IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(MAIN REGISTRY)

AT DAR ES SALAAM

(CORAM: MASOUD, KAKOLAKI, And MASABO, JJJ.)

MISCELLANEOUS CIVIL CAUSE NO. 8 OF 2022

IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA

OF 1977 AS AMENDED

AND

IN THE MATTER OF THE PUBLIC AUDIT ACT No. 11 OF 2018

AND IN THE MATTER OF BASIC RIGHTS AND DUTIES ENFORCEMENT ACT, CAP. 3

R.E 2002

AND

IN THE MATTER OF A PETITION TO CHALLENGE THE PROVISIONS OF SECTION

6(1) OF THE PUBLIC AUDIT ACT No. 11 of 2018 AS BEING UNCONSTITUTIONAL

AND

IN THE MATTER OF A PETITION TO CHALLENGE THE ACT OF THE 1st

RESPONDENT TO REMOVE THE 4th RESPONDENT FROM THE POSITION OF THE

CONTROLLER AND AUDITOR GENERAL AND REPLACE HIM WITH THE 3rd

RESPONDENT EVEN THOUGH THE 4th RESPONDENT HAD NEITHER REACHED 60

YEARS OF AGE NOR 65 YEARS OF AGE AS BEING UNCONSTITUTIONAL

BETWEEN

ZITTO ZUBERI KABWE..... .....PETITIONER

VERSUS

THE PRESIDENT OF THE UNITED

REPUBLIC OF TANZANIA.....1st RESPONDENT

THE HON. ATTORNEY GENERAL.....2nd RESPONDENT

CHARLES KICHERE.....3rd RESPONDENT

PROF. MUSSA JUMA ASSAD.....4th RESPONDENT

JUDGMENT

11/08/2022 & 5/12/2022

Masoud, J.

The petition by Zitto Zuberi Kabwe, the petitioner, brought by way of originating summons supported by the petitioner's affidavit verifying the pleaded facts, has its genesis in the termination of the service of the fourth respondent who was until 2/11/2019, the Controller and Auditor General (the CAG) and the subsequent appointment of the third respondent in to the said office by the first respondent.

The petitioner challenges the constitutional validity of, firstly, the provision of section 6(1) of the Public Audit Act, No.11 of 2008 (the Public Audit Act); secondly, the removal under section 6(1) of the Act of the fourth respondent from the position of Controller and Auditor General (the CAG) on 03/11/2019 by the first respondent; and thirdly, the subsequent appointment of the third respondent to the position on pretext of expiry of the office tenure of the fourth respondent.

The impugned provision of section 6(1) of the Public Audit Act, the removal of the fourth respondent under section 6(1) of the Act, and the subsequent appointment of the third respondent by the first respondent are challenged for allegedly violating article 144(1) of the Constitution read together with section 6(2) of the Act. It is further alleged that the impugned provision and the said removal of the fourth respondent

and the appointment of the third respondent are also violative of articles 13(1), 26(1), and 29(1),(2) and (5) of the Constitution.

The complaint against the constitutionality of the said provision, the removal of the fourth respondent and the subsequent appointment as afore said were hinged on several grounds set out in the petition. They are as follow:

Firstly, it was stated in the petition that the impugned provision offends the afore mentioned provisions of the Constitution because it runs contrary to the retirement age specified under article 144(1) of the Constitution which was pursuant to and in line with the permission accorded by the said provision of the Constitution extended from sixty to sixty five years of age under section 6(2) of the Public Audit Act.

Secondly, it was stated that the creation of a fixed term of five years within which a holder of the office of the CAG shall remain in office under section 6(1) of the Public Audit Act is offensive to article 144(1) of the Constitution as the created term was not envisaged under the said article of the Constitution. In relation to the creation of the fixed term of five years in the office of the CAG, it was the petitioner's complaint that the term was against article 144(1) which requires a holder of the position of the CAG not to vacate office until he attains the age of sixty five years as extended under section 6(2) of the Public Audit Act (supra).

Thirdly, it was stated that the creation of a fixed term of five years which is renewable for one term only is also unconstitutional since the CAG is, upon being appointed, entitled to remain in the office until he attains the age of 65 years.

Fourthly, it was contended in relation to the alleged unconstitutional removal of the fourth respondent from office that since the said respondent was born on 6/10/1961 he was, after being so appointed on 5/11/2014, required to remain in the said position until he attains the age of 65 years on 6/11/2026. Thus, it was added, his removal from the office before attaining sixty five years of age on 6/11/2026 and the subsequent appointment of the third respondent into the position of the CAG amounted to violation of the Constitution. It was averred that the basis of the alleged expiry of the first term of five years is inconsistent with the Constitution which requires a holder of the office of the CAG to vacate office upon attaining the compulsory retirement age, and not on expiry of a fixed term of five years, eligible for renewal for one term. It was his averment that one could continue to serve into the office as long as he has not attained the age of sixty years extended to sixty five years by article 144(1) of the Constitution read together with section 6(2) of the Public Audit Act.

In addition, it was the petitioner's allegation that the first respondent's acts and subsequent statements made as he was appointing the third respondent into the office occupied by the fourth respondent undermined not only the independence of the office as enshrined under the Constitution, but also the first respondent's obligation to abide by the Constitution. It was also alleged that when the fourth respondent was removed from office on 3/11/2019 on pretext of expiry of his fixed term of five years, and the third respondent appointed into the position of the CAG and sworn in on 4/11/2019, the fourth respondent was still yet to attain the age of sixty five years as he was first appointed at the age of 53 years on 5/11/2014.

It was further pointed out that the fourth respondent handed over the office to the third respondent who was appointed on 4/11/2019, notwithstanding his

knowledge that his tenure was still yet to end as he had not attained the age of sixty five years. As an individual who served as the CAG is by virtue of the law not required to be appointed to, or act in, any other office in the service of the government, the fourth respondent has, as a result of being removed from the office before attaining the age of sixty five years, let alone sixty years of age, been denied an opportunity to continue serving in any other office in the service of the government. With such allegations and complains, the petitioner invited the court to grant a number of reliefs as follow:

> *(a)A declaratory order that the provisions of section 6(1) of the Public Audit Act No.11 of 2008 is unconstitutional for offending the provisions of Article 144(1) read together with Articles 26(1) and 29(1), (2) and (5) of the Constitution of the United Republic of Tanzania of 1977 Cap 2 R.E. 2002 as amended (hereinafter "the Constitution") and for being incompatible with section 6(2)(a) of the Public Audit Act No.11 of 2008 that extended the tenure of office of the Controller and Auditor General (CAG) from 60 to 65 years in line with the permission given by Article 144(1) of the Constitution;*
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> *(b)A declaration that the removal of the 4th Respondent from office by the 1st Respondent, under the pretext of expiration of his tenure on the 3rd of November 2019, is unconstitutional as the 4th Respondent had not reached the mandatory retirement age of 65 years as required by section 6(2) (a) of the Public Audit Act No.11 of 2008 in line with Articles 144(1) and 26(1) of the Constitution.*

(c)A declaration that the removal of the 4th Respondent from office by the 1st Respondent while he had not reached the 65 years of age as set by Article 144(1) of the Constitution read together with section 6(2) (a) of the Public Audit Act No. 11 of 2008 is a flagrant violation of Articles 13(1) and 29(1),(2) and (5) of the Constitution;

(d)That the 1st Respondent is not above the laws of the land and is like all citizens of the United Republic of Tanzania required to abide with the requirements of the Constitution including Articles 13(1), 26(1), and 29(1), (2) and (5) and that the action of removing the 4th Respondent from office without reaching the legally set age of vacating his office is a violation of Articles 13(1);26(1); and 29(1),(2) and (5) while he is person who swore an oath to preserve, protect and defend the Constitution of the United Republic of Tanzania and laws made under it;

(e)That the appointment of the 3rd Respondent is unconstitutional, null, void and of no legal effect as the 4th Respondent who was the substantive holder had not reached the mandatory retirement age of 65 years old and had not committed any acts incompatible with his office and thus a blatant violation of Article 144(1) read together with Article 26(1),29(1),(2) and (5) of the Constitution;

(f)That, the 4th Respondents is the substantive holder of the office of the Controller and Auditor General of the United Republic of Tanzania as he has not reached the mandatory retirement age of 65 years;

(g)That, the 3rd Respondent is not the Controller and Auditor General of the United Republic of Tanzania.

