IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LUANDA, J.A., MUSSA, J.A., MMILLA, J.A. MUGASHA, J.A., And MWAMBEGELE, J.A.)

CIVIL APPEAL NO 65 OF 2016

THE ATTORNEY GENERAL .....APPELLANT

VERSUS

JEREMIA MTOBESYA .....RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania at Dar es Salaam – Main Registry)

(Lila, J., Kihiyo, J. And Ruhangisa, J.)

dated 22nd day of December, 2015
in
Misc. Civil Cause No. 29 of 2015

JUDGMENT OF THE COURT

23rd June, 2017 & 2nd February, 2018

MUSSA, J.A.:

This is an appeal by the Attorney General, the appellant herein, against the decision of the High Court [Lila J.K. (as he then was), Kihiyo, J. and Ruhangisa, J.] comprised in Miscellaneous Civil Application No. 29 of 2015. The factual setting giving rise to the impugned decision may briefly be recapitulated as follows:-

On the 1st day of July, 2015 the respondent who held himself up as a resident of Dar es Salaam, lodged a petition in the High Court challenging the constitutionality of the provisions of section 148 (4) of the Criminal Procedure Act, Chapter 20 of the Revised Laws of Tanzania (hereinafter referred by the acronym "CPA".). It is, perhaps, noteworthy that the referred provision forbids a court or police officer from granting bail if the Director of Public Prosecutions (the DPP) certifies in writing that it is likely that the safety or interests of the Republic would thereby be prejudiced. We shall, at a later stage, extract the referred provisions in full. For the moment, it will suffice to observe that the petition was filed by way of an originating summons which was expressly taken out under the provisions of Article 26 (2) of the Constitution of the United Republic of Tanzania, 1977 (the Constitution) as well as sections 4 and 5 of the Basic Rights and Duties Enforcement Act, Chapter 5 of the Revised Laws of Tanzania (the Act). The respondent also expressly predicated the petition under Rule 4 of the Basic Rights and Duties Enforcement (Practice and Procedure Rules, 2014 (the practice and procedure Rules). It is, perhaps, pertinent to also

observe at this stage that, in the body of originating summons, the respondent referred to Article 13 (6) (b) of the Constitution as a ground in support of the petition. To accompany the petition, was an affidavit duly sworn by the respondent on the 30th June, 2015.

From the other side, the petition was resisted by the appellant through a counter affidavit which was duly affirmed by a certain Aida Alfred Kisumo, who happens to be a learned Senior State Attorney.

Thus, against the foregoing contending pleadings, the trial court ordered the parties to argue the petition by way of written submissions and scheduled a timetable to that effect. As it turned out, the parties were heedful and, in that regard, in his written submissions, the respondent *inter alia*, advanced a plea to the effect that, in the originating summons, he inadvertently referred to Article 13 (6) (b) in lieu of Article 13 (b) (a). In the upshot, he sought the indulgence of the trial court to rectify the so-called clerical error to avert an impending misconception. In reply, the appellant vehemently resisted the attempt which he dubbed *"strange and unprocedural"*. Apparently befuddled by the rival

arguments, the presiding Judges took the assumption that the impugned reference to Article 13 (6) (b) instead of 13 (6) (a) was, in fact, a wrong citation of the enabling provisions of the law. In their own words:-

> *"We need to satisfy ourselves on the aspect whether the court has been properly moved now that the petitioner admits to have cited the wrong provisions of the law."*

The court of the first instance then painstakingly discussed the consequences of the so- called wrong citation of the enabling provision and, at the height of its deliberations, it was, nevertheless, satisfied that the petition was properly before it. We need not venture into a consideration of the merits or demerits of this finding much as, if we may digress a bit and observe *en passant*: In the originating summons, the respondent did not quite cite Article 13(6)(b) as an enabling provision to ground his petition. On the contrary and, as already intimated, the cited provisions were Article 26(2) of the Constitution, sections 4 and 5 of the Act and Rule 4 of the practice and procedure Rules. As we have hinted

upon, Article 13 (6) (b) was only referred by the respondent in the body of the originating summons as a ground in support of the petition. To say the least, it was, in the first place, unnecessary for the trial court to initiate the issue of wrong citation with respect to an Article which was not even cited as an enabling provision. With this remark, so much for our digression.

To resume our recapitulation of the factual setting, having found that it was properly seized of the petition, the court of first instance dispassionately considered and weighed the learned rival submissions from either side on the constitutionality or otherwise of the impugned provisions of section 148 (4) of the CPA. In the final result, it was observed:-

> *"The impugned section 148 (4) of the CPA is a potential ground for breeding arbitrary detentions as it denies the accused person the right to be heard on matters of bail and prematurely treats the accused person as a convict. This kind of restriction to bail puts the liberty of the citizen at stake and infringes his*

right to liberty. It is in conflict with the presumption of innocence which is guaranteed under Article 13(6) (b) of the Constitution".

The petition was, accordingly, allowed and, consequently, the court handed down the following verdict:-

"The provisions of section 148(4) of the Criminal Procedure Act, Cap. 20 (R.E.2002) are hereby declared unconstitutional for offending the provisions of Article 13 (6) (a) of the Constitution of the United Republic of Tanzania of 1977 as amended".

The appellant is presently aggrieved and, in an effort to impugn the verdict of the High Court, he filed a memorandum of appeal which is comprised of five points of grievance, namely:-

(i) That, the High Court erred in law in holding that in human rights cases, wrong citation of the enabling provisions of the law by the petitioner is not fatal if the parties were aware of the issues under consideration

and an error can be corrected without prejudicing anybody nor can it occasion any injustice to the other party.

(ii) That, the High Court erred in law in holding that section 148(4) of the Criminal Procedure Act [Cap 20 R.E. 2002] Contravenes Article 13(6) of the Constitution of the United Republic of Tanzania and that the said Provisions neither pass the proportionally test nor can be saved by the derogation clause in Article 30(2) of the Constitution of the United Republic of Tanzania.

(iii) That, the High Court erred in law in holding that the accused has no platform to stand on and challenge the certificate objecting the grant of bail by the Director of Public Prosecution in Court.

(iv) That, the High Court erred in law in disregarding Article 30(5) of the Constitution of the United Republic of Tanzania.

(v) That the High Court erred in law in venturing into areas which have already been settled and decided by the Court of Appeal of Tanzania vide the case of ***The Director of Public Prosecutions Vs Daudi Pete*** *TLR [1993] 22".*

When the appeal was placed before us for hearing, the appellant was represented by a consortium of four learned Law Officers, namely, Ms. Alesia Mbuya (Principal State Attorney), Mr. Timon Vitalis (Principal State Attorney), Mr. Abubakari Mrisha (Senior State Attorney) and Ms. Aida Kisumo (Senior State Attorney). On the adversary side, the respondent was represented by two learned Advocates, namely, Mr. Mpale Mpoki and Dr. Lugemeleza Nshala. In addition, the Court had the services of two

learned *amici curiae,* namely, Professor Gamaliel Mgongo Fimbo and Professor Chris Maina Peter.

