IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NYALALI, C. J., MAKAME, J. A. AND RAMADHANI, J. A.)

CRIMINAL APPEAL NO. 28 OF 1990

THE DIRECTOR OF PUBLIC PROSECUTIONS…..APPELLANT

AND

DAUDI PETE……………………………………………RESPONDENT

(Appeal from the Ruling of the High Court of Tanzania at Musoma)

(Mwalusanya, J.)

dated the 20th day of November, 1988 in

Miscellaneous Criminal Case No. 80 of 1988

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JUDGEMENT OF THE COURT

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NYALALI, C. J.

This appeal by the Director of Public Prosecutions hereinafter called the D.P.P. is one of three constitutional cases which have reached this court ever since Fundamental Rights and Duties embodied in the Constitution of the United Republic in 1984 became enforceable in March, 1988 by virtue of the provisions of Section 5(2) of the Constitution (Consequential, Transitional and Temporary Provisions) Act, 1984 (Act No. 16 of 1984). This case however is the first to be decided by the Court. It concerns the right to bail.

The Respondent, one DAUDI s/o PETE was charged in the District Court of Musoma District at Musoma with the offence of Robbery with violence c/s 285 and 286 of the Penal Code. He was denied bail and remanded into custody on the basis that the offence for which he stood charged was not bailable by virtue of the provisions of section 148(5)(c) of the Criminal Procedure Act 1985, (Act No. 9 of 1985). The Respondent was aggrieved by that decision, and the applied to the High Court at Mwanza for bail. The High Court, Mwalusanya, J. hold that the provisions of section 148(4) and (5) of the Act, which prohibited the granting of bail in certain cases were unconstitutional and therefore null and void. Mwalusanya, J. held that these provisions were violative of several articles of the Constitution of the United Republic of Tanzania, which concern Basic Rights, and the Doctrine of Separation of Powers between the Judicature and the Legislature. The High Court therefore granted bail. The D.P.P. was aggrieved by the decision of the High Court, hence this appeal to this Court.

While this appeal was pending before us, the trial in the District Court proceeded and the respondent was acquitted. Apparently and understandably because of this acquittal, the respondent lost interest in the D.P.P.`s appeal. He did not enter appearance before us inspite of our order made under Rule 3(2)(a) of the Rules of the Court for Notice of Hearing to be served upon him by publication in local newspapers. We are indebted however to Professor Mgongo Fimbo, learned Advocate, who agreed to act as AMICUS CURIAE so as to assist the Court to see the other side of the count of this case. We are also grateful to Mr. K. S. Massaba, learned Principal State Attorney, assisted by Mr. Matupa, learned State Attorney, who very ably represented the D.P.P. in this appeal.

The D.P.P. submitted a total of five grounds of appeal, two of which are contained in a Supplementary Memorandum of Appeal filed on 19 June, 1990. The main Memorandum of Appeal has three grounds. The two supplementary grounds of appeal read as follows:

> "1. That the Learned Judge seriously misdirected himself in framing for consideration, the issue relating to the constitutionality of the prohibition of bail under Section 148 of the Criminal Procedure Act.
>
> "2. That the Learned Judge seriously erred in considering the constitutionality of section 148 of the Criminal Procedure Act, as a whole while the

issue concerned only paragraph (c) of sub-section 5 of the said section".

The three main grounds of appeal read as follows:

"1. That the Honourable Judge erred in law in holding that by applying normal canons of interpretation, a meaning cannot be attached to section 148(5)(c) of the C.P.A. that fits within the provisions of Articles 30 and 31 of the Union Constitution.

"2. That the Honourable Judge's interpretation of section 148(5)(c) of the C.P.A. in the light of Article 13(6) of the Union Constitution is bad in law as "hearing" envisaged by the Parliamentarians in the said Article is not the same as "hearing" when the case is before the court for applications such as those of bail under section 148(5) of the C.P.A.

"3. That the Honourable Judge applied wrong canon of statutory interpretation hence his failure to interprete Section 148(5)(c) of the C.P.A. in the light of societal interests vis-à-vis these of a private citizen".

