in [1990] LRC (Const) 757. 387
29. *Bi. Hawa Mohamed v. Ally Sefu*, Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 9 of 1983 (Unreported), Nyalali, C.J. 398

30. *Donatila Exaveri v. Perekimas Twamgambo*, High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Appeal No. 87 of 1989 (Unreported), Nchalla, J. 407
31. *Phillemon Chatanda v. Republic*, High Court of Tanzania at Mbeya, Miscellaneous Economic Criminal Application No. 11 of 1990 (Unreported), Chua, J. 411
32. *A.A. Sisywa and 35 Others v. The Principal Secretary, Ministry of Finance and Another*, High Court of Tanzania at Dodoma, Civil Case No. 5 of 1994 (Unreported), Mwalusanya, J. 417

## CHAPTER FOURTEEN

### Rules of Natural Justice

- A. Meaning of Natural Justice 428
- B. The Rule Against Bias 429
- C. The Right to Be Heard 430
- D. The Right to Know Reasons for the Decision 431
- E. Rules of Natural Justice in Tanzania 432
- F. Institutions of Higher Learning and Natural Justice 435
33. *Felix Bushaija and 8 Others v. The Institute of Development Management and Another*, High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Case No. 89 of 1991 (Unreported), Kyando, J. 439
34. *Amir Hamza Umar and 3 Others v. The Minister for Local Government, Co-operatives and Marketing*, High Court of Tanzania at Mwanza, Miscellaneous Civil Cause No. 9 of 1989 (Unreported), Mwalusanya, J. 452
35. *James F. Gwagilo v. Attorney-General*, High Court of Tanzania at Dodoma, Civil Case No. 23 of 1993 (Unreported), Mwalusanya, J. 467
36. *Said Juma Muslim Shekimweri v. Attorney-General*, High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Cause No. 3 of 1996 (Unreported), Samatta, J.K. 475

## CHAPTER FIFTEEN

### Independence of the Judiciary:

#### Harassment of the Judiciary by the Executive and the Ruling Party

- A. The Judiciary and Separation of Powers 483
- B. Independence of the Judiciary 484
- C. Factors Undermining the Independence of the Judiciary 486
- D. The Party, the Government and the Judiciary 488



- E. Harassment of the Judicial Personnel 489
- F. Contempt of Court by the Government 491
- G. Side-stepping the Judiciary 493
37. *Hamisi Masisi and 6 Others v. Republic*, High Court of Tanzania at Mwanza, Miscellaneous Criminal Cause No. 54 of 1978, Reported in [1984] TLR 751, Mfalila, J. 497
38. *Republic v. Iddi Mtegule*, High Court of Tanzania at Dodoma, Criminal Revision No. 1 of 1979 (Unreported), Chipeta, J. 501
39. *James Bitu v. Iddi Kambi*, High Court of Tanzania at Mwanza, (P.C.) Civil Appeal No. 104 of 1977, Reported in 1979 LRT No. 9, Mfalila, J. 504
40. *Ally Lilakwa v. Regional Prisons Officer Arusha and Another*, High Court of Tanzania at Arusha, Miscellaneous Criminal Cause No. 29 of 1979 (Unreported), Mnzavas, J.K. 506

## CHAPTER SIXTEEN

### Peoples' Initiatives and Illegal Assumption of Judicial Power

- A. The People and their Initiative 512
- B. The Genesis of *Sungusungu* 513
- C. *Sungusungu* and the State 513
- D. Taking the Law in their Own Hands 514
41. *Ngwegwe s/o Sangija and 3 Others v. Republic*, High Court of Tanzania at Mwanza, Criminal Appeal No. 72 of 1987 (Unreported), Mwalusanya, J. 515
42. *Misperesi K. Maingu v. Hamisi Mtongori and 9 Others*, High Court of Tanzania at Mwanza, Civil Case No. 16 of 1988 (Unreported), Mwalusanya, J. 522

## CHAPTER SEVENTEEN

### The Right to Liberty: Right to Bail and Presumption of Innocence

- A. Freedom from All Forms of Restraint 526
- B. Restriction to Total Liberty - Combating False Imprisonment 527
- C. The Right to Bail and Its Legal Basis 529
- D. Presumption of Innocence and Separation of Powers 531
- E. Bail to Juveniles 531
- Daudi s/o Pete v. Republic*, High Court of Tanzania at Mwanza, Miscellaneous Criminal Cause No. 80 of 1989 (Unreported), Mwalusanya, J. 532

44. *D.P.P. v. Angeline Ojare*, High Court of Tanzania at Arusha, Criminal Appeal No. 31 of 1996 (Unreported), Nchalla, J. 557
45. *Republic v. Musuba Nyeisao and Another*, High Court of Tanzania at Mwanza, Miscellaneous Criminal Cause No. 6 of 1990 (Unreported), Mwalusanya, J. 572