From the very outset, we are obliged to express our profound appreciation in the manner the learned counsel on either side and the two learned Professors addressed the issues of contention in detail and thoroughly well. We wish to commend them all for the industry and brilliance that went into the preparation and presentation of their respective arguments. But, as we do so, we should hasten a confession that it will not be possible for us to go so far as to recite each and every detail comprised in counsel's submissions. Rather, we propose to be choosy and only relate, in a nutshell, so much of their respective contentions which are conveniently relevant and sufficient for the disposal of the matter at hand. It is, perhaps, also pertinent to observe beforehand that in the course of our deliberations, where required, the relevant provisions of the Constitution will be extracted from the latest 2008 Official Revised English Version of the Constitution which was published on the 31st December, 2010. We would, however make requisite observations just in case we find a material

deviation in any of the provisions from the controlling Kiswahili Edition of the Constitution.

That said, at the commencement of the hearing, we raised a preliminary matter, *suo motu*, to satisfy our curiosity on the manner in which the respondent's petition was presented before the High Court and, for that matter, we invited all counsel to address us on whether or not the petition was properly before the court of first instance. Our curiosity was partly prompted by a reflection on section 6 (e) of the Act which requires a petition for enforcement of basic rights and duties to set out the specific sections in Part III of Chapter one of the Constitution which are the basis of the cause. Thus, our enquiry was as to whether or not there was need to additionally cite Article 13(6) (a) as an enabling provision to come to terms with the referred section 6 (e) of the Act.

To this enquiry, Mr. Vitalis expressed at once that Article 13 (6) (a) is, after all, not an enabling provision for the purposes of predicating the petition at hand. Rather, as he put it, the same is a ground upon which the constitutionality or otherwise of the

impugned provision was to be gauged. Thus, to him, it was sufficient for the petitioner to only cite, as he did, the provisions of Article 26 (2) of the constitution. Nonetheless, upon a reflection, Ms. Mbuya refurbished her colleague's stance and urged that it was necessary for the petition to cite Article 13 (6) (a) in addition to Article 26 (2) of the constitution.

On his part, while accepting the formulation by Mr. Vitalis to the effect that Article 13 (6) (a) is not an enabling provision, Mr. Mpoki advised that the right to institute a constitutional petition is both constitutional and statutory depending on the nature of the petition as well as the particulars of the petitioner. Counsel further submitted that, on the one hand, where, for instance, the petitioner alleges a basic right contravention, in relation to him personally, he may predicate the petition under the provisions of Article 30 (3) of the constitution, just as he may as well ground it under the provisions of section 4 of the Act.

On the other hand, counsel added, where the petition is in the nature of an action for the protection of the Constitution and legality on behalf of the general public, that is, as distinguished

from personal interest, the petition ought to be instituted under the provisions of Article 26 (2) of the Constitution. Mr. Mpoki concluded that the latter type of a petition for the enforcement of basic rights and duties constitutes an action brought to protect or enforce the rights and duties enjoyed by members of the public at large which has, nowadays, assumed the title: "*Public interest litigation*". The learned counsel for the respondent finally urged that the petition giving rise to the appeal under our consideration was filed under the referred Article 26(2) and, to that end, the same was properly before the High Court.

When we invited the learned *amici curiae* to comment on the issue which we raised, Professor Fimbo was of the view that given the fact that the petition before the High Court was a public interest litigation, the enabling provision was Article 26 (2) of the constitution which was duly cited in the originating summons. In that regard, he said, both Article 30 (3) of the Constitution and section 4 of the Act were inapplicable. Thus to him, with the citation of Article 26(2), the petition was properly before the High

Court. Professor Peter went along with the submission to which he had nothing useful to add.

Addressing the issue we raised on the competency of the petition before the High Court, we are inclined to straightaway accept the position taken by both Mr. Vitalis and Mr. Mpoki to the effect that Article 13 (b) (a) is not quite an enabling provision to ground a petition for the enforcement of basic rights and duties. As correctly formulated by Mr. Vitalis, the referred Article is, rather, a ground upon which the constitutionality of an impugned enactment is to be gauged. Again, we accept Mr. Mpoki's submission to the effect that one's standing to institute a petition for the enforcement of basic rights and duties is conferred by both the constitutional and statutory provisions depending on the nature of the petition or, as the case may be, the particulars of a given petitioner. In that regard, where, for instance, the petitioner seeks to enforce a basic right or duty in relation to his personal interest, he may predicate the petition under Article 30 (3) of the Constitution which provides:-

"Where any person alleges that any provision of this Part of this Chapter or any law involving a basic right or duty has been, is being or is likely to be contravened ***in relation to him*** *in any part of the United Republic, he may institute proceedings for relief in the High Court."*

[Emphasis supplied.]

We have bolded the expression ***"in relation to him"*** to underscore the need for the petitioner proceeding under this Article to show sufficient personal interest in the action complained of. But, similarly and, under the same circumstances, such a petitioner may, just as well, predicate his petition under section 4 of the Act which stipulates:-

"If any person alleges that any of the provisions of sections 12 to 29 of the Constitution has been, is being or is likely to be contravened in relation to him, he may, ***without prejudice to any other action***

with respect to the same matter that is lawfully available, *apply to the High Court for redress."*

[Emphasis supplied.]

Apparently, in the foregoing provision of the Act, the legislature was minded to replicate the referred provisions of Article 30 (3), save for the introduction of the bolded expression which is not contained in the Article. We find it unnecessary to speculate as to whatever was the legislator's intention in introducing the expression.

Contra wise, where the contravention of a basic right or duty has no bearing on one's personal interests, the petitioner may, nevertheless, shoulder the burden for the public at large by instituting the petition under Article 26 (2) of the Constitution which stipulates:-

"Every person has the right, in accordance with the procedure provided by law, to take legal action to ensure protection of this Constitution and the laws of the land".

In the High Court decision of **Rev. Christopher Mtikila Vs. Attorney General** [1995] TLR 31, this Article was held to be the bedrock of the so –called public interest litigation. In the words of the late Lugakingira, J. (as he then was):-

> *"It occurs to me, therefore, that Article 26 (2) enacts into our constitution the doctrine of public interest litigation. It is then not in logic or foreign precedent that we have to go for this doctrine; it is already with us in our own constitution."*

We fully subscribe to and adopt the foregoing statement of principle. We may only add that by commencing with the expression *"Every person . . ."* as distinguished from "*an aggrieved or interested person*", the Article confers standing on a desirous petitioner to seek to protect the rights of another or the general public at large despite having no sufficient interest on the impugned contravention. The Article is, in itself, a departure from the doctrine of *locus standi* as we know it in the Common Law tradition.