In his submissions before us regarding the first supplementary ground, Mr. Massaba argued in effect that there was nothing in the pleadings or the submissions made in the course of the proceedings

in the High Court which could give rise to the issues of constitutionality of the prohibition of bail under section 148 of the Criminal Procedure Act. Professor Fimbo on the other hand argued the contrary view. Having examined the record of the proceedings of the court below, and bearing in mind that the respondent was a layman, we are satisfied that any reasonable tribunal would find that paragraph 5 and 6 of the affidavit filed in support of the bail application, together with the respondent's oral submissions made in support of his application, undoubtedly give rise to the issues of constitutionality of the prohibition of bail. Paragraph 5 and 6 of the affidavit state as follows:

> "5. My Lord, I agree that section 148(5) C.P.A. prevents the court to grant bail, but in my case the charge was prepared to suit the conditions of section 148(5) and it is not true that a gun was used to take only one cattle while there are many cattle in the kraal of Mr. Maregeri or Issa Magoma.
>
> "6. My Lord this Honourable Court has power to consider and administer justice so that a person cannot be mistreated by the existing law or otherwise. Mr. Maregeri, Mr. Issa Magoma, and the Police have conspired to detain the applicant by means of law without even a reasonable evidence".

Mr. Massaba`s argument that the respondent in these paragraph is

complaining only of victimization by the Police and Mr. Maregeri cannot be sustained in the light of what is stated in the first sentence of paragraph 6. The respondent's assertion that the High Court has "power to consider and administer justice so that a person cannot be mistreated by the existing law or otherwise" read together with the respondent's reference to the provisions of section 148(5) of the Criminal Procedure Act, clearly shows beyond doubt that the respondent was challenging the constitutionality of the provisions of section 148(5) which prohibit bail.

The relevant parts of the respondent's submissions as recorded in the High Court reads as follows:

> "The law should not be used to victimize citizens. Mr. Maregeri and the O.C.D. are using the law as an instrument of oppression. This offence is purely out of vindictiveness. I am wondering as to whether such cause of action is constitutional. I understand that our Bill of Rights has come into operation. What of it? I thought that we oppressed citizens would be saved by it. If section 148(5) of the C.P.A. condones denying liberty to a citizens for more vindictiveness then I am afraid the Bill of Rights is not worth the paper it is written on".

We think no stronger words could have been used to raise the constitutional issues than these. In his submission in reply Mr. Muna, Learned State Attorney, who represented the Republic in the

High Court, is recorded to have said, inter alia,

> "The question of Bill of Rights under Article 13(2) and 15(2) of the Constitution would seem to give the right to liberty to the citizen. But that right has lawfully been curtailed by Parliament.

It is my submissions that section 148 is constitutional which does not go against Article 13(2) and 15(2) of the constitution. I rely on Articles 30 and 31. These are saving the said provisions of section 148 of the C.P.A. So that law of bail in Section 148 is lawful for public interest and on national security grounds".

In response to the submissions of Mr. Muna, the respondent concluded by saying

> "I wish only to add that, if Parliament condones such things as vindictiveness, then I am afraid that, we the down-trodden have no where to run to for our liberty. Parliament cannot have unlimited powers to pass oppressive laws as this one which the State Attorney is keeping defending. It was not the intention of the Legislature to pass laws to oppress Wananchi. That cannot be true in a democratic state like Tanzania".

There can be no doubt in the mind of any reasonable tribunal that these parts of the submissions made by both sides of the case in the

High Court raised issues of constitutionality of the provisions of section 148 of the Criminal Procedure Act. It follows therefore that the learned trial judge was correct in framing issues relating to the Constitutionality of section 148 and we so find.

Mr. Massaba also made submissions concerning the jurisdiction and procedure of the High Court in the enforcement of the Basic Rights, Freedoms and Duties enshrined in the Constitution, in view of what the trial judge had said on that point. In his ruling, Mwalusanya, J. stated inter alia:

> "A point in limine to be taken is as to whether the Bill of Rights may be enforced when the procedure and rules for conducting such cases by the court are yet to be enacted by the Government as provided in Article 30(4) of the Constitution. Counsel for the Republic did not address me on this point.
>
> My view is stated in the case of Marwa Wambura Magori VS. A. C. (in) High Court Miscellaneous Criminal Cause No. 2 of 1988, and wish to reiterate here that it is not necessary to have such rules in order to enforce the Bill of Rights. The enforcement may be done by application in the form of Habeas Corpus, Mandamus, Prohibition, Certiorari, Declarations and even by an application for bail as the case at hand".

Both Mr. Massaba and Professor Fimbo agree with this view of the learned trial judge on this point. Professor Fimbo further informed us that the jurisdiction of the High Court is derived from three sources, two of which exist under Articles 30(3), (4) and 108(1) and (2) of the Constitution, and the third under section 5(2) of the Constitution (Consequential, Transitional and Temporary Provisions) Act, 1984, (Act No. 16 of 1984). According to the official English translation of the Swahili version of the Constitution.