(h)Costs to be provided for by the Respondents;

(i)Any other reliefs (s) the Hon. Court may, in the circumstances, deem just, fit and proper to grant.

In the reply to the petition by the fourth respondent and his counter affidavit, the fourth respondent did not dispute the petition. Rather, he supported the claim that it was the compulsory retirement age provided for by the Constitution that determined his tenure of the office and not the expiry of the alleged fixed term of five years. He further supported the averment by the petitioner that the fixed term of five years renewable only once under section 6(1) of the Public Audit Act contradicts article 144(1) of the Constitution.

The fourth respondent was of the above view because article 144(1) of the Constitution provides that the CAG shall hold the office until he reaches the age of sixty years. It was his allegation however that the extension of the said age limit from sixty to sixty five years under section 6(1) of the Public Audit Act was also contrary to article 144(1) of the Constitution.

The fourth respondent admitted that he was born on 6/11/1961 as averred by the petitioner which meant that he was fifty three years old when he was appointed on 5/11/2014. He went further to state that when he was removed from the office of the CAG he was only fifty eight years old, meaning that he had neither reached the age of sixty years nor sixty five years, nor committed anything incompatible with his

office as provided by article 144 of the Constitution read together with section 6(2) of the Public Audit Act.

The first, second and third respondents on their side resisted the petition. They filed a joint reply to the petition which was accompanied by the counter affidavits sworn by one, Mr. Haruni Benge Matagane, in respect of the first and the second respondent, and one, Mr. Charles Edward Kichere, the third respondent, respectively. They both disputed the assertion by the petitioner that the removal of the fourth respondent from office before attaining the age of sixty years or sixty five years was unconstitutional for offending the alleged provisions of the Constitution.

They also disputed the contention that section 6(1) of the Public Audit Act was unconstitutional for violating the alleged provisions of the Constitution. They maintained that section 6(1) of the Public Audit Act which created a fixed term of five years renewable for only one term was in compliance with article 144(1) of the Constitution.

They stated that the termination of office tenure of the fourth respondent and the appointment of the third respondent into the office of the CAG were a result of the expiry of the fourth respondent's term of office as per his appointment letter and therefore constitutional. The appointment letter pleaded by the said respondents was however not annexed to the relevant counter affidavit of the first and second respondent despite being referred to.

As far as they are concerned, the fourth respondent's tenure expired on 4/10/2019 by the operation of law which pegged such tenure to the age limit of sixty years or any other age that may be set by an Act of Parliament. It was averred in the

counter affidavit of the first and second respondent that the fourth respondent was notified upon appointment that his appointment was for a tenure of five years subject to re-appointment on the discretion of the appointing authority. The respondents disputed all the grounds raised supporting the allegation of violation of the Constitution.

At the hearing both sides appeared represented and were heard through written submissions. Mr. Nyororo Mwita Kicheere, learned advocate, appeared and filed the submissions for the petitioner whereas the submissions by the first, second and third respondent were prepared and filed by Mr. Hangi M. Chang'a, learned Principal State Attorney. And the submissions by the fourth respondent were filed by Mr. Fulgence Massawe, learned advocate.

In his written submission in chief, Mr. Nyaronyo Mwita Kacheere, learned Advocate for the petitioner, adopted the petition, and the supporting affidavit as part of his submission. His submission was consistent with the petitioner's averments in the petition and the supporting affidavit. Indeed, the submission and the resulting arguments were informed and inspired by the said averments. Although we need not reproduce the submissions, the following points of arguments from the said submissions are noteworthy and will be fully considered.

The enactment of section 6(1) of the Public Audit Act extending the tenure of the holder of the Office of the CAG from sixty to sixty five years was pursuant to the requirement of article 144(1) of the Constitution. The latter provides for enactment by the Parliament of a law that prescribes for any other age. We were thus told that a holder of the office of the CAG is supposed to serve in such office until he reaches the

age of sixty five years unless he commits acts incompatible with the office and he is found guilty by the commission formed for such purpose, resigns or dies.

We were told that the age of the fourth respondent when appointed on 4/11/2014 in the office of the CAG was only fifty three years. As the retirement age of a holder of the office of the CAG was in compliance with article 144(1) of the Constitution extended by the Parliament under section 6(2) of the Public Audit Act from sixty to sixty five years of age, the fourth respondent was obliged to serve the office for a period of not less than twelve years before he vacates the office upon attaining the age of sixty five years.

It was accordingly argued that the removal of the fourth respondent from his office by the first respondent, after the expiry of first term of five years when he was only fifty eight years old and before attaining the compulsory retirement age of sixty five years was offensive to the Constitution as pleaded and verified by the petitioner's affidavit, which Constitution the first respondent is equally bound to abide by. Thus, by removing the fourth respondent acting under section 6(1) of the Public Audit Act, the first respondent breached the Constitution which he was bound under article 26(1) of the Constitution to abide by as the fourth respondent was yet to attain the age of sixty five years by then.

With respect to the principle of law that the first respondent was bound to abide by the Constitution, we were referred to the case of **Mwalimu Paul John Mhozya v Attorney General** [1996] TLR 130. The principle in this case as per Samatta JK (as he then was) was that, all government leaders, including the president, are like the humblest citizen bound to comply with the laws of the country.

On our part, we have no doubt that the above statement of principle is still valid today as was before, and perhaps, very relevant in the prevailing circumstances than it was then. The counsel for the petitioner was in our understanding saying in relation to the circumstances of the petition at hand, that the first respondent was constitutionally bound to ensure that the fourth respondent remains in the office until he attains the age of sixty five years unless he is found guilty of committing acts not compatible with the office, dies or resigns.

We were likewise referred to the authority of **Legal and Human Right Centre and Two others vs Attorney General** [2006] TLR 240, at page 278, and more importantly, the Court of Appeal's decision in **Attorney General versus Jeremia Mtobesya**, Civil Appeal No. 65 of 2016, with regard to the principle requiring this court to juxtapose the impugned provision with the violated provision of the Constitution to discern the alleged violation or otherwise.

We have no doubt in our mind that the above two authorities favourably considered and applied the principle in the situations whereby statutory provisions were being challenged for violating relevant provision or provisions of the Constitution.

As to **Legal and Human Rights Centre case** (supra), this court, if we were to expound a bit on it, had it in relation to the provision that was questioned that '*...what this court has to look at are the provisions themselves vis-a-vis the articles of the Constitution which are alleged to have been breached.*' Similarly but more importantly, as to **Jeremia Mtobesye case** (supra), the Court of Appeal had it inter alia that the duty of the court in such situation is just to '*...lay the article of the*

Constitution which is invoked beside the statute which is challenged and to decide whether the letter squares with the former.'

We are satisfied that the above mentioned principle which in so far as we are aware traced its origin from the case of **US vs Butler**, 297 US. 1 [1936] is now part of our jurisprudence relating to constitutional cases, and would be invoked by this court in appropriate circumstances. It was argued by Mr. Kicheere, counsel for the petitioner, that when section 6(1) of the Public Audit Act is laid besides article 144(1) of the Constitution read together with section 6(2) of the Public Audit Act, the former is clearly found to be violative of the latter.

It was insisted that section 6(2) of the Public Audit Act read together with article 144(1) of the Constitution sets out the retirement age of a holder of the office of the CAG at the age sixty five years while section 6(1) of the Public Audit Act sets a fixed term of five years which may be renewed once for another term on the discretion of the first respondent. The implication is, we were told, that a person appointed into the office and has served for a fixed term of five years cannot continue serving in the office on expiry of such term even if he has not reached the age of retirement set out by the Constitution and which was increased to sixty five years of age.

It is the argument of Mr. Kicheere, learned Counsel, that, by setting a fixed five years term renewable once for the same period of five years, the provision of section 6(1) of the Public Audit Act (supra) violates article 144(1), and article 26(1) of the Constitution. It is so violated because the Constitution does not provide for the term of five years eligible for renewal for one time only which term may lead to removal of

the CAG before he attains the compulsory age of sixty five years. We were thus invited to so find and hold.