All said, our curiosity was satisfactorily quenched and we fully subscribe to counsel submission that, with the citation of Article 26 (2) of the constitution, the petition was properly before the High Court. We note that the respondent additionally cited sections 4 and 5 of the Act as well as Rule 4 of the practice procedure Rules which are inapplicable to the situation at hand. Nonetheless, as correctly urged by both Mr. Mpoki and Dr. Nshala, reference to those provisions were an unnecessary *surplusage* which did not affect the competency of the petition so long as the enabling Article 26 (2) of the Constitution was cited. We should note that this is not the first time we are making this observation, much as we have previously consistently stated that where a provision that confers jurisdiction in the Court is cited alongside inapplicable or superfluous provisions, the matter is deemed to to have sufficient legs to stand in Court (see, for instance, the unreported Civil Appeal No. 22 of 2007 – **Abdallah Hassan vs. Juma Haamis Sekiboko;** and Civil Appeal No. 60 of 2012 – **Bitan Inernational Enterpprises Ltd. Vs. Mished Kotalu**)

Coming now to the appeal, Mr. Vitalis commenced his address by abandoning the first, third and fifth grounds of appeal. The learned Principal State Attorney then prefaced his substantive arguments with a brief background of the impugned section 148 (4) of the CPA. The provisions, he said, were imported into our legislation from section 123 (4) of the Criminal Procedure Code of the Republic of Zambia. To fortify his contention, Mr. Vitalis referred us to the Report of the Judicial System Review Commission which recommended the importation of the provision from the Criminal Procedure Code of Zambia. Thus, he concluded, the Zambian provision was introduced into the CPA with modifications that were to follow upon numerous amendments.

On the second ground of appeal which he, apparently, approached generally, Mr. Vitalis reminded us that, in the petition, the respondent's complaint was not on liberty, rather, it was on the right to be heard. The learned Principal State Attorney then contended that whilst section 148 (4) takes away the court's discretion to admit the intended person to bail, the same does not, however, bar the hearing of such person. In that regard, Mr.

Vitalis referred us to our unreported Criminal Appeal No. 508 of 2015 - **The Director of Public Prosecutions Vs. Li Ling Ling.** In the referred case, he said, the High Court afforded the respondent a hearing despite there being a corresponding certificate under the provisions of section 36 (2) of the Economic and Organized Crime Control Act, Chapter 200 of the Revised Laws of Tanzania (the Economic Crimes Act). Elaborating further on the availability of the right to a hearing on the person affected by the DPP's certificate, the learned Principal State Attorney submitted that the right to a hearing is securely guaranteed under the provisions of section 161 of the CPA which stipulates that all orders issued under sections 148 to 160, that is, including the impugned provisions, are appealable just as they are subject to judicial review.

On the test to determine the constitutionality or otherwise of an impugned provision, Mr. Vitalis contended that regard must be in the provisions themselves and not the resultant outcome of the operation of the provision. To bolster his contention, the learned Principal State Attorney referred us to **Rev. Mtikila** (supra) and,

we should suppose, Mr. Vitalis had in mind the observation made by the High Court at pg. 55:-

> *"... it must be realized that the constitutionality of a provision or statute is not found in what could happen in its operation but in what it actually provides for. Where a provision is reasonable and valid, the mere possibility of its being abused in actual operation will not make it invalid."*

Still on the second ground of appeal, the learned Principal State Attorney finally submitted that for an impugned provision to be declared unconstitutional, the alleged breach of the Constitution must be express as opposed to one which has to be arrived at by mere inference. To fortify this position, Mr. Vitalis, again, paid homage to **Rev. Mtikila** (supra). It is noteworthy that at pages 70 - 71 of the High Court decision there is this remark:-

> *"A breach of the Constitution, however, is such a grave and serious affair that cannot be arrived at by mere inferences, however*

attractive and I apprehend that this would require proof beyond reasonable doubt."

As to what extent the foregoing statement of principle related to the impugned provision under our consideration, Mr. Vitalis was not quite forthcoming. A remark is, however, well worth that the learned Principal State Attorney hardly addressed us on the gist of the complaint in the second ground to the effect that the High Court erred in holding that the impugned provisions neither passed the proportionality test nor can be saved by the derogation clause in Article 30(2) of the Constitution. Nonetheless, in the written submissions in support of the appeal, the appellant submits, in effect, that on a proper and true construction of the provisions of sub-section (4) of section 148 of the CPA, a meaning can be ascertained which fits into the provisions of Article 30(2)(b) of the Constitution. Thus, it is part of the appellant's case that the impugned provisions fall within the scope of Article 30(2)(b) of the Constitution and are therefore constitutionally valid.

Addressing us on the fourth ground of appeal, the learned Principal State Attorney criticized the court below for disregarding

and, as a result, not invoking the provisions of Article 30 (5) which provides:-

> *"Where in any proceedings it is alleged that any law enacted or any action taken by the Government or any other authority abrogates or abridges any of the basic rights, freedoms and duties set out in Article 12 to 29 of this Constitution, and the High Court is satisfied that the law or action concerned, to extent that it conflicts with this Constitution is void is inconsistent with this Constitution, then the High Court if it deems fit, or if the circumstances or public interest so requires, instead of declaring that such law or action is void, or shall have power to decide to afford the Government or other authority concerned an opportunity to rectify the defect found in the law or action concerned within such a period in such manner as the*

High Court shall determine, and such law or action shall be deemed to be valid until such time the defect is rectified or the period determined by the High Court lapses, whichever is the earlier."

Mr. Vitalis contended that the High Court did not accord reasons, as one would have expected, for not invoking its discretion conferred under the Article. To buttress his contention, the learned Principal State Attorney referred us to the case of **Tanesco Vs. IPTL** [2000] TLR 327. Nonetheless, Mr. Vitalis candidly conceded that in his written submissions below, the appellant did not prompt the High Court to exercise its discretion under the Article.

In sum, the learned Principal State Attorney urged us to allow the appeal and quash the decision of the High Court upon a declaration that the provisions of section 148 (4) of the CPA were enacted *intra vires* the Constitution. Although he did not forthrightly express so in his prayers, on the strength of the fourth

ground of appeal, the appellant would seemingly impress upon us to step into the shoes of the High Court and invoke the provisions of Article 30 (5), that is, if we are minded to uphold the decision of the High Court on the unconstitutionally of the impugned provision.

