

EVALUATION OF THE RIGHTS TO LEGAL REPRESENTATION BEFORE THE WARD TRIBUNAL IN TANZANIA

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ABSTRACT

This paper evaluates the rights of legal representation before the ward tribunal proceedings as per the Constitutional rights of The United Republic of Tanzania. The undertaking is focusing to reality, despite of existing rights, legal and institutional frameworks toward the rights to legal representation. Still not affordable to the individuals or targeted population. Logically and reasonably, the same arises a lot of questions on the constitutional rights which are not adhered to by the institutions. This paper is developed on the adherence of the rights to legal representation through diverse approaches including studying of the relevant policies, institutional strategies, plans, reports and the reviews of the relevant laws. This paper will focus on identifying the problems which hinder them from effectively devoting to the legal rights before the ward tribunals. The paper evaluated the relevant laws and legal institutional framework in performance of the basic rights and rights to legal representation. Finally, this paper recommends for the elevating the laws and legal institutional framework in view of making proper performance of rights of legal representation before the ward tribunal proceedings in Tanzania.

Keyword: Rights to Legal Representation; Before the Ward Tribunal

INTRODUCTION

The term "right to legal representation" has historically been used to describe the ability of an individual to act on behalf of another under legally recognized authority, particularly with regard to that other's property or interests, or to serve as that other's personal representative or agent. In the legal world, it is generally understood to be the procedure by which an attorney represents their client's interests in a court of law.

It has been acknowledged that all attorneys offering legal assistance are also subject to the laws governing the attorney-client relationship. This implies that the attorneys have an obligation to maintain the utmost confidentiality, privilege, and inadmissibility of all communications with their clients.

Some authors analyze what has been called "legal representation" in great detail, claiming that it is intimately tied to the right to privacy and the right to be heard. And each of these rights must be acknowledged in accordance to principles of natural justice.ⁱ

The right to legal representation is one of the fundamental rights that are often provided through legal assistance and are crucial for any individual during a trial, even if they have been neglected for years. These rights were firmly established in our legal system in 1984 when the Constitution was amended to include a Bill of Rights, which is now known as the Basic Rights.

International Convention on Political and Civil Rights (ICPCR), 1966

As a signatory to the treaty, the United Republic of Tanzania bears the responsibility of ensuring that the Convention's principle is adhered to.

It provides under Article 14 (3) of the International Convention on Political and Civil Rights (ICPCR)ⁱⁱ read together with Article 10 of the International Convention on Political and Civil Rights (ICPCR)ⁱⁱⁱ that All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person, vividly provide for the need of legal assistance for any accused person; -

Article 14 (3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a)*
- (b)*
- (c)*
- (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;*

The convention acknowledged the right to legal representation, and in spite of the aforementioned clauses, it is binding on the member states that signed it; they must comply and ensure that the right to legal representation is safeguarded.

AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS, 1981

The United Republic of Tanzania has become a member of the African Charter on Human and Peoples' Rights since 1901. Through signing and adopt the same, the charter provides for the rights to legal representation under Article 7 (1) (c) of the African Charter on Human and Peoples' Rights,^{iv} as follows; -

Article 7(1) every individual shall have the right to have his cause heard, this comprises; -

- (a)*
- (b)*
- (c) the right to defense, including the right to be defended by counsel of his choice.*

This article guarantees not only the right to legal representation but also the right of the parties to select the representatives for their cases. It is a right that extends to all individuals, including those who advocate for human rights, in order to ensure that no one is left behind and that justice and peace are upheld.

Among the African states the charter has been enacted to safeguard the rights of its people toward the African countries and any state or country have to watch over and has the right to claim upon breach of the human and people's rights.

In the case of *Evarist v. Tanzania (merits) (2018)*^v The Court held, in case where free legal representation had not been provided in relation to a serious crime, that the State had violated the right to a fair trial and ordered compensation.

THE TREATY FOR THE ESTABLISHMENT OF EAST AFRICA COMMUNITY (EAC), 1999

The Treaty for the Establishment of the East Africa Community (EAC), 1999, established the East Africa Community (EAC). With its headquarters located in Arusha, Tanzania, the community is a regional intergovernmental organization made up of seven member states: Burundi, Democratic Republic of the Congo, Kenya, Rwanda, South Sudan, Tanzania, and Uganda. As a member state, each state is required to uphold the community's principles.