We were further referred to the reply to the petition by the first, second and third respondents and the averments in the respective counter affidavits. Accordingly, the averment that upon expiry of the first five years term, the age limit of sixty years or sixty five years, whichever comes first, would apply, was disputed because the holder of the office of the CAG vacates the office upon attaining the age of sixty five years which was extended from sixty years, or upon his resignation, death or upon being found guilty of acts incompatible with the office of the CAG.

In line with the above argument, it was a further submission of the learned counsel for the petitioner that the appointment of the third respondent by the first respondent while the fourth respondent was still in office and was still yet to reach the age of sixty five years was unconstitutional and the court was called upon to hold so. The case of **Juma Muslim Shekimweri vs Attorney General** [1997] TLR 3 was relied on in fortification. It was held in the above cited case that compulsory retirement of a civil servant or his removal from service in the public interest may be challenged in this court on, among other things, the ground that the legislation under which the impugned decision was made is unconstitutional.

The submission in reply by Mr. Fulgence Massawe, Advocate, the counsel for the fourth respondent, was consistent with the submission made on behalf of the petitioner by Mr. Kicheere. The submission in a nutshell reemphasised on the background as to the appointment by the first respondent of the fourth respondent as the CAG on 5/11/2014 at the age of fifty three years, his removal from the office at

the age of fifty eight years on 03/11/2019 before attaining the age of sixty five years and his replacement by the appointment of the third respondent as the CAG.

Mr. Massawe also underlined the position of the Constitution and the Public Audit Act as to appointment, tenure and retirement of the CAG from the office as maintained by Mr. Kicheere. In doing so, Mr. Massawe referred us to article 144(1) of the Constitution which provides that the CAG shall hold the office until he attains the age of sixty years, and section 6(2) of the Public Audit Act which provides that the CAG shall retire at the age of sixty five years.

Mr. Massawe linked the foregoing position with the dictates of the supremacy of the Constitution, and the mandate of the court to interpret the law in which case the Constitution must be regarded as the fundamental law. In his arguments, he drew support from articles 4(2), 26, 30(5), 64(4) and article 107A of the Constitution. In relation to such arguments by the learned counsel on the supremacy of the constitution, and the court's mandate to interpret the law, the court's attention was drawn to a number of cases in which remarks signifying the supremacy were made.

Such cases relating to the principle on the supremacy of the Constitution relied on in fortification by the counsel for the fourth respondent included, **Rajashtan vs Union of India** (1970) 3 SCC 592 (India); **Minerva Mills vs Union of India** (1980) 3 SCC 625(India); **R(Jackson) vs The Attorney General** [2005]4 All ER 1253 (England); **My Vote Counts vs Speaker of the National Assembly & others** [2015] ZACC 31**; Centre for Rights and Awareness and Others vs the Speaker of National Assembly & 6 Others** (2016) eKLR, **Ally Linus and Eleven Others**

vs Tanzania Harbours Authority and Another [1998] TLR 5, page 12; and **Julius Ishengoma Francis Ndyanabo vs Attorney General** [2004] TLR 14.

In the case of **Centre for Rights and Awareness and others** (supra), it was, among other things, held that if there is irreconcilable variance between the legislation and the Constitution, that which has the superior obligation and validity ought, of course, to be preferred, or in other words, the Constitution ought to be preferred. The court was, in the end, asked to interpret and determine as to whether section 6(1) of the Public Audit Act is unconstitutional for offending article 144(1) of the Constitution.

Consistent with their reply to the petition and counter affidavits, Mr. Hangi Chang'a, learned Principal State Attorney for the first, second and third respondents, vehemently submitted against the petition. The respective counter affidavits of Mr. Haruna Benge Matagane and Mr. Charles Edward Kichere were adopted as part of the learned Principal State Attorney's submission in reply. Mr. Chang'a employed a whole range of guiding principles in determining the constitutional petitions in a bid to show that they work against the instant petition.

The cases cited by Mr. Chang'a included **Julius Inshengoma Francis Ndyanabo** (supra); **Legal and Human Rights Centre and Two Others** (supra); and **Attorney General vs Dickson Paulo Sanga**, Civil Appeal No. 175 of 2020 which concerned the established standard of proof required in constitutional cases. And the case of **DPP vs Daudi Pete** [1993]; **Julius Ishengoma Francis Ndyanabo** (supra); **Kukutia Ole Pumbun and Another vs Attorney General and Another**

[1993] TLR 159 (CAT) which concerned the principles on the interpretation of the Constitution and fundamental rights and freedom.

Mr. Chang'a observed that there were no issues proposed by the petitioner. He subsequently proposed issues for determination which revolved around the constitutionality of section 6(1) of the Public Audit Act, the removal of the fourth respondent from the office, and the appointment of the third respondent into the office. The formulation of the proposed issues in our view dismissed the argument that the first, second and third respondents could not comprehend as to what exactly the petitioner was challenging in the instant petition.

Answering the issues, Mr. Chang'a considered the impugned provision in the light of the provisions of article 144(1) read together with article 26(1), 29(1), (2) and (5) of the Constitution. He submitted that article 144(1) necessarily provides for the retirement age of the CAG or any other age stipulated in any law enacted by Parliament. According to Mr. Chang'a, the other age stipulated by the law, to wit, section 6(2)(a) of the Public Audit Act, is sixty five years. Thereafter, Mr. Chang'a submitted at page 9, paragraph 26 of his submission in reply, and we quote "*In one way or another, regardless of the time saved in the office, the CAG will have to move out of the office upon reaching the age stipulated.*"

On the other hand, it was Mr. Chang'a's view that section 6(1) of the Public Audit Act sets out a fixed tenure of five years upon appointment of the CAG which may be renewed only once. The said tenure was, it was argued, consented by the fourth respondent when he was served with the appointment letter. Thus, the fourth respondent, it was further argued, knew that he was to serve for a fixed term of five

years with an option of renewal. According to Mr. Chang'a, article 144(1) of the Constitution only provides for a maximum age which does not however preclude application of other laws providing for the terms of the office.

In a bid to fortify the forgoing arguments, Mr. Chang'a urged us to consider the words used in article 144(1) as they relate to the spirit of section 6(1) of the Public Audit Act. With such reasoning, the case of **R v Mwesige Geofrey & Another**, Criminal Appeal No. 355 of 2014, Bukoba (unreported) was cited in connection with underlying principles of statutory interpretation. We were told that the Court in that case borrowed a leaf from the U.S Supreme Court's authority in **Consumer Products Safety Commission and Another vs GTE Sylvania Inc.** 227 U.S. 102 (1980) to the effect that:

> *The starting point for interpreting a statute is the language of the statute itself. Absenting a clearly expressed legislative intention to the contrary, that language must be ordinarily regarded as conclusive. [If a language of a statute is plain and clear] the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.*

We were further told that in view of the foregoing, the Court of Appeal restated the position of the law that when the words of a statute are unambiguous, there is no need for interpolations. Mindful of these principles, Mr. Chang'a submitted that it cannot be said that the impugned provision is violative of the Constitution as alleged by the petitioner. However, Mr Chang'a did not elaborate with reference to the language of the impugned provision and the contravened provisions as to how they relate to the above principle on statutory interpretation.

As to article 26(1) of the Constitution which had nothing to do with the appointment, it could not be invoked as the basis of the petition. Rather, the impugned provision, it was submitted, was enacted with a view to protecting and determining rights and duties of every person. In any case, it was argued, the impugned provision is, pursuant to **Attorney General vs Dickson Sanga** (supra) saved by article 30(2) of the Constitution as it meets the test of proportionality, legitimacy, and lawfulness. Thus, article 30(2) was reproduced without specifying any specific purpose falling within the ambit of the provisions of the Constitution invoked.

In the end, it was said that if the petitioner is aggrieved by, among other things, the removal of the fourth respondent, he should have resorted to judicial review in view of the case of **Sanai Murumbe and Another v Muhere Chacha** [1990] TLR 54.

We have duly considered the submissions and examined the records of the petition and the affidavit and counter affidavits of the respective parties herein. In doing so, we were mindful of issues emerging from the pleadings and rival submissions as to whether the impugned provision is violative of the provisions of the Constitution alleged by the petitioner, and whether the removal of the fourth respondent from the office, and the subsequent appointment of the third respondent as the CAG was violative of the cited provisions of the Constitution as alleged by the petitioner.