Article 30(3) and (4) reads as follows:

> "30(3) 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 without prejudice to any other action or remedy lawfully available to him in respect of the same matter, institute proceedings for relief in the High Court.
>
> (4) Subject to the other provisions of this Constitution, the High Court shall have and may exercise original jurisdiction to hear and determine any matter brought before it in pursuance of this section; and an Act of Parliament may make provisions with respect to"-

a) the procedure regulating the institution of proceedings under this section;

b) the powers, practice and procedure of the High Court in relation to the hearing of proceedings instituted under this section;

c) ensuring the more efficient exercise of the powers of the High Court, the protection and enforcement of the basic rights, freedoms and duties in accordance with this Constitution".

We concur with the learned trial judge that the provisions of sub-articles (3) and (4) of Article 30 sufficiently confer original jurisdiction upon the High Court to entertain proceedings inrespect of actual or threatened violations of the Basic Rights, Freedoms and Duties may be effected under the procedure and practice that is available in the High Court in the exercise of its original jurisdiction, depending on the nature of the remedy sought.

As to the provisions of Article 108(1) and (2), it is provided therein as follows:

> "108 (1) There shall be a High Court of the United Republic (referred to as the "High Court") which shall have the jurisdiction and powers conferred on it by this Constitution or by any other legislation.
>
> (2)Where it is not expressly stated in this Constitution or

> in any other legislation that any specific matter shall first be heard and determined by certain court, the High Court shall have jurisdiction to hear and determine that matter. In addition the High Court shall have jurisdiction in respect of any other matter which in accordance with legal traditions and conventional practices obtaining is ordinarily to be heard and determined by the High Court. Save that, the provisions of this section shall apply subject to the jurisdiction of the Court of Appeal of Tanzania as provided for in this Constitution or in any other legislation".

We agree with Professor Fimbo that under the above cited provisions, the High Court unlimited inherent original jurisdiction to adjudicate upon any legal matter unless there is express statutory provision to the contrary. However, we concur with Mr. Massaba that since there is a specific provision under the Constitution, that is, Article 30(3) and (4) concerning the enforcement of the Basic Rights, Freedoms and Duties in question, any proceedings for that purpose must be instituted under that specific article of the Constitution.

With regard to the provisions of section 5(2) of the Constitution (Consequential, Transitional and Temporary Provisions) Act, 1984, it is stated therein that:

> "5 (2) Notwithstanding the amendment of the Constitution and, in particular, the justiciability of the provisions relating to basic rights, freedoms and duties, no existing

> law or any provision in any existing law may, until after three years from the date of the commencement of the Act, be construed by any court in the United Republic as being unconstitutional or otherwise inconsistent with any provision of the Constitution".

On a proper construction of the above cited provisions, we are, with due respect to Professor Fimbo, unable to accept his learned advice to the effect that the provisions in question create or confer jurisdiction on the High Court to adjudicate upon the constituonality of any law of the land. It is apparent in our view that these provisions deal with the consequences of introducing a justiciable Bill of Rights and Duties into the consequences of introducing a justiciable Bill of Rights and Duties into the Constitution, by providing for a transitional period of grace of three years when the Government could put its own house in order, so to speak, by making appropriate amendments to existing law. That this is so is borne out by the next sub-provisions (3) of section 5 which reads:

> "(3) The President may, at any time before the 39th of June, 1985, by order published in the Gazette, make amendments to any existing law as may appear to him
> to be necessary or expedient for bringing that law into conformity with the provisions of the Act and the Constitution or for giving effect, or enabling effect to be given to these provisions, and where the President makes

> an order under this sections in relation to any law which is applicable to Zanzibar as well as to Mainland Tanzania, that order shall have effect so as to amend that law in relation to any persons or matter connected with Zanzibar as well as with Mainland Tanzania inrespect of any matter within the legislative competency of the Parliament of the United Republic notwithstanding any provision to the contrary in the interpretation of Laws and General Clauses Act, 1972".

Let us now turn to the second supplementary ground of appeal. Mr. Massaba has submitted in effect, in the alternative to the first supplementary ground, that the only issue raised in the High Court concerned the constitutionality of the provisions of paragraph (c) of sub-section (5) of section 148 of the Criminal Procedure Act, and that the learned trial judge was therefore wrong in framing issues to cover the whole of section 148. Professor Fimbo on the other had has advised us to the effect that the learned trial judge was correct in framing issues covering the whole of section 148 since paragraph (c) of sub-section (5) is inseparable from the other provisions of section 148.