## CHAPTER EIGHTEEN

### Preventive Detention and Illegal Detention

- A. Defining Preventive Detention 582
- B. History of Preventive Detention in Tanzania 584
- C. Salient Features of the Preventive Detention Act, 1962 588
- (1). Basis of Detention 588
- (2). Arrest and Detention 591
- (3). Challenge of Detention in Court of Law 592
- D. The 1985 Amendment to the Preventive Detention Law 593
- E. Other Laws Sanctioning Detention Without Trial 597
- F. Making a Case for Abolition of Detention Without Trial 600
- G. When Arrest and Detention is Illegal 601
- H. Rampancy of Illegal Arrests and Detentions in Tanzania 601
- I. From Legal to Illegal Detention 602
46. *Ahmed Janmohamed Dhirani v. Republic*, High Court of Tanzania at Mwanza, Miscellaneous Criminal Cause No. 28 of 1976, Reported in 1979 LRT No. 1, Maganga, J. 603
47. *Shaaban Khamis Mloo and 4 Others v. The Superintendent of the Zanzibar Prison and Another*, High Court of Zanzibar at Zanzibar, Miscellaneous Criminal Case No. 4 of 1990 (Unreported), Hamid, C.J. 608
48. *Ally Yusuf Mpore v. Republic*, High Court of Tanzania at Dar es Salaam, Miscellaneous Criminal Cause No. 2 of 1977 (Unreported), Samatta, Ag. J. 619
49. *Dishon Susa Yamo and Another v. Republic*, High Court of Tanzania at Mwanza, Miscellaneous Criminal Cause No. 7 of 1985 (Unreported), Mushi, J. 622
50. *Re Felix Bwogi*, High Court of Tanzania at Dar es Salaam, Miscellaneous Criminal Cause No. 29 of 1980 (Unreported), Kimicha, J. 626

**CHAPTER NINETEEN****Internal Deportation**

- A. Deporting Away from Power Base 630
- B. The Colonial Regime and Deportation 631
- C. Deportation after Independence 631
- D. The Constitutionality of Deportation 632
- E. Abuse of the Deportation Law and Process 632
- 51. *Chumchua s/o Marwa v. Officer i/c of Musoma Prison and Another*, High Court of Tanzania at Mwanza, Miscellaneous Criminal Cause No. 2 of 1988 (Unreported), Mwalusanya, J. 635
- 52. *Sheikh Muhammad Nassor Abdulla v. The RPC Dar es Salaam and 2 Others*, High Court of Tanzania at Dar es Salaam, Miscellaneous Criminal Cause No. 21 of 1983 (Unreported), Mapigano, J. 645

**CHAPTER TWENTY****Freedom of Association and The Right to Participate in National Affairs**

- A. Freedom of Association at a General Level 651
  - (1). Right to Associate and International Law 652
  - (2). Regional Instruments and the Right to Associate 653
- B. Freedom of Association in Tanzania 655
  - (1). Post Independence Period: 1961 to 1992 655
  - (2). The Multi-party Era: 1992 and Thereafter 657
- C. The Right to Participate in National Affairs 657
- D. Harassment of Political Opponents 661
- E. Raising Fundamental Issues: Public Interest Litigation or Social Interest Litigation 663
- 53. *Rev. Christopher Mtikila and 3 Others v. Republic*, High Court of Tanzania at Dodoma, Criminal Appeal No. 90 of 1992 (Unreported), Mwalusanya, J. 665
- 54. *Rev. Christopher Mtikila v. Attorney-General*, High Court of Tanzania at Dodoma, Civil Case No. 5 of 1993, Lugakingira, J. [Reported in Volume 1 *Commonwealth Human Rights Law Digest*, 1996, p. 11]. 676
- 55. *Seif Shariff Hamad v. Serikali ya Mapinduzi Zanzibar*, Court of Appeal of Tanzania at Zanzibar, Criminal Appeal No. 171 of 1992 (Unreported), Ramadhani, J.A. 702

## CHAPTER TWENTY-ONE

### Enforcement and the Future of Human Rights in Tanzania

- A. Enforcement of Human Rights: A General Overview 711
  - (1). Enforcement of Fundamental Rights and Freedoms at International Level 712
  - (2). Enforcement of Human Rights in Tanzania: The Role of The Judiciary 714
- B. The Bill of Rights and Continued Violation of Human Rights 719
  - (1). Torture, Inhuman and Degrading Treatment or Punishment 721
    - (i). Arrest and Detention of University Student Leaders 722
    - (ii). Torture to Death of Suspects in Custody 723
    - (iii). Unlawful Detention of a Foreigner Visitor 724
  - (2). Wanton Killings by Agents of the State 725
    - (i). The Kilombero Massacre of 1986 725
    - (ii). Killings by Police and Peoples Militia 726
    - (iii). Killing of the former Intelligence Chief 726
  - (3). Denial of Democratic Rights By the Executive 728
    - (i). Consent to Sue the Government 728
    - (ii). Restriction of the Freedom of Association 730
    - (iii). Right to Organize: Harassment of BAWATA 730
    - (iv). *Funga Mdomo*: The War on the Media 735
    - (v). The the Right to Work and Natural Justice 741
    - (vi). Indirect Terrorization of Legal Counsel 743
    - (vii) The Abuse of the Powers of the D.P.P. 745
- C. Continuous "Contempt of Court" by the State Through the Legislature 747
- D. Political Scandals and Loss of Legitimacy 748
  - (1). The "Hunting Sheikhs" of Loliondo 749
  - (2). Zanzibar and the Joining of the OIC 750
  - (3). Sailing to Death: The Mv. Bukoba Tragedy 752
  - (4). The 1995 First Multi-party Elections 753
  - (5). The Contentious Tax Exemptions 760
- E. The Basic Rights and Duties Enforcement Act, 1994 764
- F. The Future of Human Rights in Tanzania 766

**Glossary** 769

**Table of Cases** 777

**Table of Legislation** 805

**Selected Readings** 815

**Annexures** 875

1. The Bill of Rights of the United Republic of Tanzania, 1984. 875
2. The Basic Rights and Duties Enforcement Act, 1994. 889