In reply, Mr. Mpoki commenced his argument with a reference to Article 13 (6) (a) which we shall later extract in full. The learned counsel for the respondent then submitted that the impugned section 148 (4) does not prescribe any procedure, let alone one which is reasonable, fair and appropriate to govern the issuance of the DPP's certificate. To that extent, he said, an accused person is not afforded any meaningful opportunity of being heard before he is denied bail by operation of the DDP's certificate. Thus, to him, the impugned provision violated the particular Article of the Constitution.

Mr. Mpoki further submitted that the onus of proving that a breach of a basic right was limited or saved by the derogation provisions rests upon the party seeking to uphold the saving or limitation. In that regard, the learned counsel for the respondent

criticized the appellant for not venturing, in the least, to seek the invocation of the derogation provisions. In any event, Mr. Mpoki urged, the impugned provision would not pass the proportionality test referring us to the case of **Kukutia Ole Pumbun and Another Vs. The Attorney General** [1993] TLR 159.

On his part, Professor Fimbo formulated his advice along the lines of the mandate given to him by the Court which was to address the following issues namely;-

(i) Whether the provisions of section 148 (4) of the Criminal Procedure Act contravene Article 13(6) of the Constitution.

(ii) Whether the provisions of section 148(4) of the Criminal procedure Act are covered by the permissible limitation of Article 30 (2) of the constitution of the United Republic of Tanzania, Cap. 2 (R.E.2002) the clawback clause.

*(iii) Whether **DPP V. Daudi Pete's** case [1993] TLR 22 is applicable to the circumstances of*

the present case or is distinguishable and to what extent.

(iv) Whether the constitutional Court was justified to declare section 148 (4) of the Criminal Procedure Act, unconstitutional."

We shall henceforth refer the extracted issues as, respectively, the first to fourth instructions. Addressing us on the first instruction, the learned Professor reminded us that to him, the same is broader than the issue addressed by the respondent in his originating summons which was limited to Article 13(6) (a) of the Constitution. Accordingly, in his submissions Professor Fimbo examined the provisions of the Article, which relates to the right to be heard, in the light of the other fundamental rights such as, **one,** the right to bail, **two,** access to courts, **three**, presumption of innocence and; **four** equality before the law. More particularly, Professor Fimbo submitted that the right to be heard is enshrined under Article 13(b) (a) of the Constitution. Of recent, he said, the jurisprudence of the Court was developed and expanded in the case of **Mbeya - Rukwa Auto parts and Transport Ltd vs**

Jestina George Mwakyoma [2003] TLR 251 where it was held that a decision reached without regard to principles of natural justice and/or in contravention of the Constitution is void and of no effect.

Coming to the right to bail, Professor Fimbo submitted that the same is similarly enshrined under Article 15(2) of the Constitution, save for certain prescriptions. In this respect, he referred to the leading case of **DPP vs Daudi Pete** [1993] TLR 22 which read the right to bail in Article 15(2) as one of the species of the right to personal freedom.

As regards the access to courts, the learned Professor referred us to a portion of the judgment of Court in **Julius Francis Ishengoma Dyanabo v. The Attorney General** [2004] TLR 14 where the concept was underlined in the following words:-

> *"Access to courts is undoubtedly, a cardinal safeguard against violations of ones rights whether those rights are fundamental or not. Without that right, there can be no*

rule of law and therefore, no democracy. A court of law is the "last resort of the oppressed and the bewildered." Anyone seeking a legal remedy should be able to knock on the door of justice and be heard."

On the presumption of innocence and equality before the law, Professor Fimbo referred us to a decision of the High Court of Kenya in **Juma and Others vs The Attorney General** (2003) AHRLR. 179 (Ke HC 2003 where the court held in part:-

"Subject to the right of every person entrenched in the Constitution of Kenya and including the presumption of innocence until proved guilty beyond reasonable doubt, the fundamental right to a fair hearing by its nature requires that there be equality between contestants in litigation. There can be no true equality if the legal process allows one party to withhold material information from his adversary without just

cause or peculiar circumstances of the case."

Having discussed the first instruction, the learned Professor concluded thus:-

"It is hereby advised that a provision which denies an accused person to present and be heard on his application for bail or to challenge the certificate of the DPP constitutes unfair hearing and thereby contravenes Article 13 (6) (a) of the Constitution"

Dealing with the second instruction, Professor Fimbo was very brief: The impugned provisions, he said, could only be validated if they are, on the terms of Article 30 (2) of the Constitution, construed as being wholly for ensuring the defence, public safety public peace and any other interests for the purposes of enhancing public benefit. Adopting the construction *formulae*

from **DPP vs Daudi Pete** (supra), the learned Professor advised that the impugned provisions are so broadly drafted as they may encompass all accused person irrespective of the seriousness of the offence they are faced with as well as the circumstances of the commission of the offence charged.

Addressing the third instruction, Professor Fimbo was similarly brief: To the extent that in the matter at hand, the High Court did not address itself on Article 15(2) of the Constitution and, further, inasmuch as the Court in **Daudi Pete** (supra) did not specifically address the impugned provisions, the latter decision is distinguishable.

Finally, on the fourth instruction, the learned professor advised that in terms of Article 30(5) of the Constitution, two alternatives avail upon a determination that an impugned legislation abrogates the Constitution: **First** the court may declare such legislation or part of it null and avoid or **second,** it may grant the relevant authority time and opportunity to take remedial action. Whereas, he said, the first option is immediately effective, in the

second option remedial action may take effect in future. Professor Fimbo did not go so far as to prescribe the appropriate option for the matter at hand although he cautioned that, if anything the second option cannot be supervised by the court. With this detail, so much for the submissions of Professor Fimbo.

We now turn to the written submissions of Professor Peter who, just as well, predicated his arguments along the lines of the four instructions which we have already extracted. Addressing us on the first instruction, the learned Professor commenced his argument with an outright proposition that the impugned legislative provision does, indeed, contravene Article 13 (6) (a) of the Constitution. To him, the basic constitutional principle is equality before the law and, in this regard, he said on account of the impugned legislative provision, the DPP and the person accused are not on the same level. He submitted that by giving the DPP an option to block bail to an accused person, the fair battle envisaged by the Constitution is thereby, curtailed.

As regards the second instruction, Professor Peter argument was no more than that the wide powers given to the DPP under the impugned legislative provision cannot, in any way, fit into and be associated with the provisions of Article 30(2) of the Constitution. To him, section 148(4) of the CPA cannot be synchronised with any of the permissible derogations comprised in Article 30 (2) of the Constitution.