With due respect to both Counsel, we think there is a common misdirection on their part concerning what the learned trial Judge actually did. There is nothing on the record of the proceedings in the High Court to suggest that the issue were framed on the whole of section 148. What is self-evident is that issues were framed only

two sub-sections of sections 148. In a part of his Ruling, the learned trial Judge states:

> "Before the application was heard I informed the State Attorney Mr. Muna, that the application raised matters of great public and Constitutional importance, as this court had to decide as to the Constitutionality of these provisions which restrict courts of law to grant bail to accused persons. And so the State Attorney was afforded opportunity to prepare himself and was given by me a list of the issues that needed to be examined closely. The issues framed involved the whole of sub-section (4) and (5) of section 148 of the C.P.A……".

From the record of the proceedings in the High Court, it is obvious that only the provisions of paragraph (c) of sub-section (5) of section 148 were in issue between the parties. Was the learned trial Judge correct in framing issues to include the provisions of sub-section (4)?

Were these provisions, as Professor Fimbo advises, inseparable from paragraph (c) of sub-section (5) which was in issue?

Let us have a close lock at these provisions as amended by Act. No. 12 of 1987 and 10 of 1989:

> "(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.

“(4A) A certificate, issued by the Director of Public Prosecutions under this section shall take effect from the date it is filed in the 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 Prosecution withdrawals 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 accused of murder or treason;

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) the accused person is charged with an offence alleged to have been committed while he was released on bail by a court of law;

e) the act or any of the acts constituting the offence with which a person is charged consists of a serious assault causing grievious bodily Harm on or threat of violence to another person, or having or possessing a firearm or an explosive;

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

g) the offence for which the person is charged involves property whose value exceeds ten million shillings, unless that person pays cash deposit equivalent to half the value of the property, and the rest is secured by execution of a bond; provided that this shall not apply in the case of police bail."

It seems to us that the following points are obvious. First, the provisions of sub-section (4) deal with a situation which is entirely different from that covered by the provisions of sub-section (5). Second, each of paragraph (a) to (g) concerns a situation which is

entirely different from that dealt with in any of the other paragraphs. It follows therefore that the provisions of paragraph (e) of sub-section (5) are separable from the provisions of paragraphs (a), (b), (c), (d), (f) and (g) of sub-section (5), and also separable from the provisions of sub-section (4) of section 148 of the Criminal Procedure Act. We find therefore that the learned trial Judge was wrong in framing issues covering the whole of sub-section (4) and sub-section (5) of section 148.

Next we turn to the first main ground of appeal. Mr. Massaba has submitted to the effect that on a proper and true interpretation of the provisions of paragraph (e) of sub-section (5) of section 148 of the Criminal Procedure Act, a meaning can be ascertained which fits into the provisions of Article 30(2)(b) of the Constitution, which, according to him, permits the Parliament to enact laws under certain circumstances which are derogative or restrictive of the Basic Rights, Freedoms and Duties of the human being. It was part of Mr. Massaba`s submission that the provisions of paragraph (e) of sub-section (5) of section 148 which derogate from the basic right to personal liberty guaranteed by Article 15 fall within the scope of Article 30(2)(b) of the Constitution, and are therefore constitutionally valid. Without prejudice to this submission, Mr. Massaba also submitted to the effect that the provisions of Article 15(2) of the Constitution permits the enactment of laws such as paragraph (e) of sub-section (5) of section 148.

Professor Fimbo on the other has advised us to hold the contrary

view regarding Article 15 and 30 (2) of the Constitution in respect of the provisions of paragraph (e) of sub-section (5) of section 148 of the Criminal Procedure Act.

Let us first have a close examination of Article 15 of the Constitution. But a word caution first. Since our Constitution is established in the Kiswahili language, we must constantly bear in mind that the controlling version is the Kiswahili one and not the English version. When that is done, it is immediately noticed that the English version of paragraph (b) of sub-article (2) of Article 15 is incorrect in so far as it includes the words "or upon reasonable suspicion of having committed a criminal offence". Fortunately for us, the case before us does not involve that part of Article 15. We are only concerned with sub-articles (1) and (2) paragraph (a) which state"

> "(1) Man`s freedom is inviolable and every person is entitled to his personal freedom.
>
> 2) For the purposes of protecting the right to personal freedom, no person shall be subject to arrest, restriction, detention, exile or deprivation of his liberty in any other manner save in the following cases:-
>
> (a) in certain circumstances, and subject to a procedure, prescribed by law; or

(b)………………………… (not applicable).