Good governance is one of the fundamental principles of the community that are outlined in article 6(d) of the Treaty for the Establishment of the East African Community.^{vi} The observance of democratic, legal, accountable, transparent, social justice, equal opportunity, and gender equality principles; additionally, the acknowledgment, advancement, and defense of human and people's rights in compliance with the requirements of the African Charter on Human and Peoples' Rights.

The treaty placed a strong emphasis on the defense of human rights, including the right to counsel as a means of obtaining legal representation and natural justice principles.

The provision for the fundamental principles guides other rights like the right to legal representative that provided by article 37 (1) Treaty for the Establishment of the Community^{vii} it provides for Appearance before the Court

Article 37 (1). Every party to a dispute or reference before the Court may be represented by an advocate entitled to appear before a superior court of any of the Partner States appointed by that party.

The recognition of the right of its citizens to have an advocate or other legal representation in court is one of the essential principles that will guide the Partner States in achieving the Community's goals.

THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA OF 1977

The Constitution of the United Republic of Tanzania supreme law of the land and require the other enacting laws to be following the Constitution. In making sure that peace and security are well maintained in settlement of disputes, article 107B of the Constitution of The United Republic of Tanzania^{viii} has provides that; -

Article 107 B. "In exercising the powers of dispensing justice, all courts shall have freedom and shall be required only to observe the provisions of the Constitution and those of the laws of the land."

In observance of the Constitutional provisions, Article 13 (6) (a) The Constitution of the United Republic of Tanzania,^{ix} provides over the right and equality before the laws, whereby the state authority shall make procedures which are appropriate or which take into account the following principles, namely: -

Article 13 (6) To ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the following principles, namely:

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

The right to legal representation is incorporated under the constitutional rights that embrace, among others, the right to a fair hearing, the right to have legal counsel of one's choice and personal freedom respectively. The importance of the above referred to article is that it is necessary in any hearing in a court of law that the parties to it understand clearly the entire proceedings. Undoubtedly this may not always be easy since the lawyers involved will inevitably use legal technicalities that may not be easily understood by laymen.

Any party in a trial, whether conducted by judicial or quasi-judicial organizations, has the inalienable right to have legal representation by an advocate or any other individual of their own choosing.

The right to legal assistance and representation does not necessarily mean that an advocate must represent a person in court. What is important is to have a trusted person whom one can rely on for purposes of representing his/her interests and pursuit of the same. This type of a representative may be called a paralegal.

CIVIL PROCEDURE CODE

According to Order III rule 1 of the Civil Procedure Code^x it provides for the recognized agents and advocates before the court as follows; -

Rule 1. Any appearance, application or act in or to any court, required or authorized by law to be made or done by a party in such court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person or by his recognised agent or by an advocate duly appointed to act on his behalf or, where the Attorney-General is a party, by a public officer duly authorised by him in that behalf: Provided that, any such appearance shall, if the court so directs, be made by the party in person.

Through legal advice and representation, the Act recognizes the fundamental right of an individual to legal representation and the situation for a part to be represented. Effective

access to justice and peace over non-lawyer individuals is made possible by legal counsel in court.

THE MAGISTRATES' COURTS ACT

Previously the law was not providing a room for the advocates to appear before the Primary Court to provide the legal representation to the person involve with the disputes. As per Section 33 (1) of the Magistrates' Courts Act^{xi} whereby advocates and prosecutors was limited from appearing or acting for a party to the proceedings in a Primary Court. Later in 2021, the Parliament through the Written Laws (Miscellaneous Amendments) (3) Act, of 2021 amended section 33 and introducing a new subsection (4) to allow advocates and prosecutors to appear or act for parties in primary Courts, whereby the proceedings are presided over by a Resident Magistrate. Despite this appearance has to be made by the form that will be filed by the advocate for his appearance (Notice and Commitment to Appear in Court) which is primary court.

The qualifications of the judicial person overseeing the proceedings, which is a Primary Court, thereby limited the right to legal representation in primary court. This also alters the post-amendment scenario by mandating that the parties involved in the proceedings be represented by a prosecutor or an advocate.

It is in that spirit that the provisions of section 33 (2) of the Magistrates' Courts Act,^{xii} read together with Rule 21 of the Magistrates' Courts (Civil Procedure in Primary Courts Rules Part II of the Civil Proceedings, allow representation. Section 33 of The Magistrate Court Act,^{xiii} stated as hereunder:

Section 33

"(1) N/A

(2) Subject to the provisions of subsection (1) and (3) of this section and to any rules of the court relating to representation of parties, a primary court may permit any

relative or any member of the household of any party to any proceedings of a civil nature, upon the request of such party, to appear and act for that party. "

Parties, however, are entitled to legal counsel in cases where the presiding magistrate is a resident magistrate. Stricter restrictions apply: the primary Court will only let a party to be represented by a family member or relative in civil proceedings.