Addressing the third instruction, the learned Professor was of the view that the case of **DPP vs Daudi Pete** (supra) is clearly distinguishable from the situation at hand. Whilst, he said, on the one hand, the former case addressed the question of bail for a person charged with an offence constituting specific serious assaults, on the other hand, central to the matter under consideration, is the DPP's certificate blocking bail, as it is, the offence charged being completely irrelevant.

Finally, on the fourth instruction, Professor Peter reiterated the stance he had taken with respect to the first instruction to the effect that the impugned legislative provision offends Article 13

(6)(a) of the Constitution and that, in the premises, the High Court was fully justified to declare it unconstitutional. More particularly, he submitted that under Article 15 of the Constitution, every person has the right to freedom and to live as a free person. That right, he added, cannot be arbitrarily taken away by any person unless a due process is followed including a fair hearing. On fair hearing, the learned Professor authoritatively referred us to the unreported decision of the Court in Criminal Case No. 132 of 2004 - **Dishon John Mtaita vs The DPP** where it was observed:-

> *"...The right to be heard when one's rights are being determined by any authority, leave alone a court of justice, is both elementary and fundament. Its flagrant violation will, of necessity, lead to the nullification of the decision arrived at in breach of it."*

Thus, in sum, Professor Peter concluded that to the extent, that the impugned legislative provision *a priori* abrogates the right to a fair hearing and completely dismisses the courts of law that

might have otherwise provided relief to an accused person; the same is unconstitutional and, therefore, void.

That concludes the respective submissions from the parties as well as the two learned *amici curiae*, either in support or in opposition to the appeal. We should now be in a position to carefully address and weigh the contending issues and determine the appeal.

For a start, we think it is now opportune to fully extract section 148 of the CPA which goes thus:-

> *"148.-(1) When any person is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a court and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail the officer or the court, as the case may be, may, subject to the following provisions of this section, admit that person to bail; save that*

the officer or the court may, instead of taking bail from that person, release him on his executing a bond with or without sureties for his appearance as provided in this section.

(2) The amount of a bail shall be fixed with due regard to the gravity and other circumstances of the case, but shall not be excessive.

(3) The High Court may, subject to subsections (4) and (5) of this section, in any case direct that any person be admitted to bail or that the bail required by a subordinate court or a police officer be reduced.

(4) Notwithstanding anything in this section contained, no police officer or court shall, after a person is arrested and while he is awaiting trial or appeal, admit that person to bail if the Director of Public Prosecutions, certifies in writing that it is likely that the safety or

interests of the Republic would thereby be prejudiced; and a certificate issued by the Director of Public Prosecutions under this section shall take effect from the date it is filed in court or notified to the officer in charge of a police station and shall remain in effect until the proceedings concerned are concluded or the Director of Public Prosecutions withdraws it.

(5) A police officer in charge of a police station or a court before whom an accused person is brought or appears, shall not admit that person to bail if–

(a) that person is charged with–

(i) murder, treason, armed robbery, or defilement;

(ii) illicit trafficking in drugs against the Drugs and Prevention of Illicit

Traffic in Drugs Act, but does not include a person charged for an offence of being in possession of drugs which taking into account all circumstances in which the offence was committed, was not meant for conveyance or commercial purpose;

(iii) an offence involving heroin, cocaine, prepared opium, opium poppy (papaver setigerum), poppy straw, coca plant, coca leaves, cannabis sativa or cannabis resin (Indian hemp), methaqualone (mandrax), catha edulis (khat) or any other narcotic drug or psychotropic substance specified in the Schedule to this Act which has an established value certified by the Commissioner for National Coordination of Drugs

Control Commission, as exceeding ten million shillings;

(iv) terrorism against the Prevention of Terrorism Act, 2002;

(v) money laundering contrary to Anti-money Laundering Act, 2006;

b) it appears that the accused person has previously been sentenced to imprisonment for a term exceeding three years;

(c) it appears that the accused person has previously been granted bail by a court and failed to comply with the conditions of the bail or absconded;

(d) it appears to the court that it is necessary that the accused person be kept in custody for his own protection or safety;

(e) the offence with which the person is charged involves actual money or property whose value exceeds ten million shillings unless

that person deposits cash or other property equivalent to half the amount or value of actual money or property involved and the rest is secured by execution of a bond:-

Provided that where the property to be deposited is immovable, it shall be sufficient to deposit the title deed, or if the title deed is not available such other evidence as is satisfactory to the court in proof of existence of the property; save that this provision shall not apply in the case of police bail.

(6) Where a court decides to admit an accused person to bail, it shall impose the following conditions on the bail, namely–

(a) surrender by the accused person to the police of his passport or any other travel document; and

(b) restriction of the movement of the accused to the area of the town, village or other area of his residence.

(7) A court may, in addition to the mandatory conditions prescribed in subsection (6), impose any one or more of the following conditions which appear to the court to be likely to result in the appearance of the accused for the trial or resumption of the trial at the time and place required or as may be necessary in the interests of justice or for the prevention of crime, namely–

(a) requiring the accused to report at specified intervals to a police station or other authority within the area of his residence;

(b) requiring the accused to abstain from visiting a particular locality or premises, or associating with certain specified persons;

(c) any other condition which the court may deem proper and just to impose in addition to the preceding conditions."

From the foregoing extract, it is noteworthy that we have bolded subsection 4 of the provision which is the subject of the present appeal. True, as hinted upon by Mr. Vitalis, the impugned subsection 4 was imported into the CPA from section 123 (4) of the Criminal Procedure Code of Zambia (the Zambian Code). As it were, the recommendation for the importation of the provision was comprised in report of the Judicial System Review Commission (the Commission) which was presented to the Government on the 12th August, 1977. At the time of the recommendation, section 123 (4) of the Zambian Code, as referred by the commission in its report, read as follows:-

"Notwithstanding anything in this section contained, no person shall be admitted to bail, either pending trial or pending appeal, if the Director of Public Prosecutions

certifies that it is likely that the safety or interests of the Republic would thereby be prejudiced"

[See page 205 of the Report of the Judicial System Review Commission, 1977.]

It is noticeable that the Zambian Code provision, as it then stood, was more or less *in pari materia* with our section 148 (4) which is under our consideration. We shall, at a later stage, reflect on how the Zambian section 123 (4) presently stands. For the moment, we deem it instructive to explore, albeit briefly, the reasons behind the commission's recommendation.