Mr. Massaba has contended, correctly in our view, that the basic right to personal liberty may be derogated from or restricted within the scope of the exceptions stated under paragraphs (a) and (b) of Article (c) of sub-section (5) of section 148 of the Criminal Procedure Act, fall squarely within the scope of paragraph (a) above cited. Professor Fimbo has advised us to the contrary.

In our consider opinion, we think there is a need to bear in mind certain basic concepts, principles and characteristics concerning the Bill of Rights and Duties enshrined in our Constitution, in order to interprete the Constitution and the laws of the land properly. First, the Constitution of the United Republic recognizes and guarantees not only basic human rights, but also, unlike most constitutions of countries of West, recognizes and guarantees basic human duties. It seems that the framers of our Constitution realized that the individual human being does not exist or live in isolation, but exists and lives in society. Our Constitution shares this characteristic with the Constitution lives in society. Our Constitution shares this characteristic with the Constitution of India which contains "fundamental Duties" of every citizen of India in PART IVA of the Constitution. There is however a significant difference between our situation and that of India on this point. First, the fundamental or basic duties recognized by our Constitution are attributed to human beings, whereas those under the Indian Constitution of India, fundamental rights are dealt with in a separate part of the Constitution

(PART III) and fundamental duties in another separate part (PART IVA). In our situation, both fundamental or basic rights and duties are dealt with in one single part of the Constitution, that is, PART III. This location of basic rights and duties in one single part of the Constitution of the United Republic is both symbolic and significant. It is a symbolism and an expression of a constitutionally recognized co-existence of the individual human being and society, as well as the co-existence of rights and duties of the individual and society.

This view is supported by the principles underlying The African Charter on Human and Peoples` Rights which was adopted by the Organisation of African Unity in 1981 and came into force on 21 October, 1986 after the necessary ratifications. Tanzania signed the Charter on 31 May, 1982 and ratified it on 18 February, 1984. Since our Bill of Rights and Duties was introduced into the Constitution under the Fifth Amendment in February, 1985, that is, slightly over three years after Tanzania signed the Charter, and about a year after ratification, account must be taken of that Charter in interpreting our Bill of rights and Duties.

The preamble to the Charter states:

> “The African States members of the Organization of African Unity, parties to the present conviction entitled “African Charter on Human and People’s Rights”,
>
> …………………………………………………………………..
>
> …………………………………………………………………..

Taking into consideration the virtues of their historical tradition and the values of African civilization which should inspire and characterize their reflection on the concept of human and people's rights;

Recognizing on the one hand, that fundamental human rights stem from attributes of human beings, which justifies their international protection, and on the other hand that the reality and respect of peoples` rights should necessarily guarantee human rights;

Considering that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone;

……………………………………………………………………

It seems evident in our view that the Bill of Rights and Duties embodied in our Constitution is consistent with the concepts underlying the African Charter on Human and People's Rights as stated in the Preamble to the Charter.

The second important principle or characteristic to be borne in mind when interpreting our Constitution is a corollary of the reality of co-existence of the individual and society, and also the reality of co-existence of rights and duties of the individual on the one hand, and the collective or communitarian rights and duties of society on the other. In effect this co-existence means that the rights and duties of the individual are limited by the rights and duties of society, and vice versa. Thus under Article 29(5) it is stated:

> "(5) For the purposes of the better enjoyment by all persons of the rights and freedoms specified in this Constitution, every person shall so conduct himself and his affairs as not to prejudice the rights and freedom of others or the public interests".

The same principle or characteristic is reflected in Article 30(1) which states:

> "The rights and freedoms whose basic content have been set out in this Constitution shall not be exercised by any person in such a manner as to occasion the infringement or termination of the rights and freedoms of others or the public interest".

We are aware that such limitations to basic rights and duties are not unique to Tanzania. They are inherent in any society and are to be found in many Constitutions and legal systems. Thus the merits and demerits of any legal system in so far as the question of Human Rights is concerned depend upon the extent to which a particular legal system succeeds or fails to harmonize the basic rights and freedoms of the individual on the one hand, and the collective or communitarian rights and duties of Society on the other.

It is in the light of these consideration that the provisions of Section 148 (5)(c) of the Criminal Procedure Act and these of Article 15(2)(a) and Article 30(2)(b) must be construed as to their meaning and effect.