Section 54 (4) of the Written Laws (Miscellaneous Amendments) (No. 3) Act, of 2021^{xiv} amended Section 33 of the Magistrates Courts Act,^{xv} by adding immediately after subsection (3), the following subsection (4) Notwithstanding the provisions of this section, an advocate may appear or act for any party in a Primary Court presided over by a Resident Magistrate's.

In the case of *Nelson Elifalet Mmari v. Verynice Jackson Kimambo*^{xvi} where MASABO J. was held that the Parliament had passed the Written Laws (Miscellaneous Amendments) Act (Act No. 5 of 2021) by which advocates were afforded audience before Primary Courts presided over by Resident Magistrates. By doing so there is no need of transferring the case to the Resident Magistrate Court or District Court where the parties can have the right of legal representative from the fact that is the only place apart from the High Court and the Court of Appeal where the right to legal representative can be obtained.

In the alternative MASABO J argued that, even if the transfer was necessary, the petition ought not to have been transferred to the Resident Magistrate Court as the District Court of Siha and District Court of Hai which are more proximate to their place of abode have jurisdiction over the petition.

Thus, it would have been convenient and more appropriate to transfer the petition to any of these two District Courts. In further strengthening, it was argued that the transfer order ignored the costs likely to be involved in accessing the Resident Magistrate's Court and in procuring witnesses.

THE WARD TRIBUNAL ACT

The law provides for the appearance of the parties before the tribunal where by section 13 (1) of the Ward Tribunal Act^{xvii} provides as follow; -

Section 13 (1) On the date specified in the summons the parties shall, subject to subsection (3), appear in person before the Tribunal, give their evidence and answer all questions put to them by any member of the Tribunal.

The only requirements under the Act are limited for the parties to appears in personal before the Ward Tribunal and not a legal representative on his or her behalf. It is the onus of the parties to appear themselves in the court of law without being represented by any person and this has been taken as a general rule under the ward tribunal proceedings.

But under section 3 (3) of the Ward Tribunal Act^{xviii} provides,

Section 13 (1)

(2)

(3) where the complainant or the person complained against is a child below eighteen years of age, or is a person who for any sufficient cause cannot adequately put his case or defend himself, that person may appear before the Tribunal together with his parent, guardian, relative or friend who may, subject to the procedure adopted by the Tribunal, assist him in the examination or cross examination of witnesses or the making of submissions before the Tribunal.

The Act is very limited upon the legal representatives and allowed the said representative to be conducted over children's and for others must be with a dure submission before the tribunal.

This is quite different to the situation of legal representatives in the Primary Court as per the changes made in the Written Laws (Miscellaneous Amendments) (3) Act, of 2021^{xix} that amended section 33 and introducing a new subsection (4) to allow advocates and prosecutors to appear or act for parties in Primary Courts. And so doing there is no need of

reopening or transferring of cases to the courts with the position or basis for legal representatives to parties.

Section 18 (1) of the Land Disputes Courts Act,^{xx} read: “*No advocate as such may appear and act for any party before the Ward Tribunal.*”

In the lawsuit, this stance was further discussed in *Musa Makweta Musa v. Faraja Finance*^{xxi} where by Mlyambina J, (by then he was) was in held that even if the new law would be amended by repealing Section 18 (1) the Land Disputes Courts Act^{xxii} and allow appearance of Advocates before the Ward Tribunals, unlike the Primary Courts which are manned by Resident Magistrates, the Ward Tribunals are not composed of lawyers. As such, reconciliation on matters represented by lawyers is likely to be mostly complicated, which may lead to its failure and wastage of time.

There for it remains with the standing that the ward tribunal are limited to the legal representatives despite the informal model of dispute settlement was using the elders in dispute settlement of land mater to represent the parties.

OPPORTUNITY TO OBTAIN LEGAL REPRESENTATION

If the ability to pay for a reasonable opportunity to exercise legal rights is a requirement of the right to legal representation, then the circumstances amount to a denial of such opportunity when requested, depriving the person of their right to legal representation and, consequently, their right to a fair trial. A fair opportunity to retain the legal counsel of their choosing must be given to the accused.