In quenching our quest on the merit of the petition and thus the constitutional validity of the impugned provision, the removal of the fourth respondent from the office and subsequent appointment of the third respondent, we had to go back to the history as is on the record of the petition and submissions before us.

It is common ground that the fourth respondent was, at the age of fifty three years, appointed by the first respondent into the office of the CAG on 5/11/2014. Having saved in the office as the CAG for five years, the fourth respondent was at the age of fifty eight years removed by the first respondent from the office on 3/11/2019. It is also common place that with the removal of the fourth respondent who was born on 4/10/1961, the third respondent was appointed by the first respondent to replace the fourth respondent who was until 02/11/2019 the CAG.

The dispute between the petitioner and the fourth respondent on one hand, and the first, second and third respondents, on the other, was on the constitutionality of section 6(1) of the Public Audit Act, the constitutionality of the removal of the fourth respondent from the office pursuant to the impugned provision, and the constitutionality of the appointment of the third respondent into the office.

While the petitioner maintained in his petition, affidavit, and submission in chief filed on his behalf by his learned counsel, that the removal of the fourth respondent from the office before attaining the age of sixty five years, the subsequent appointment of the third respondent in to the office, and the provision of section 6(1) of the Public Audit Act are violative of article 144(1) of the Constitution read together with section 6(2) of the Public Audit Act, articles 13(1), 26(1) and 29(1), (2), and (5) of the Constitution which stance was supported by the fourth respondent; the first, second and third respondent maintained that the removal of the fourth respondent from the office, the appointment of the third respondent into the office and the impugned provision are all consistent with the alleged provisions of the Constitution.

Section 6(1) of the Public Audit Act was admittedly used by the first respondent to provide for a fixed term of five years of the office of the fourth respondent. According to the counter affidavit of the first and second respondent, the fourth respondent duly consented to the said fixed term of five years of the office. It was also not disputed that the fourth respondent was removed from the office following the alleged expiry of the first five years term of the office of the fourth respondent, and hence the subsequent appointment of the third respondent into the office.

It was furthermore the position of the first respondent and second respondent, which was disputed by the petitioner and the fourth respondent, that the first respondent was entitled under section 6(1) of the Public Audit Act to opt to renew or not to renew the fourth respondent's five years term of the office. It is the subject of this judgment whether or not the provision is violative of the stated provisions of the Constitution.

Despite being only referred to article 144(1) of the Constitution which was allegedly violated by the provision of section 6(1) of the Public Audit Act, we saw it fit to reproduce, and ponder on, the entire provisions of article 144 which relate to the appointment of the CAG, the tenure of the office of the CAG, and the removal of the CAG from the office. The said provisions of article 144(1)–(7) of the Constitution read in Kiswahili thus:

> ***144***.*-(1)* ***Bila ya kuathiri masharti mengine yaliyomo katika ibara hii****, Mdhibiti na Mkaguzi Mkuu wa Hesabu wa Jamhuri ya Muungano* ***atalazimika kuacha kazi yake atakapotimiza umri wa miaka sitini au umri mwingine wowote utakaotajwa na Sheria iliyotungwa na Bunge.***
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> *(2) Mdhibiti na Mkaguzi Mkuu wa Hesabu* ***aweza tu kuondolewa katika madaraka ya kazi yake*** *kwa sababu ya kushindwa*

kutekeleza kazi zake (ama kutokana na maradhi au sababu nyingine yoyote) au kwa sababu ya tabia mbaya, au kwa kuvunja masharti ya sheria ya Maadili ya Viongozi wa Umma ***na hataweza kuondolewa kazini ila kwa mujibu wa masharti ya ibara ndogo ya (4) ya ibara hii.***

(3) Iwapo Rais anaona kwamba suala la kumwondoa kazini Mdhibiti na Mkaguzi Mkuu wa Hesabu kwa mujibu wa masharti ya ibara hii lahitaji kuchunguzwa, basi katika hali hiyo mambo yatakuwa ifuatavyo:

(a) Rais atateua Tume Maalum ambayo itakuwa na Mwenyekiti na Wajumbe wengine wasiopungua wawili. Huyo Mwenyekiti na angalau nusu ya wajumbe wengine wa Tume hiyo itabidi wawe watu ambao ni Majaji au watu waliopata kuwa Majaji wa Mahakama Kuu au Mahakama ya Rufani katika nchi yoyote iliyomo kwenye Jumuiya ya Madola;

(b) Tume hiyo itachunguza shauri lote halafu itatoa taarifa kwa Rais kuhusu maelezo ya shauri lote na itamshauri Rais kama huyo Mdhibiti na Mkaguzi Mkuu wa Hesabu aondolewe kazini kwa mujibu wa masharti ya ibara hii kwa sababu ya kushindwa kufanya kazi kutokana na maradhi au sababu nyingine yoyote au kwa sababu ya tabia mbaya.

(4) Ikiwa Tume iliyoteuliwa kwa mujibu wa masharti ya ibara ndogo ya (3) itamshauri Rais kwamba huyo Mdhibiti na Mkaguzi Mkuu wa Hesabu aondolewe kazini kwa sababu ya kushindwa kufanya kazi kutokana na maradhi au sababu nyingine yoyote au kwa sababu ya tabia mbaya, basi Rais atamwondoa kazini.

(5) Ikiwa suala la kumwondoa kazini Mdhibiti na Mkaguzi Mkuu wa Hesabu limepelekwa kwenye Tume kwa ajili ya uchunguzi kwa mujibu wa masharti ya ibara hii, Rais aweza kumsimamisha kazi huyo Mdhibiti na Mkaguzi Mkuu wa Hesabu, na Rais aweza wakati wowote kufuta uamuzi huo wa kumsimamisha kazi, na kwa hali yoyote uamuzi huo utabatilika ikiwa Tume itamshauri Rais kwamba huyo Mdhibiti na Mkaguzi Mkuu wa Hesabu asiondolewe kazini.

(6) Mtu ambaye ni Mdhibiti na Mkaguzi Mkuu wa Hesabu au aliyepata kuwa Mdhibiti na Mkaguzi Mkuu wa Hesabu hawezi kuteuliwa kushika au kushikilia madaraka ya kazi nyingine yoyote katika utumishi wa Serikali ya Jamhuri ya Muungano.

(7) Masharti ya ibara hii hayatatumika kwa mtu yoyote aliyeteuliwa kuwa Kaimu Mdhibiti na Mkaguzi Mkuu wa Hesabu. (Emphasis is ours)

Translated in English, the above provisions read thus

> ***144.-**(1) **Without prejudice to the other provisions of this Article**, the Controller and Auditor-General of the United Republic **shall be obliged to vacate office upon attaining the age of sixty or any other age which shall be prescribed by a law enacted by Parliament.***
>
> *(2) The Controller and Auditor-General may be removed from office only for inability to perform the functions of his office (either due to illness or to any other reason) or for misbehaviour, or for violating the provisions of the law concerning the ethics of public leaders and shall not be so removed except in accordance with the provisions of sub article (4) of this Article.*
>
> *(3) if the President considers that the question of the removal of the Controller and Auditor-General from office under the provisions of this Article needs to be investigated, then the procedure shall be as follows:*
>
> *(a) the President shall appoint a Special Tribunal which shall consist of a Chairman and not less than two other members. The Chairman and at least half of the other members of that Special Tribunal shall be persons who are or have been Judges of the High Court or of the Court of Appeal in any country within the Commonwealth;*
>
> *(b) the Special Tribunal shall investigate and submit report to the President on whole matter and shall advise him whether or not the Controller and Auditor General should be removed from office in accordance with the provisions of this Article on the grounds of inability to perform his functions due to illness or any other reason or on grounds of misbehaviour.*
>
> *(4) If the Special Tribunal appointed in accordance with the provisions of subarticle (3) advises the President that the Controller and Auditor-General be removed from office on grounds of inability to perform functions of his office due to illness or any other reason or on grounds of misbehaviour, then the President shall remove him from office.*
>
> *(5) If the question of removing the Controller and Auditor-General has been referred to a Special Tribunal for investigation pursuant to the provisions of this Article, the President may suspend the Controller and Auditor-General from office, and the President may at any time rescind the decision to suspend the Controller and Auditor-General and in any case such decision shall lapse if the*

Special Tribunal advises the President that the Controller and Auditor-General be not removed from office.