We must start with Article 15 which we have already reproduced earlier. As already observed, Mr. Massaba, learned Principal State Attorney, contends that the provisions of section 148(5)(c) which deprive an accused person of his or her personal liberty by prohibiting the grant of bail are constitutionally valid, since such deprivation is done in respect of circumstances and according to a procedure prescribed by law. According to his argument, the requirements of Article 15(2)(a) are fulfilled, since the prescribed circumstances are the offences charged, and the prescribed procedure is implied under the Criminal Procedure Act, in that the accused has opportunity to be heard before he is remanded into custody by the subordinate court. In response to our question whether such procedure is meaningful when it does not affect the outcome in the sense that the accused is bound to be denied bail whatever he may say on his behalf, Mr. Massaba replied to the effect that although such hearing is of no consequence on the issue of denial of bail, it may result in the dismissal of the charge when for instance, such charge discloses no offence known to the law of the land.

Unfortunately, the learned trial Judge did not specifically consider the issue whether the requirements of Article 15(2)(a) are fulfilled by the provisions of section 148(5)(c). What he stated on this point is as follows:

> “article 15 of our Constitution provides for Rights to liberty such that no one may be deprived of his freedoms except in accordance with the law. Now section 148 of the

C.P.A. derogates from the right to liberty, and so it is ex-facie ultra vires the provisions of Article 15 of the Constitution. It is for the Republic to prove that section 148 of the C.P.A. is saved by Articles 30 and 31 of the Constitution by showing that the statute in question is in the public interest and justifiable on national security grounds. The Republic has to prove on a balance of probabilities".

It would seem that the learned trial judge is of the view that every statute which derogates from the right to personal liberty "is ex facie ultra vires the provisions of Article 15". This view is obviously wrong because Article 15 itself provides for derogation under sub-article (2).

On a close examination of Article 15, it is apparent that there are two situations under which a person may be denied or deprived of personal liberty under the same article. For purposes of clarity we repeat the provisions of Articles 15:

"15 (1) Man`s freedom is inviolable and every person is entitled to his personal freedom.

2) for the purpose of protecting the right to personal freedom, no person shall be subject to arrest, restriction, detention, exile or deprivation of his liberty in any other manner save in the following cases:-

(a) in certain circumstances, and subject to a procedure, prescribed by law; or

(b) in the execution of the sentence or order of a court in respect of which he has been convicted".

It is obvious from these provisions that a person may be deprived or denied of personal liberty under Article 15 only under the conditions stipulated under paragraphs (a) and (b). In the case before us, it is paragraph (a) which is relevant. That paragraph sanctions the deprivation or denial of liberty under "certain circumstances" and "subject to a procedure", both of which must be "prescribed by law".

In our considered opinion, there is no difficulty in finding the "certain circumstances" prescribed by section 148(5)(c) for deprivation or denial of personal liberty through the prohibition of bail. This is provided for in the words underlined hereunder:

"(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) ………………………………………..

b) ………………………………………..

c) ………………………………………..

d) ………………………………………..

e) <u>the act or any of the acts constituting the offence with which a person is charged consists of a serious</u>

assault causing grievious harm on or threat of violence
to other person, or of having or possessing a firearm or an explosive."

here is however a real problem in finding the requisite prescribed procedure for denying bail to the accused. As already mentioned, Mr. Massaba, learned Principal State Attorney, contends in effect that such procedure is implied under the Criminal Procedure Act in that there is nothing under section 148 which prohibits the court from hearing the accused inrespect of bail before remanding him into custody. With due respect to Mr. Massaba, we are satisfied that he is wrong, and that his error is a result of a misconception as to what amounts to `procedure` in terms of paragraph (a) of Article 15.

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. In the words of the Supreme Court of India which considered a similar provision in the Indiaa Constitution 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".

We are unable to find under section 148 or lsewhere 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)(c) of the Act is violative of Article 15(2) of the Constitutions and we so find.

We must now examine whether the provisions of section 148(5) (c) are also violative of Article 13(6)(a) of the Constitution. That article deals with the basic right to be heard before being condemned. It states:

"(6) For the purposes of ensuring equality before the law the state shall make provisions:

a) that every person, when his rights and obligations are being determined, be entitled to a fair hearing by the court of law or other body concerned and be guaranteed of the right of appeal or to another legal remedy against the decision of courts of law and other bodies which decide on his rights or interests founded on statutory provisions".