In its report, the Commission noted that the law, as it then stood, only prohibited the grant of bail where the person was charged with either murder or treason. The Commission, however, noted that there was in existence of a school of thought amongst the members of the public which advocated the view that offences involving violence and economic sabotage should be included in the statutory list of unbailable offences. Nonetheless, the

Commission felt reluctant to accommodate the school of thought in the following words:-

> *"We appreciate the anxiety generated among the members of the public regarding the present rate at which crime seems to be increasing and the fact that it is being perpetrated with violence and with motivation subversive of the national economy.* ***But, with great respect, it is our considered view that the solution to the crime problem does not depend on an increasing denial of liberty to persons who are not yet convicted. On the other hand, to increase the number of non-bailable offences, and to do so in the manner advocated, would be to jump from the present rigid position of the law on bail into another legal straight jacket.***

Furthermore, once it is accepted that more offences be added into the present list of non-bailable offences, it would be difficult to foretell where the process would stop. Public opinion does not always reflect the interests of justice. For these reasons we think and recommend that the present law in relation to offences in respect of which bail may not be granted be left as it is."

[Emphasis supplied].

Nevertheless, despite the foregoing recommendation, the Commission was concerned that there are certain circumstances where the safety of the accused person and the gravity or other circumstances surrounding the offence with which a person is charged, would necessitate the limitation of his liberty, albeit temporarily. The commission felt that the law as it then stood did not address such a situation, hence the recommendation to import the provision of the Zambian Code. Speaking of it, the Commission observed:-

"We believe that, if enacted, a provision of this nature, even if used sparingly and conscientiously, as it naturally should, would go a long way to take care of cases where bail is presently granted to the consternation of justice."

All said with respect to the rationale behind the enactment of the impugned provision, it is common ground that under it, the DPP is empowered to file a certificate against the release on bail of an accused person if it is likely that the safety or interests of the Republic would be prejudiced by the grating of bail.

The provision does not require the DPP to specify or disclose the nature of the safety or public interest concerned. As was stated in the case of **DPP Vs Ally Nur Dirie and Another** [1988] TLR 252, once the DPP's certificate has met a validity test, a court of law will have no other option than not to grant bail, such validity test, it was said, is to be governed by the following conditions:-

"(i) That the DPP must certify in writing;

(ii) The certificate must be to the effect that the safety or interests of the United Republic are likely to be prejudiced by granting bail in the case; and

(iii) The certificate must relate to a ***criminal case either pending trial or pending appeal.****"*

[Emphasis supplied].

We have supplied emphasis as a reminder that the expression ***"either pending trial or pending appeal"*** which was then subsisting under the impugned provision at **Dirie's** time, was replaced by the expression ***"awaiting trial or appeal"*** *by* a subsequent amendment. Incidentally, the DPP's certificate in **Dirie's** case was adjudged pre-mature on account that the trial had not commenced and the amendment was seemingly brought to cure the apparent mischief.

Having restated the effect of the DPP's certificate on bail, let us now turn to the nitty-gritty of the matter which is whether or not the High Court correctly adjudged the impugned provision to be unconstitutional. But, before embarking on an analysis and determination of this issue, it is useful to clearly express the duty

of the Court as well as the principles that should guide the court in making its determination. As regards the duty of the Court, we need to do no more than to borrow and adopt the persuasive wisdom of the Supreme Court of the United States of America in **U.S vs Butler, 297 U.S. 1 [1936]** where it was expressed:-

> *"When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty;* ***to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.*** *All the Court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment.* ***This Court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether***

the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends."

[Emphasis added.]

As to what should guide us in our determination, we are minded to allude to the principles governing constitutional interpretation which were meticulously laid down by the Court in **Julius Francis Ishengoma Dyanabo v. The Attorney General** (supra), thus:-

First, the Constitution of the United Republic of Tanzania is a living instrument, having a soul and consciousness of its own as reflected in the Preamble and Fundamental Objectives and Directive Principles of State Policy. Courts must, therefore, endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in tune with the

lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and rule of law.... Secondly, the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed. Thirdly, until the contrary is proved, a legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, legislation should receive such a construction as will make it operative and

not inoperative. Fourthly, since, as stated a short while ago, there is a presumption of constitutionality of a legislation, save where a claw back or exclusion clause is relied upon as a basis for constitutionality of the legislation, the onus is upon those who challenge the constitutionality of the legislation; they have to rebut the presumption. Fifthly, where those supporting a restriction on a fundamental right rely on a claw back or exclusion clause in doing so, the onus is on them; they have to justify the restriction.

From other jurisdictions, it has also been persuasively held 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 realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the 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."*

Mindful of the foregoing guidelines from the extracted judicial pronouncements, we now turn to consider the turn of

legislative developments which have evolved subsequent to the enactment of section 148(4). If we, for a start, first reflect on the inspiring section 123 across the border, after several amendments which were comprised in Acts Nos. 36 *of* 1969, 59 *of* 1970, 6 *of* 1972 and 35 *of* 1993, the Zambian provision presently reads as follows:-

> *"123(4) Notwithstanding anything in this section contained,* ***no person charged with an offence under the State Security Act*** *shall be admitted to bail, either pending trial or pending appeal, if the Director of Public Prosecutions certifies that it is likely that the safety or interests of the Republic would thereby be prejudiced."*
>
> [Emphasis added].

We have supplied emphasis on the extracted provision to demonstrate that, unlike here, in Zambia, the scope of the operation of the DPP's certificate was subsequently qualified and limited to offences under the State Security Act which is the

equivalent of our National Security Act, Chapter 47 of the Revised Laws.

Back home, it should be recalled that, at the enactment of section 148(4) of the CPA, the law, as it then stood, only prohibited the grant of bail where the offence involved was either murder or treason. But, in the wake of numerous amendments, as one may discern from the body of the provisions of the section, the list of unbailable offences was extended well beyond the offences carrying a possible or mandatory capital penalty to include armed robbery; defilement; illicit trafficking in or conveyance of drugs for commercial purpose as well as offences involving certain narcotic drugs; terrorism; and money laundering.

Quite apart from the CPA, the list of unbailable offences is presently additionally embodied in such other legislation as the Economic and Organised Crimes Control Act, Chapter 200 of the Revised Laws (the Economic Crimes Act), as well as the Drugs Control and Enforcement Act No. 5 of 2015 (the DCA). Speaking of the Economic Crimes Act, the same contains a provision akin to section 148(4) of the CPA through which the DPP is similarly

empowered to issue a certificate denying bail to an accused person upon grounds that the safety or interests of the United Republic are likely to be prejudiced by granting bail. As regards the DCA, the provisions of the CPA with respect to the unbailable drugs offences have been replicated therein with a rider to the effect that the same would apply *mutatis mutandis* to the DCA.