(6) A person who holds or who has held the office of Controller and Auditor-General shall not be appointed to, or act in, any other office in the service of the Government of the Untied Republic.

(7) The provisions of this Article shall not apply to any person appointed acting Controller and Auditor-General. (Emphasis is ours)

It is plain from the construction of the provisions of article 144(1)-(7) of the Constitution that the Constitution sets up a framework within which one may be appointed into the office of the CAG and a framework of the tenure of the office of the CAG. That, he should upon being so appointed hold the office until he attains the age of sixty years or any other age prescribed by the law; he may be removed before he vacates the office but only for inability to perform the functions of his office (either due to illness or to any other reason) or for misbehaviour, or for violating the provisions of the law concerning the ethics of public leaders; and he shall only be properly removed if a special tribunal so advise the first respondent. In addition, article 144(1) provides for any other age which shall be prescribed by a law enacted by the Parliament, and which once attained the holder of the office "*shall be obliged to vacate office.*"

In our understanding, article 144(1) - (7) of the Constitution affords only two avenues in respect of which the CAG may leave the office. The first avenue is when the CAG attains the age of sixty years or any other age that may be prescribed by the law in which case he '*shall be obliged to vacate the office.*' And the second avenue is through removal of the CAG from the office by the first respondent on the grounds of inability to perform his functions due to illness or any other reason or on grounds of

misbehaviour and only upon advice of a properly constituted special tribunal to the first respondent. In our considered view the framework of the above provision does not envisage any other avenue through which the CAG may either vacate his office or be removed from the office.

In other words, we can say that article 144(1)-(7) of the Constitution sets out the parameters under which one has to vacate office only upon attaining the age of sixty years or any other age prescribed by the law, or may be removed from the office by the first respondent on the advice of a special tribunal on the grounds of inability to perform his functions due to illness or any other reason or on grounds of misbehaviour, such that one should not be removed or subjected to termination by the first respondent but in compliance with those parameters of the Constitution.

We underlined the significance of the use of some phrases in the said provision, namely, the phrase "*without prejudice to the other provisions of this article*", the phrase "*...or any other age which shall be prescribed by a law enacted by Parliament*" and the phrase "*...shall be obliged to vacate office.*" We did so while mindful of the argument by Mr. Chang'a, learned Principal State Attorney that the provision sets the CAG's compulsory retirement age of sixty years as the ceiling age, but it does not restrict enactment of other laws, such as the impugned provision, setting out the terms of the office in respect of which a holder of the office may be subjected to; and while also mindful of the argument by Mr. Kicheere that article 144(1) of the Constitution read together with section 6(2) provides for the timeframe for holding the office of the CAG, which would only last upon the holder of the office attaining the age of constitutional retirement age of sixty five years old, and not a renewable five years term provided for by the impugned provision.

We have no doubt in our mind that the use of the phrase "*Without prejudice to the other provisions of this Article*" under article 144(1) is to the effect that unless the CAG is removed by the first respondent pursuant to sub-article 144(4), he is required not to vacate the office before attaining the age of sixty years or any other age prescribed by the law. Likewise, in our understanding of rules of interpretation, the use of the phrase "*...or any other age which shall be prescribed by a law enacted by Parliament*" under article 144(1) means that the law enacted by the Parliament should not provide for an age limit which is less than the age of sixty years provided for under the Constitution.

We do not therefore subscribe to the implied argument by Mr Chang'a that the phrase "*...or any other age which shall be prescribed by a law enacted by Parliament*" entitles the parliament *to enact* a law prescribing a retirement age below the age of sixty years provided by the Constitution as the minimum or a law whose effect would lead to removal of the CAG before attaining the compulsory retirement age. We also do not think that the said phrase entitles the Parliament to enact a law providing for a criterion of expiry of a fixed office term of five years, and the removal of a holder of the office of the CAG from the office on expiry of the fixed term of five years.

Although we will come back to the above point as we ponder on the constitutionality of the provision of section 6(1) of the Public Audit Act (supra) and the import of section 6(2)(a) of the Public Audit Act, it should however suffice at this stage to state that the significance of section 6(2)(a) of the Act is to increase the constitutional retirement age of a holder of the office of the CAG from sixty years to sixty five years pursuant to article 144(1) of the Constitution which, among other

things, entitles the Parliament to enact a law prescribing for any other retirement age other than sixty years..

On the other hand, the impugned provision of section 6(1) of the Public Audit Act, which, according to the petitioner, is not compatible with the provision of article 144(1) of the Constitution, as well as the provisions of section 6(2) and section 7 of the said Act, which are consistent with the scheme of article 144are worth noting. They read thus:

> *6(1) The Auditor and Controller General shall hold office for the fixed term of five years and shall be eligible for renewal for one term only.*
>
> *(2) Unless the question of removal becomes the subject of investigations in terms of Article 144(3) of the Constitution, the Controller and Auditor General shall vacate office:-*
>
> *(a) Upon attaining the age of sixty-five years.*
>
> *(b) if the Controller and Auditor General resigns;*
>
> *(i) on account of medical grounds or any other grounds Which the President considers sufficient; or*
> *(ii) by giving six months' notice to the President.*
>
> *7. The Controller and Auditor General may be removed from his office for reasons and procedures provided for under Article 144(4) of the Constitution. (Emphasis is ours)*

We reflected on the provisions of section 6(1) and (2) of the Public Audit Act (supra) whilst mindful of the gist of the whole Act and the rival submissions of learned counsel for the petitioner and the respondents. It was correctly said by the counsel for both sides that section 6(1) provides for a fixed term of five years which is eligible for renewal for one term only. It is therefore correct to say that section 6(1) introduces

a criterion of removing a holder of the office of CAG on expiry of a fixed term of five years.

It was further correctly said that section 6(2) provides for a retirement age of sixty five years which once attained the CAG is obliged to vacate the office unless he is removed from the office in accordance with article 144(3) of the Constitution. In fact, the wording of section 6(2)(a) has it in part that *"...the Controller and Auditor General shall vacate office upon attaining the age of sixty-five years."* The wording is no doubt consistent with the provision of article 144(1) of the Constitution under which a holder of the office is required to vacate office upon attaining the compulsory age of retirement extended from sixty to sixty five years.

In so far as the above mentioned section is concerned, the language used is so plain that the duty of interpretation of the provision does not arise, as was held in the case of **Republic vs Mwesige Geofrey and Another** (supra) which was also referred to us by Mr. Chang'a, learned Principal Attorney for the first, second and third respondent, and which borrowed a leaf from the US Supreme Court's decision in **Consumer Products Safety Commission** *et al* **(supra)**.

In addition to the above authority, we are aware of the case of **Commissioner General of Tanzania Revenue Authority vs Aggreko International Projects Ltd**, Civil Appeal No. 148 of 2018, which heavily relied on the case of **Mwesige Geofrey** (supra), in respect of the principle that when the words of a statute are unambiguous, "judicial inquiry is complete", and there is no need of interpolations.

We are fortified with the above position because in our view section 6(1) of the Public Audit Act, unambiguously, provides, firstly, for a fixed term of five years in

which the CAG shall hold the office, and secondly, for the eligibility of a renewal for one term. We considered the purview of the impugned provision against the backdrop of the constitutional set up of the age upon which the CAG is required to vacate office under article 144(1) of the Constitution read together with section 6(2) of the Public Audit Act, and the Constitutional means through which the CAG may be removed from the office.

We were in doing so mindful of the supremacy of the Constitution in relation to the need to regard it as the fundamental law as rightly argued by Mr. Massawe, learned Counsel for the fourth respondent, as well as the words and the meaning of the phrase used in article 144(1) of the Constitution, namely, *"shall be obliged to vacate office upon attaining the age of sixty years"*. On our part, if we go by the meaning of the word "*obliged*" in the **Oxford Advanced Learners' Dictionary of Current English** (Fourth Edition, 1992), the said phrase would mean, "*shall be compelled or required by law to vacate office upon attaining the age of sixty years.*" We then wondered as to whether the provision violates article 144(1) of the Constitution read together with section 6(2)(a) of the Public Audit Act mindful of the age upon which the CAG is compelled or required to vacate office which was extended to sixty five by section 6(2)(a) of the Public Audit Act.