The learned trial judged in the case before us was of the view an

accused person is not given any meaningful opportunity of being heard before he is denied bail under section 148(5)(e) of the Criminal Procedure Act. In our view the provisions of Article 13(6)(a) are really inapplicable to section 148(5)(e). We say so because that part of the Article concerns only situations "when ….. rights and obligations are being determined" and not situations such as under section 148(5)(e) when the court must make a particular order, without discretion.

Next to turn to Article 13(6)(b) of the Constitution to see whether the trial Judge was correct in holding to the effect that the relevant provisions of section 148(5)(e) were violative of that Article. The paragraph reads:

> "(6) For the purposes of ensuring equality before the law, the state shall make provisions:-
>
> (a) …………………………………… (cited above)
>
> (b) every person charged with a criminal offence shall be presumed to be innocent until he is proved guilty".

This is another Article of which English translation does not correctly reflect the Swahili version, which is the controlling version. The concept contained in the Swahili version is broader than the English translation. A proper translation of the Article should read along the following lines:

> "No one charged with a criminal offence shall be treated like a convict until his guilt is proved".

On a proper interpretation of section 148(5)(e), we agree with a part of what Msumi, J. stated in the case of REPUBLIC V. PEREGRIN Y. MROPE, Misc. Criminal Cause No. 43 of 1989 (unreported) where he stated, inter alia:

> "On the question of unconstitutionality, I am of the view that Section 148(5)(e) does not contravene the provision of Article 13(6) (b), …… Denying bail to accused person does not necessarily amount to treating such a person like a convicted criminal".

With regard to the provisions of Article 13(4) and (5) which prohibit discriminatory legislation incompatible with the basic right to equality before the law, the learned trial Judge held to the effect that section 148, which prohibited bail for certain offences, was violative of Article 13(4) and (5). In coming to that conclusion, the learned trial Judge was influenced by the meaning of discrimination, as defined by the Court of Appeal of the Cook Islands in the case of Clarke v. Karika (1985) L.R.C. (Const.)732; also by the Supreme Court of the United States in the case of Lindsley v. Natural Carbonic Gas Co. (1911) 220 U.S. 61; and the case of Megowan v. Maryland (1961)366 U.S. 420. With due respect to the learned trial Judge, he seems to have misdirected himself on the correct interpretation of \`discrimination\` as envisaged under Article 13(4) and (5). The term \`discriminations\` is

specifically defined under Sub-article (5) as follows:

> “For the purpose of this section the expression “discriminatory” means affording different treatment to different persons attributable only or mainly to their respective descriptions by race, place of origin, political opinion, colour, occupation or creed whereby persons of one such description are subject to disabilities or restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of such description”.

This is another English translation which is incorrect in certain parts. The word ‘occupation’ used therein is not the correct rendering of the Swahili expression “hali yao ya maisha”. We think the correct English translation consistent with the underlying concept should be something like, “ Their status in life”.

Bearing in mind, as we must, this interpretation, we are satisfied that the selective prohibition against bail contained under section 148 (5) (c) cannot be said to be discriminatory in terms of the Constitution. This is because the accused persons who are denied bail are so denied on the basis of their actions or conduct.

Finally, we must consider whether the learned trial Judge was correct in holding that the provisions of section 148 were volatize of the

Doctrine of Separation of Powers stated under Article 4. After reviewing several decisions by a number of courts in Commonwealth countries, the learned trial Judge concluded:

> " Pursuant to that reasoning, which I adopt, I am of the view that the fettering or removing of judicial discretion by the legislature in matters of granting bail under S. 148 of the C.P.A. is unconstitutional……".

With due respect the learned trial Judge, we think he came to a wrong conclusion. In our view, the Doctrine of Separation of Powers can be said to be infringed when either the Executive or the Legislature takes over the function of the Judicature involving the interpretation of the laws and the adjudication of rights and duties in disputes either between individual persons or between the state and individual persons. A legislation which prohibits the grant of bail to persons charged with specified offences does not in our view amount to such a take over of judicial functions by the Legislature. Such legislations do exist in several countries o the Commonwealth, such as Zimbabwe and The Gambia, where their constitutional validity has been confirmed in cases like Bull v. Minister of Home Affairs (1987) LRC (Const) p.555 and Attorney General of the Gambia v. Memedou Jobe (1984) A.C. 689 (PC).

In the end however, when all is said and done, we find that the provisions of section 148(5)(e) are violative of Article 15(2)(a) of the Constitution. To the extent that section 148(5)(e) violates the

Constitution, it would be null and void in terms of Articles 64(5) of the constitution, unless it is saved by the general derogation clauses, that is, Article 30 and 31, which permit certain derogations from the basic rights of the individual.