If having the financial means to pay for a fair chance to exercise one's legal rights constitutes the right to legal representation, then the circumstances amount to a denial of that chance when requested, which in turn denies the right to a fair trial. A fair chance to seek legal representation from a lawyer of their choosing must be given to the parties.

The right to a legal representation is subjected to the rights of a fair trial and this recognized in human rights instruments as including the right to instruct legal counsel during the

settlement of disputes. Access to legal representation during and before the tribunal is well established within domestic understandings of fair trial, as well as through international conventions such as the Universal Declaration of Human Rights^{xxiii} also the International Convention on Political and Civil Rights (ICPCR) and the right to a fair trial under art 6 of the ECHR.^{xxiv}

In the case of *Naiman Moiro v Nailejiet K.J Zablon*^{xxv} whereby Chief Justice Nyalali (as he then was) Held that on the matter is that nobody having power of attorney could represent a litigant present in the Court room reasoning that there is no law in the Country authorizing such an act. He further provides the idea of paralegal representation which was initially accepted at the High Court stated that it is not aware of any statute in Tanzania authorizing laymen holding power of attorney to present the litigant while he is present in person in the court.

Legal representation before the commission for mediation and arbitration (CMA), the law allows the parties to have legal representation for the claims or complains filled before the CMA, section 86 (6) of Employment and Labour Relation Act,^{xxvi} Rule 23 (1)^{xxvii} and Rule 7(1),^{xxviii} this provision allows the parties in labour conflicts to have a legal representative in all stages of their disputes as from the beginning when the parties start to mediate. The provisions governing labour disputes has categorized legal representatives into three groups who are members or an official of that party's trade union, a legal practitioner or an advocate, and lastly a personal representative.

THE NECESSITY FOR LEGAL REPRESENTATION

The necessity of having someone to present over parties before the judicial or quas judicial bodies is very important since it provides the principle of natural justice. Despite the necessity of legal representation, it allows inter relationship between the lawyer and its clients or claimant who is not aware of his claim in adherence to the fundamental basic rights.

The right to legal representation is a fundamental right, among the fundamental rights are the right to be heard and every individual in any dispute regardless of which is under judicial or quasi-judicial bodies. And thus, it's the right explore and assess the applicability of the right to legal representation.

The right to legal presentation determines the rights of citizens, it safeguard the rights of individuals are protected by witnessing and provisions of evidence. It is supportive toward the freedom of expression from the Constitution that vested with powers to determine the rights of citizens.

The right to legal representation is fallen to a principle of natural justice, without the rights to representation it would be meaningless if it is not actual. It's the real position that the parties to a dispute have the right to be assisted by counsel or any other person by his choice, that is, to have the right to be assisted by counsel before any authority at every stage of the proceedings and lead to fair and acceptable hearing.

The legal representation of an individual or parties to a claim is the key factor on the comprehension of the complexities towards legal processes. Such as procedures during the presentation of individual during the proceedings, in sometime ensures that individuals understand the legal process and procedural requirements in every stage and mode of procedures by reducing the likelihood of errors.

Legal representation is today regarded as a necessity, not a luxury. Their expertise can help identify legal options, assess potential risks and consequences, and provide informed advice.

THE DUTY OF A COURT TOWARDS AN UNREPRESENTED PERSON

It is the duty of the court to inform unrepresented person that has the right to be represented by a counsel who should be assisted him. The court has to inform the parties on their fundamental rights to ensure that the proceedings are fair.

The duty of a court towards an unrepresented person but in the current position of the laws depending on the jurisdiction and legal system. Generally, the courts have the onus to ensure that the rights of the parties are protected and there is free and fair trial, by considering that the Right to be informed unrepresented parties their rights, including the right to legal representation are well recognized.

In recognizing of the rights to legal representation to parties will subject procedures to be fair, the neutrality of the proceedings, safeguarding of the fundamental rights especially in respectful of personal rights.

In civil disputes it has been left behind and seen as if the parties in civil cases their rights are not much taken into consideration to the fundamental rights rather than the criminal cases. But to take much consideration a legal representative can provide expertise, legal advice, and advocacy throughout the legal process, helping to safeguard the parties' rights and interests.