There was no dispute as to the principles on the interpretation of the Constitution and fundamental rights and freedoms, as well as the principles on the burden of proof in constitutional cases, which principles also take into account the supremacy of the Constitution as the fundamental law, and principles that apply when exclusion clauses or saving provisions of the Constitution are relied upon as a basis of the constitutionality of a provision of a statute.

We agree with the parties that those are the relevant principles which we are bound to take into account as we resolve the instant petition. In relation to such principles, we recalled the case of **Attorney General vs Dickson Sanga** (supra) which cited with approval the case of **Rev. Christopher Mtikila vs the Attorney General** [1995] TLR 58, and **Julius Inshengoma Francis Ndyanabo** (supra) to mention but a few.

One such principle, specifically, identified in **Attorney General vs Dickson Sanga** (supra) from **Rev. Christopher Mtikila**(supra) is to the effect that constitutionality of a statutory provision is not in what could happen in its operation but in what it actually provides for, and further that mere possibility of a statutory provision being abused in actual operation will not, as a matter of general rule, make it invalid. This principle is, undoubtedly, relevant to a cause of action that does not require occurrence of an event injurious to the right of a petitioner.

An example in respect of the above, as demonstrated in **Rev Christopher Mtikila's case** is where the issue is whether a particular law is unconstitutional, in which case the court looks at the law itself and not how it works. The issue as to whether the impugned provision of section 6(1) of the Public Audit Act is unconstitutional for violating article 144(1) of the Constitution is necessarily one of such instances.

It was in this respect worthwhile to note that in that case (i.e **Rev. Christopher Mtikila's case**), the court equally held that a situation could certainly arise where the cause of action would depend upon actual exercise of power as is in the present instance with regard particularly to the alleged unconstitutionality of the

removal of the fourth respondent from the office, and the alleged unconstitutionality of the appointment of the third respondent into the office. Indeed, in respect of the latter, the court in **Rev. Christopher Mtikila's case** held, among other things, that:

> *A situation could certainly arise where the cause of action would depend upon actual exercise of power. Such a situation is exemplified in this petition where the constitutionality of the appointment of Zanzibaris to non-union positions on the Mainland is questioned. In that context, it is the appointment themselves that constitute the cause of action, but that has to do with the validity of the action rather than the law.*

The above principle was also restated in the case of **Attorney General and others v Bob Chacha Wangwe**, Civil Appeal No. 138 of 2019. In applying the principle, the Court of Appeal in this case was of the holding that the argument by the respondent that because the district executive directors are appointed by the President they cannot abide by the Constitutional requirement of being impartial was a mere speculative and based on apprehension.

It was so held in that case, because the Court was satisfied that the respondent in that case did not have any evidence to prove that the said directors were not impartial because of being appointed by the President. The Court held that:

> *"We are supported further in that view by the persuasive decision in the case of **Campbell and Fell vs United Kingdom** 7 E.H.R.R 165 cited by the High Court in the case of **Mabere Nyaucho Marando and Edwin Mtei v The Hon. AG**, Civil Case No. 168 of 1993 (unreported). In that case, the European Court of Human Rights considered*

the issue whether or not a body whose members are appointed by the Home Secretary can be independent. It held that:

> *"The personal impartiality of a member of a body covered by article 6 is to be presumed until there is proof to the contrary....."*

In the case at hand, like in ***Campbell and Fell*** *(supra), the respondent did not have any evidence to prove the contrary. In the circumstances, the personal impartiality of the Directors should have been accordingly presumed unless proved otherwise.*

It is in the instant case neither speculative nor apprehensive that the service of the fourth respondent as the CAG was at the age of fifty eight years ended and the third respondent appointed into the office by the first respondent. It was common ground that the termination of the fourth respondent's service was on the reason that his fixed term of five years expired on 4/11/2019 pursuant to his appointment letter issued under section 6(1) of the Public Audit Act.

The alleged letter of appointment was however never shown as it did not accompany the counter affidavit relied on by the first, and second respondent despite being referred to in the said counter affidavit. It was contended that the letter had, as one of its terms and conditions the fixed term of five years of holding the office of the CAG that the fourth respondent agreed to serve in the first place. It was also contended that the term was not renewed on its expiry and as a result the fourth respondent's tenure ended.

There is as such ample evidence from the petitioner's affidavit which was not contradicted by the counter affidavits of the respondents to the effect that the fourth

respondent's service as the CAG was brought to an end under section 6(1) of the Public Audit Act, because upon being so appointed into the office he agreed to be subjected to the fixed term of five years pursuant to his letter of appointment which was in line with section 6(1) of the Public Audit Act. It is also common knowledge that the third respondent was subsequently appointed into the office, which appointment of the third respondent is a subject of determination as to its unconstitutionality, as is the unconstitutionality of the fourth respondent's removal from the office.

While the petitioner's counsel alleged that the termination of the fourth respondent's tenure and the subsequent appointment of the third respondent were both violative of the Constitution as the fourth respondent was still the substantive the substantive holder of the office of the CAG, it was maintained by Mr. Chang'a that the termination of the fourth respondent's tenure and the appointment of the third respondent were made in accordance with the relevant provisions of the Constitution and the Public Audit Act.

Despite the above rival arguments, we are satisfied that the above evidence sufficiently established, firstly, the termination of the fourth respondent's tenure and his removal from the office before attaining the constitutional age of retirement of a holder of the office of CAG, and secondly, the appointment of the third respondent into the office subsequent to the termination of the service of the fourth respondent. The issue is whether the removal of the fourth respondent and the appointment of the third respondent were as alleged violative of the Constitution. We will answer this issue afterwards.

Thus, in the light of the above issues and evidence, we hastened to consider the legislative purpose of section 6(1) of the Public Audit Act (supra). We had no doubt that it was meant to impose a fixed five years' term of service in the office of CAG, which is eligible for renewal only once, and which, according to Mr. Chang'a, is renewable only at the option of the first respondent. Thus, the creation of a fixed term of five years has therefore introduced a removal criterion of removing a holder of the office of the CAG on expiry of the fixed term, which whittles down the security of tenure of the CAG guaranteed under the scheme of article 144 of the Constitution.

We were satisfied that the purpose was in effect realised in this case on 4/11/2019 when the fourth respondent was at the age of fifty eight years removed from the office by the first respondent, not based on the requirement of article 144(1) of the Constitution or the procedure of removal under article 144(3) of the Constitution, but merely on the expiry of the fixed term of five years provided for under section 6(1) of the Public Audit Act, which the fourth respondent allegedly consented to, and which commenced on 05/11/2014 pursuant to the alleged letter of appointment as allegedly submitted by Mr. Chang'a.

In view of the foregoing, the purpose and effect of the said provision are relevant in determining the constitutional validity of the provision against the backdrop of article 144(1) read together with section 6(2)(a) of the Public Audit Act and the other provisions of the Constitution relied on by the petitioner. See **Attorney General and others v Bob Chacha Wangwe** (supra), **Attorney General vs Jeremia Mtobesya** (supra), and **Christopher Mtikila vs Attorney General** (supra). Our reasoning is fortified by a passage in the case of **Jeremia Mtobesiya** (supra) in which

the Court of Appeal borrowed a leaf from a Canadian case of **R vs Big M Drug Mart Ltd** [1985] 1 S.C.R 295 and stated that:

> *In determining the constitutionality of a statute, a court must be guided by the object and purpose of the impugned statute, which object and purpose can be discerned from the legislation itself. The Supreme Court of Canada, for instance, in* ***R vs Big M Drug Mart Ltd*** *[1985] 1 S.C.R 295 enunciated this principle as follows:*
>
> > *Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realised through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity.*

In that case (i.e **R v Big M Drugs**), which was persuasively considered in **Jeremia Mtobesya** (supra), the Supreme Court of Canada, considered the issue whether the Lord's Day Act, and especially section 4, (i) infringed the right to freedom of conscience and religion guaranteed in the Canadian Charter of Rights and Freedoms; (ii) were justified by section 1 of the Charter; and (iii) were enacted pursuant to the criminal law power (section 91(27)) of the Constitution Act, 1867.