With the foregoing legislative developments, the so-called *"legal straight jacket"* which the Commission conscientiously sought to avoid, has been overtaken and is, presently, fully fledged with a sizable number of unbailable offences. That being the obtaining position, a question begs: If it is, as such, as plain as pike – staff that the reasons for which the Commission justified the promulgation of section 148(4) have been pre-empted and completely overridden; what is the utility, if at all, of having the DPP's certificate? As we pose the question lest we be misunderstood to suggest that we are bent towards determining the constitutionality of the impugned provision on account of its usefulness or otherwise: Far from it! As we have already remarked, it is not part of our mandate to approve or condemn the legislative

wisdom but, we should caution though and, with respect to Mr. Vitalis, as was observed in the Canadian case of **Big M Drug Mart Ltd.,** (supra), *"... an unconstitutional effect can invalidate legislation."* That takes us to a consideration of the impugned provision in the light of the relevant articles of the Constitution.

The specific provision of the Constitution which is claimed to be infringed by the impugned section 148(4) of the CPA is Article 13(6) (a) which relates to equality before the law by providing thus:-

> *"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 rights and duties of any person are being determined* ***by the court or any other agency,*** *that person shall be entitled to a fair hearing and to the right of appeal or other legal remedy against the*

decision of the court or of the other agency concerned;

[Emphasis supplied].

But, whist we are alive to Mr. Vitalis's reminder to the effect that, in the petition, the respondent's complaint was not on liberty, rather, it was on the right to be heard; we, nonetheless, with respect, take the position that, since the challenge hinges on denial of bail which is basically the negation of personal liberty, the foregoing Article cannot be considered in isolation to Article 15 which makes provision for the right to personal freedom as follows:-

"15.-(1) Every person has the right to freedom and to live as a free person.

(2) For the purposes of preserving individual freedom and the right to live as a free person, no person shall be arrested, imprisoned, confined, detained, deported or otherwise be deprived of his freedom save only-

(a) under circumstances and in accordance with procedures prescribed by law; or

(b) in the execution of a judgment, order or a sentence given or passed by the court following a decision in a legal proceeding or a conviction for a criminal offence."

As we have already hinted, the appellant argued the appeal on the premise that the impugned provision are *intra vires* the Constitution, much as the right to a hearing is securely guaranteed under the provisions of section 161 of the CPA which stipulates that all orders issued under sections 148 to 160, that is, including the impugned provisions, are appealable just as they are subject to judicial review. Thus, whilst he somewhat conceded that section 148 (4) takes away the court's discretion to admit the intended person to bail, the learned Principal State Attorney contended that the same does not, however, bar the hearing of such person. On the other hand, the respondents and the two invitees of the Court were upbeat in the contention that the impugned provision actually denies an accused person to present and be heard on his

application for bail or to challenge the certificate of the DPP which constitutes unfair hearing and thereby contravenes Article 13 (6) (a) of the Constitution.

It is in the context of these submissions that we propose to start with a consideration of the impugned provisions of Section 148 (4) of the CPA in the light of Article 15 of the Constitution which we have reproduced. If we may express at once, the basic right to personal liberty is not absolute as it may be derogated from or restricted within the scope of the exceptions stated by the Article itself under paragraphs (a) and (b) of the Article itself. As to what constitutes *"circumstances and in accordance with procedures prescribed by law"*, within the meaning of Article 15(2)(a), the Court had the occasion to discuss the expression at length in ***DPP V. Daudi Pete*** (supra) in the course of its deliberations on the validity of section 148(5)(e) which, incidentally, related to denial of bail.

Speaking of paragraph (a) of the Article, the Court observed that the same sanctions the deprivation or denial of liberty under "certain circumstances" and "subject to a procedure", both of

which must be "prescribed by law". As it were, the Court was in no difficulty finding the "certain circumstances" for deprivation or denial of personal liberty much as such circumstances are clearly enumerated under section 148(5)(a) to (e) of the CPA. The real problem, it was further observed, was in finding the requisite "prescribed procedure" for denying bail to the accused and, in that regard, the Court held:-

> *"From a close examination of sub-article (2) of Article 15, it is apparent that its wording is so emphatically protective of the right to personal liberty that the procedure envisaged under paragraph (a) cannot be anything but a procedure of safeguards by which one may be deprived or denied of personal liberty."*

To fortify its stance, the Court sought reliance in the words of the Supreme Court of India which considered a similar provision the in the case of **Maneka Gandhi v. Union of India** (1978)2 SCR p.621:-

"...is the prescription of some sort of procedure enough or must the procedure comply with any particular requirements? Obviously procedure cannot be arbitrary, unfair or unreasonable".

In the upshot, the Court was drawn into the conclusion:-

"We are unable to find under section 148 or elsewhere any prescription for the requisite procedure for denial of bail in terms of paragraph (a) of Article 15(2) of the Constitution of this country. It follows therefore that sections 148(5)(e) of the Act is violative of Article 15(2) of the Constitutions and we so find."

We venture to say that the foregoing statement of principle applies, in similar vein, to the situation at hand. We say so because we have already indicated the extent to which the impugned provision does not require the DPP to specify or disclose the nature of the safety or public interest concerned. Once the certificate

meets the validity test, which we have, again, extracted from the case of **DPP Vs Ally Nur Dirie and Another** (supra), a court of law as well as a police officer, in terms of section 148(4) of the CPA will have no other option than not to grant bail. Thus, in terms of the impugned provision, a court or a police officer is, so to speak, not only compelled to accede to the DPP's *ex parte* statement of fact, not supported by any evidence, but the statute also tells the court what order to give: To refuse bail. To us, such a provision which completely eliminates the judicial process in matters of personal liberty cannot qualify to "prescribed procedure" or, by any standards, a due process, within the meaning of Article 15(2)(a). With respect, the obtaining procedure appears to us to be meaningless, much as it does not go so far as to affect the outcome, in that the accused is bound to be denied bail irrespective of what he may say in that regard. But we say no more much as this particular Article was not the subject of the complaint in the court below.

Addressing now Article 13 (6) (a), we entirely share Mr. Mpoki's sentiments to the effect that the impugned section 148

(4) does not prescribe any procedure, let alone one which is reasonable, fair and appropriate to govern the issuance of the DPP's certificate. To that extent, we, again, agree with his submission that an accused person is not afforded any meaningful opportunity of being heard before he is denied bail by operation of the DDP's certificate. Despite the numerous statutory powers accorded to the DPP, it should be appreciated that, in a criminal proceeding, she is no more than a party who, along with the accused person, deserves equal treatment and protection before the law. In this regard, we should clearly express that it is utterly repugnant to the notion of fair hearing for the legislature to allot so much power to one of the parties to a proceeding so that he is able to deprive the other party of his liberty merely by her say-so and; much worse, to the extent that the victimized party as well as the court or, as the case may be, a police officer, are rendered powerless. The right to a fair hearing, by its very nature, requires there be equality between the contestants in the proceeding. There can be no true equality if the legislature, as we have said, allows one party to deprive the other of his personal liberty merely by her

say – so. All said, we just as well find that the impugned provisions infringe Article 13 (6) (a) of the Constitution.