CHALLENGES OF LEGAL REPRESENTATION BEFORE THE WARD TRIBUNAL

Legal representative before the Ward Tribunal is another challenge on adherence of the fundamental principle of human rights. It has to be considered as from the stage of informal mode of settlement of disputes by the traditional tribunals in settlement of disputes that was used in pre-colonial mode. Where by traditional judicial trial was represented in both centralized and non-centralized societies. During those periods parties to the dispute had to be represented by a "wise man" in the community who was acquire different titles in their societies.^{xxix}

The issue of legal representation before the ward tribunal is very limited from what is provided by the laws especially under Section 18 (1) of the Land Disputes Courts Act,^{xxx} provides as that no advocate as such may appear and act for any party before the Ward Tribunal. The situation which is different to the Primary court and the Constitution of The United Republic of Tanzania that provides over the fundamental rights. As the same was

provided under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania,^{xxxi} that provides for the rights and equality before the laws inclusively to the rights of legal representation.

In the case of *Itikisaeli Kiwandai Nnko & 6 Others v Eliakira G Pallangyo*^{xxxii} where by ROBERT, J: -was ruled that

“The Decree Holder 6 (Respondent herein) lacked locus standi to commence and prosecute this matter at the lower Tribunal as he was not the legal representative of the deceased. However, the Hon. Chairman considered that the grounds raised by the Judgment Debtors (Applicants) including this ground were improperly brought before him as the proper action to be taken was for the Judgment Debtors (Applicants) to make application for revision of the proceedings and decision of the lower Tribunal under section 36(1) of the Land Disputes Courts Act.”

The laws and the decided cases provide farther over the responsibilities of the parties to stand for their own cases before the Ward Tribunal. The third parties have no locus standi to commence and institute a Land Complain before the Ward Tribunal.

This situation of limitation of the legal representation over the parties to the institution and proceedings of land disputes before the Ward Tribunal it amounts for the violation of the Constitution of The United Republic of Tanzania and other Human rights.

CONCLUSION

The right to legal representation is expressly provided for in the Constitution of the United Republic of Tanzania to guide both judicial and quasi-judicial bodies vested with powers to determine the rights of citizens, and this can be easily done via the Constitution of the United Republic of Tanzania. There is a need for similar amendments and enactments of the law to cover the gap in legal representation, as the same appears in the primary court’s jurisdiction, with the same link to the Ward Tribunal. Therefore, the tribunals must provide the same rights of legal representation to make sure justice and peace are obtained and the parties are satisfied to be represented by persons with capacity and knowledge in the legal field.

ENDNOTES

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- ⁱ Peter, C.M., *Human Rights in Tanzania: Selected Cases and Materials*, Riidiger Koppe Verlag. Koln 1997, p. 333
- ⁱⁱ International Convention on Political and Civil Rights (ICPCR), 1966
- ⁱⁱⁱ *ibid*
- ^{iv} article. 7 (1) (c) of the African Charter on Human and Peoples' Rights, 1981.
- ^v 2 AfCLR 402
- ^{vi} The Treaty for the Establishment of East Africa Community (EAC), 1999
- ^{vii} *Ibid*
- ^{viii} The Constitution of the United Republic of Tanzania, 1977 (as amended from time to time).
- ^{ix} *Ibid*
- ^x Cap 33 R.E. 2002.
- ^{xi} Cap.11 R.E 2019.
- ^{xii} Cap. 11 R.E. 2002
- ^{xiii} *Ibid*
- ^{xiv} Act No. 5 of 2021
- ^{xv} *Supra*
- ^{xvi} High Court of Tanzania, Misc Civil Application No 5 of 2022.
- ^{xvii} Cap. 206 R.E. 2002
- ^{xviii} *Ibid*
- ^{xix} Act No. 5 of 2021
- ^{xx} Cap 216 R.E. 2019.
- ^{xxi} High Court of Tanzania, Civil Appeal No.8 of 2021
- ^{xxii} *Supra*
- ^{xxiii} Universal Declaration of Human Rights GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).
- ^{xxiv} European Convention on Human Rights 1950
- ^{xxv} (1980) TLR 274
- ^{xxvi} Cap 366 R.E 2019
- ^{xxvii} GN No.64 of 2007
- ^{xxviii} GN No.67 of 2007
- ^{xxix} Rufiji District Book, The National Archives, DSM pg. 22
- ^{xxx} Cap 216 R.E. 2019.
- ^{xxxi} The Constitution of the United Republic of Tanzania of 1977, as amended from time to time
- ^{xxxii} The High Court of Tanzania at Arusha, Misc. Land Revision No. 11 of 2020 (un reported)