It was held in that case that since the acknowledged purpose of the Lord's Day Act, was the compulsion of religious observance, that Act offends freedom of religion and it is unnecessary to consider the actual impact of Sunday closing upon religious freedom. It was further held that legislation whose purpose is found to violate the Charter cannot be saved even if its effects were found to be inoffensive. It means that the legislation's effects need only be considered when the law under review has passed the purpose test. The effects test can never be relied upon to save legislation with an invalid purpose. We draw inspirations for the instant petition from this decision of the Supreme Court of Canada which was as earlier shown favourably relied upon in **Jeremia Mtobesya case**.

Guided by the above authorities, we went ahead to lay the articles of the Constitution which were invoked by the petitioner besides the impugned provision of section 6(1) of the Public Audit Act in order to determine whether the impugned provision, and for that matter its intrinsic purpose, and its effect, violate the stated provisions of the Constitution. In doing so, we looked at the impugned provision of section 6(1) mindful of its purpose, vis-à-vis the articles of the Constitution which are allegedly infringed, to wit, article 144(1) read with section 6(2), articles 13(1), 26(1), and 29(1), (2), and (5) which, according to Mr. Massawe, learned counsel for the fourth respondent, constitute the fundamental law. In doing so, we considered the purpose of the impugned provision which is by virtue of **Mutobesya's case (supra)** and **Rev. Christopher Mtikila's case (supra)** discerned from the legislation itself, and the effect which is, in so far as the instant case is concerned, apparent in the uncontroverted evidence set out herein above.

We were in the end satisfied in view of what we deliberated upon herein above that the provision of section 6(1) of the Public Audit Act clearly offends the provision of article 144(1) of the Constitution, which read together with section 6(2) of the Public Audit Act, has as its purpose guaranteeing security of tenure of a holder of the office of the CAG, by setting up his age of retirement at sixty five years as increased from sixty years of age under article 144(1) to sixty five of age under article 144(1) read together with section 6(2) of the Public Audit Act. Inimical to article 144(1) and the entire of scheme of article 144 of the Constitution, the impugned provision subjects the holder of the office of CAG to a removal criterion of expiry of a fixed term of five years regardless of the age provided for by the Constitution. We were satisfied that the language of the impugned provision precludes any other conclusion.

In the light of the fore going, we are of the firm view that once appointed into the office, the holder of the office of CAG is required by the Constitution not to leave the office; unless, he either vacates office upon attaining the age of sixty years or any other age prescribed by the law pursuant to article 144(1) which is in this case sixty five years as provided for under section 6(2) of the Public Audit Act (supra); or he is removed by the first respondent under article 144(4) of the Constitution upon advice by a special tribunal on any of the grounds specified under article 144(2) of the Constitution.

None of the foregoing two avenues, to wit, vacating office at the age of sixty five years pursuant to article 144(1) of the Constitution read together with section 6(1) of the Public Audit Act, or being removed by the first respondent in accordance with the procedure laid down under the Constitution, is consistent with the removal criterion of expiry of "*a fixed term of five years, which is eligible for renewal for one*

term only" under section 6(1) of the Public Audit Act, and in respect of which, the fourth respondent was, upon the expiry of only five years, removed from the office, without any renewal for another term and contrary to article 144 of the Constitution. The uncontroverted evidence is loud and clear about the removal of the fourth respondent, although the first, second and third respondent through Mr. Chan'ga, learned Principal State Attorney wanted us to hold that he was not removed but his tenure just expired in accordance with the law.

We are therefore settled that the impugned provision is alien to and not at all envisaged under the scheme of article 144(1), let alone the rest of article 144 of the Constitution. Being unconstitutional as it is, the impugned provision compels the observance of the fixed term of five years which may be renewed for one term, as opposed to vacating office upon attainment of the age of sixty five years, and which upon expiry of the five years term, the holder of the office is removed notwithstanding whether or not he has attained the compulsory age of retirement prescribed under article 144(1) of the Constitution read together with section 6(2)(a) of the Public Audit Act.

The procedure of removal involving the special tribunal's advice was not relevant in the instant case, as it was admitted by the first and second respondents that the office tenure of the fourth respondent ended on the expiry of the fourth respondent's fixed term of five years, which was not renewed for another term. It was in this respect alleged that the fixed term of five years, which expired and culminated in the removal of the fourth respondent, was one of the terms and conditions of the fourth respondent's appointment. In our considered opinion, since the impugned provision is violative of the invoked provision of article 144(1) of the Constitution, it

cannot be saved by the fourth respondent's consent as alleged and we so hold. We agree with the petitioner's counsel that the first respondent was therefore pursuant to article 26(1) of the Constitution bound to abide by the dictates of article 144(1) of the Constitution.

As we have already shown herein above, since the acknowledged purpose of the impugned provision of section 6(1) of the Public Audit Act is, in our considered view, to subject a holder of the office of CAG to a tenure of a fixed term of five years eligible for renewal for one term only and hence a removal criterion of expiry of the said term, that provision offends the security of tenure provided for under article 144 and in particular article 144(1) of the Constitution, in which the holder of such office is required to vacate office at the age of sixty five years unless he is removed from the office by the first respondent in accordance with article 144(4) of the Constitution.

By subjecting a holder of the office of the CAG to a fixed tenure of five years, renewable only once, the holder of such office is required to be removed from the office on expiry of the fixed term of five years even if it is before attaining the age of sixty five years pursuant to article 144(1) read with section 6(2), and contrary to the procedure of his removal from the office as provided for under article 144(4) of the Constitution. Although the provision is by itself unconstitutional, the effect of its application in the instant case reinforces the unconstitutionality of the said provision.

As was in the instant petition, the criterion of expiry of the fixed term of five years led to the removal of the fourth respondent before attaining the compulsory retirement age of sixty five years which is contrary to the Constitution. With such effect, it means that a holder of the office of the CAG will necessarily have to leave

the office if his fixed term of five years which may be renewed for another term, expires before he attains the compulsory age of retirement of sixty five years.

To us, the above outcome, is contrary to the stipulation of the Constitution which, firstly, provides for a compulsory retirement age of sixty five years as we have alluded to herein above, and which once attained obliges the holder of the officer to vacate office, and secondly, provide for the removal by the president on advice of the special tribunal based on the specific grounds mentioned in the Constitution. We are thus satisfied that the provision runs counter to, and whittles down the security of tenure of the office

We thus disagree with the averments and arguments made on behalf of the first, second and third respondents that the impugned provision and its outcome are in this regard consistent with the Constitution because the fourth respondent agreed in his letter of appointment to be subjected to such tenure of a fixed term of five years. In so far as the impugned provision is unconstitutional, it is irrelevant that the fourth respondent agreed to be subjected to the requirement of the unconstitutional provision which eventually led to his removal from the office on expiry of the fixed term of five years.

We recalled the principle that a piece of legislation or a statutory provision is presumed to be constitutional until the contrary is proved as was restated in **Julius Inshengoma Francis Ndyanabo case** (supra). However, we are of a finding that in our instant case the principle does not hold as it has sufficiently been shown and found that the impugned provision which creates the criterion of removal of a holder of the office of the CAG on expiry of a fixed term of five years regardless of attaining

the mandatory retirement age of sixty five years does not square with the purview of article 144(1) of the Constitution requiring the holder of the office of the CAG to vacate office at the age of sixty or any other age prescribed by a law enacted by Parliament which in this case is sixty five years of age as provided for under section 6(2) of the Public Audit Act

Having so found that the impugned provision is indeed violative of article 144(1) of the Constitution, the next issue is whether the removal of the fourth respondent is equally offensive of the Constitution. We hasten to hold that in view of the forgoing, the removal of the fourth respondent from the office was undoubtedly violative of the provisions of article 144 of the Constitution and in particular article 144(1) of the Constitution. The fourth respondent was at the age of fifty eight years undisputedly removed from the office pursuant to the impugned provision on the expiry of the fixed term of office of five years, before attaining the age of sixty five years. He was so removed at such age notwithstanding the consequences attached to such removal pursuant to article 144(6) of the Constitution, which consequences relate to employability of the fourth respondent in any office in the service of the government. The provision of article 144(6) of the Constitution reads thus:

> *144(6) A person who holds or who has held the office of Controller and Auditor General shall not be appointed to or act in any other office in the service of the Government of the United Republic.*

Next is the alleged violation of Article 13 of the Constitution. We will, on the following two grounds, respectfully not advent on this issue further. First, the finding above has sufficiently resolved the controversy between the parties. Second, and

perhaps most important, the petitioner did not sufficiently articulate how the term limit, the consequential removal of the fourth respondent from office and his subsequent substitution by the third respondent was discriminatory in nature, over and above contravening article 144(1) of the Constitution.