Our finding to the effect that the impugned provisions infringe the provisions of Articles 13 (6) (a) and 15 of the Constitution does not automatically mean the same is *"ex facie ultra vires the Constitution"*. On the contrary, we bear in mind that the Constitution itself permits the derogation from basic rights in certain circumstances as provided in Articles 30 or 31. Thus, in each case where the court finds a statutory provision to have infringed one or several fundamental rights, it must further venture into a determination as to whether or not the impugned provision is saved by articles 30 or 31 of the Constitution which, as we have just remarked, permit derogation from basic human rights in certain circumstances. Article 31 which relates to measures taken during the period of emergency is obviously inapplicable to the situation at hand and, as far as article 30 is concerned, only sub-article (2) is relevant and the same goes thus:-

"It is hereby declared that the provisions contained in this Part of this Constitution

which set out the principles of rights, freedom and duties, does not render unlawful any existing law or prohibit the enactment of any law or the doing of any lawful act in accordance with such law for the purposes of-

(a) ensuring that the rights and freedoms of other people or of the interests of the public are not prejudiced by the wrongful exercise of the freedoms and rights of individuals;

(b) ensuring the defence, public safety, public peace, public morality, public health, rural and urban development planning, the exploitation and utilization of minerals or the increase and development of property of any other interests for the purposes of enhancing the public benefit;

(c) ensuring the execution of a judgment or order of a court given or made in any civil or criminal matter;

(d) protecting the reputation, rights and freedoms of others or the privacy of persons involved in any court proceedings, prohibiting the disclosure of confidential information, or safeguarding the dignity, authority and independence of the courts;

(e)imposing restrictions, supervising and controlling the formation, management and activities of private societies and organizations in the country; or

(f) enabling any other thing to be done which promotes, or preserves the national interest in general.

The question is thus whether or not section 148(4) of the CPA is saved by any of the extracted derogation provisions. This Court had occasion to deal with a corresponding question, again, in

the case of **DPP v Daudi Pete** (supra) where it was recognised that because of the coexistence between the basic rights of the individual and the collective rights of the society, it is common nowadays to find in practically every society limitations to the basic rights of the individual. So, it was further observed, the real concern today is how the legal system harmonizes the two sets of rights. Thus, consistent with that approach, the Court, in the subsequent case of **Kukutia and Another Vs. The AG** (supra), laid down the statement of principle as follows:-

> *"... a law which seeks to limit or derogate from the basic right of the individual on grounds of public interest will have special requirements; first, such a law must be lawful in the sense that it is not arbitrary. It should make adequate safeguards against arbitrary decisions, and provide effective controls against abuse by those in authority when using the law. Secondly, the limitation imposed by such law must not be more*

than is reasonably necessary to achieve the legitimate object. This is what is also known as the principal of proportionality. The principle requires that such law must not be drafted too widely so as to meet everyone including even the untargeted members of the society. If the law which infringes a basic right does not meet both requirements, such law is not saved by article 30(2) of the Constitution, it is null and void."

It was further held that any law that seeks to limit fundamental rights of the individual must be construed strictly to make sure that it conforms to the foregoing requirements, otherwise the guaranteed rights under the Constitution may easily be rendered meaningless by the use of the derogative or clawback clauses of that very same Constitution.

We shall now apply the two tests to section 148(4) of the CPA to see if it is saved by Article 30(2) of the Constitution. If we

may express at once, it is most apparent that the impugned provision is, indeed, arbitrary. We have already indicated the extent to which the provision does not prescribe any procedure, let alone one which is reasonable, fair and appropriate to govern the issuance of the DPP's certificate. In the result, an accused person is not afforded any meaningful opportunity of being heard before he is denied bail by operation of the DDP's certificate.

Turning now to the requirement that the law must not be drafted too widely, it is obvious, once again, that the impugned provision does not pass that test either. The provision is too broadly drafted and overbroad, much as it applies to all offences irrespective of their seriousness. As such, it may easily give way to an abuse of the powers conferred by it as the exercise of that power wholly depends on the DPP's whims. In this regard, we are reminded of a treatise by **Chaskalson, Woolman and Bishop** in **Constitutional Law of South Africa, Juta, 2nd ed. 2014,** at page 49 where the learned authors stated that:

"Laws may not grant officials largely unfettered discretion to use their

power as they wish, nor may laws be so vaguely worded as to lead reasonable people to differ fundamentally over their extension."

To say the least and, in sum, upon our deliberations, we find the impugned section 148(4) of the CPA does not as well fit into any of the provisions of Article 30(2) of the Constitution. That concludes our deliberations on the second ground of appeal which is, accordingly, answered in the negative.

The fourth ground of appeal need not detain us a bit. Before us, Mr. Vitalis candidly conceded that in the proceedings below, the High Court was not prompted to exercise its discretion under Article 30(5). That being the position the court had no material whatsoever with which to exercise that discretion and, indeed, the appellant had no cause to criticize the court below for not doing what was, after all, not sought. We would be loath to have to venture upon a request which was, in the first place, not sought in the proceedings below. To this end, we, accordingly, similarly

dismiss the fourth ground of appeal which we find to be wholly bereft of merit.

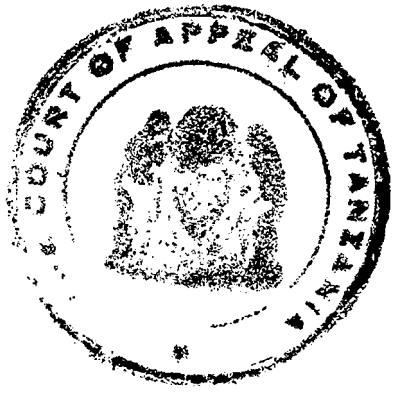
In the final event, we are minded to dismiss the appeal with costs and uphold the decision of the High Court to the effect that impugned section 148(4) of the CPA is, indeed, unconstitutional as well as null and void on account of its derogation from the provision of Aticle13(6)(a) of the Constitution.

DATED at **DAR ES SALAAM** this 31st day of January, 2018.

B.M. LUANDA
JUSTICE OF APPEAL

K. M. MUSSA
JUSTICE OF APPEAL

B. M. K. MMILLA
JUSTICE OF APPEAL



S. E. MUGASHA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

I certify that this is a true copy of the original

J. R. Kahyoza
REGISTRAR
COURT OF APPEAL