Further to the points above, with respect to the removal of the fourth respondent from the office, there was an argument that if the petitioner was aggrieved by his removal from the office, he could have moved the court by way of judicial review and in fortification the case of **Sanai Murumbe and Another vs Muhere Chacha** [1990] TLR 54 was cited. In that case, the Court of Appeal enumerated a number of grounds relevant in bringing application for judicial review.

We do not need to waste much time on the above argument, as firstly, this was one of the issues that were raised, argued and determined when preliminary issues were taken by and resolved against the first, second and third respondents. And secondly, judicial review was in so far as we were concerned irrelevant as the petition was challenging constitutional validity of the impugned provision, removal of the fourth respondent, and the appointment of the third respondent into the office.

Having resolved the above issues, we now move to the validity or otherwise of the third respondent's appointment into the position of the CAG. Subsequent to the unconstitutional removal of the fourth respondent from the office, the third respondent was appointed into the office. Such appointment of the third respondent is not in dispute. In his counter affidavit, the third respondent stated that he was appointed pursuant to section 4 of the Public Audit Act, which appointment was in compliance with the requirements of the law as he does have all relevant qualifications prescribed

under section 4(1) & (2) of the Public Audit Act, namely, being a Tanzanian citizen, and being in possession of the relevant professional qualifications, experience and leadership skills suitable for appointment into the position of the CAG. The averments as to his appointment into the office, his possession of relevant qualifications and experience, as required by the law were not disputed by the petitioner or the fourth respondent in any way.

It is common ground that the third respondent was, upon being so appointed into the office, sworn in on 5/11/2019 and as admitted by the fourth respondent, the office was handed over to the third respondent by the fourth respondent on 6/11/2019. Consistent with the appointment, the swearing in, and the handing over that took place between the third respondent and fourth respondent, we took judicial notice under sections 58 and 59(1)(e) of the Evidence Act, Cap. 6 R.E 2019 that the third respondent has immediately thereafter been discharging duties and responsibilities of the office as is apparent under section 5 of the Public Audit Act read together with article 143(2) of the Constitution.

We have given due consideration to the complaints of the petitioner as to the constitutional validity of the appointment of the third respondent which according to the counsel for the petitioner stems from the unconstitutional removal of the fourth respondent. With such complaint and the foundation upon which the complaint is advanced, the petitioner also had another complaint which grounded the relief sought in the petition that the fourth respondent is still the substantive holder of the office of the CAG.

However, considering what has already happened, regard being had to the appointment of the third respondent, the swearing in, the handover, and the duties and responsibilities that have since been discharged under article 143 of the Constitution read together with section 5 of the Public Audit Act which provide for the constitutional functions of the office of the CAG, we hasten to say that the issue whether the appointment of the third respondent is unconstitutional has already been overtaken by event.

On a different note however, it does not necessarily follow in the circumstances that because the impugned provision and the fourth respondent's removal from office pursuant to the impugned provision were both unconstitutional for contravening article 144(1) of the Constitution, the subsequent appointment of the third respondent was also constitutionally invalid. We say so as we have already shown that the appointment was only challenged based on the unconstitutional removal of the fourth respondent and unconstitutionality of the impugned provision, and not on the reasons that the third respondent did not have requisite qualifications, experiences and leadership skills which were nonetheless not disputed by the petitioner and the fourth respondent himself.

We think that holding otherwise would result into absurdity which is not in the best interest of the country if we consider the implications of the vacuum that would result by holding as sought by the petitioner. We would so hold notwithstanding our resolve on the unconstitutionality of the impugned provision and the unconstitutionality of the removal of the fourth respondent from the office of the CAG. Consequently, we are not also inclined in view of what have been deliberated upon herein above to ascribe an affirmative answer to the issue requiring us to hold, in

favour of the petitioner, that the fourth respondent is still the substantive holder of the office of the CAG.

Having found that the impugned provision of section 6(1) of the Public Audit Act offends the provision of article 144(1) and the entire scheme of article 144 as was also the removal of the fourth respondent from the office pursuant to section 6(1) of the Constitution which was equally unconstitutional as we have already held, the next issue for our consideration is whether the said provision of section 6(1) of the Public Audit Act and the removal of the fourth respondent are saved by the provision of article 30(2) of the Constitution.

It was argued by Mr. Chang'a in respect of section 6(1) whose application led to the removal of the fourth respondent from the office of the CAG that its true and proper interpretation is saved by article 30(2) of the Constitution. Despite reproducing the provision of article 30(2) of the Constitution and enlisting the purposes which may operate to save any law, or the doing of any lawful act, it was never in respect of each purpose shown how the impugned provision which violates article 144(1) of the Constitution is necessary and saved under article 30(2) of the Constitution.

The omission is to us serious. We say so because in our understanding of the law as restated in **Julius Inshengoma Francis Ndyanabo case** (supra) and **Attorney General vs Dickson Sanga** (supra), 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. We think this principle as to burden of proof would equally apply in the instant petition in which section 6(1) of the Public Audit Act violates article 144(1) of the Constitution.

We were not told a legitimate purpose that the provision and the removal of the fourth respondent from the office save. We were similarly not told how article 30(2) would save the impugned provision and the removal of the fourth respondent from the office which are violative of article 144(1) of the Constitution. We nonetheless do not see any lawful object which was intended to be achieved by the provision, other than introducing a criterion of ensuring removal of the CAG from the office on expiry of the fixed term of five years contrary to the provision of article 144 and the security of tenure of the CAG guaranteed under the Constitution.

In the light of what we have discussed with regard to the saving provision of article 30(2) of the Constitution, we are satisfied and we so hold that neither section 6(1) of the Public Audit Act nor the act of the removal of the fourth respondent from the office is saved by and falls within the purview of article 30(2) of the Constitution.

When all is said and done, we considered the reliefs sought by the petitioner in the light of the foregoing findings and conclusions. Since we have found section 6(1) of the Public Audit Act and the removal of the fourth respondent from the office by the first respondent to be unconstitutional for violating article 144(1) of the Constitution, we are inclined to make appropriate declarations to that effect. As to the appointment of the third respondent into the office, we are satisfied that we cannot in the circumstances hold that the appointment was unconstitutional for reasons very well stated herein above, which would also cater for our resolve to decline to hold that the fourth respondent is the substantive holder of the office of the CAG.

In the upshot of the foregoing reasons and findings, the petition fails in the issue of the appointment of the third respondent in which case we decline to hold that

the appointment of the third respondent is unconstitutional, and we in the same way decline to hold that the fourth respondent is a substantive holder of the office of the CAG. It also fails in other issues implied from the reliefs which we did not expressly mention here. However, the petition is allowed in respect of unconstitutionality of the provision of section 6(1) of the Public Audit Act and the unconstitutionality of the removal of the fourth respondent from the office of the CAG pursuant to section 6(1) of the Public Audit Act before attaining the age of sixty five years. We so hold because the provision of section 6(1) and the removal of the fourth respondent from the office are all violative of article 144(1) of the Constitution. Consequently, the provision of section 6(1) of the Public Audit Act, No. 11 of 2008 is in terms of article 64(5) of the Constitution herein declared null and void and is hereby struck out forthwith from the Public Audit Act, No. 11 of 2008. We make no order as to costs as the petition was conducted as a public interest litigation.

It is so ordered.

DATED and DELIVERED at Dar es Salaam this 5th day of December, 2022.

B. S. Masoud
Judge

12/5/2022

X

Signed by J.L MASABO

J. L. Masabo
Judge

E. E. Kakolaki
Judge