Article 30 and 31 states as follows:

"30(1) The rights and freedoms whose basic content have been set out in this Constitution shall not be exercised by any person in such a manner as to occasion the infringement or termination of the rights and freedoms of others or the public interest.

2) It is hereby declared that no provision contained in this Part of this Constitution, which stipulates the basic human rights, freedoms and duties, shall be construed as invalidating any existing law or prohibiting the enactment of any law or the doing of any lawful act under such law, making provision for-

(a) ensuring that the rights and freedoms of others or the public interest are not prejudiced by the misuse of the individual rights and freedoms;

(b) ensuring the interests of defence, public safety, public order, public morality, public health, rural and urban development and utilization of mineral

resources or the development or utilization of any other property in such manner as to promote the public benefit;

(c) ensuring the operations of the judgement or order of court given or made in any civil or criminal proceedings;

(d) the protection of the reputation, rights and freedoms of others on the private lives of persons involved in any court proceedings, prohibiting the disclosure of confidential information, or the safeguard of the dignity, authority and independence of the courts;

(e) imposing restrictions, supervision and control over the establishment, management and operation of sections and private companies in the country; or

(f) enabling any other thing to be done which promotes, enhances or protects the national interest generally.

Article 31:-

31.- (1) Notwithstanding the provision of section 30(2), an Act of parliament shall not be invalid for the reason only that it provides for the taking, during periods of emergency, or in

ordinary times in relation to individuals who are believed to be conducting themselves in a manner that endangers or compromises national security, of measures that derogate from the provisions of section 114 and 15 of this Constitution.

2) No measures referred to in section (1) shall be taken in pursuance of any law during any period or emergency, or in ordinary times in relation to any person, save only to the content to which they are necessary and justifiable for dealing with the situation that exists during the period of emergency or in ordinary times dealing with the situation created by the conduct of the individual in question.

3) Nothing in this section shall be construed to authorize the deprivation of any person of the right to live except in respect of death caused as a result of acts of war.

4) In this and the following sections of this Part “period of emergency” means any period during which the proclamation of a state of emergency made by the President in the exercise of the power conferred on him by section 32,

continues in force".

The question that arises is whether section 148(5)(e) fits inte the provisions of Article 30 or 31. The learned trial Judge dealt with this aspect of the case and stated:

> "Therefore if the Republic wants bail to be denied under the provisions of Article 30 of the Constitution on the ground that the provisions of section 148(4) and (5) of the C.P.A. are in the public interest the said provisions of section 148(4) and (5) of the C.P.A. must pass the proportionality test on a balance of probabilities. Similarly when the Republic wants the court to refuse bail to the accused person under the provisions of Article 31 of the Constitution on the ground that the provisions of section 148(4) and (5) were enacted on national security grounds the Republic has to prove and establish that these provision of section 148(4) and (5) of the C.P.A. are necessary and reasonably justifiable. If the Republic overcomes both these two hurdles then only then, may the courts refuse bail, but after affording the accused person opportunity to challenge the Republic's statements and remarks".

It is apparent from the above cited paragraph, that the learned trial judge is of the view that the answer to the question whether sections 148(5)(e) fits into the provisions of Article 30 depends upon proof by evidence adduced by the prosecution. With due respect to the

learned trial Judge, we do not think that this is a question of evidence at all. On the contrary, it is a question of law. Mr. Massaba correctly confined his submissions to the provisions of Article 30. Obviously, Article 31 is not relevant to the case before us. It is Mr. Massaba`s contention that if section 148(5)(e) is found to fall short of the requirements of Article 15(2)(a), it is nevertheless validated by the provisions of paragraph (b) of Sub-Article (2) of Article 30 of the Constitution.

We accept the proposition that any legislation which falls within the parameters of Article 30 if constitutionally valid, notwithstanding that it may be violative of basic rights of the individual. But, and this is the crucial but, such legislation must fit squarely within the provisions of the Article. Any statute which is so broad as to fall partly within and partly outside the parameters of the Article would not be validated for the reason to be given hereafter. Let us therefore see whether section 148(5)(e) falls fully within paragraph (b) of sub-Article (2) of Article 30.

It is apparent that section 148(5)(e) would be validated if it can be construed as being wholly for “ensuring the interests of defence, public safety, public order” in terms of paragraph (b) of sub-Article (2) of Article 30. Since the objective of the relevant paragraph of the Constitution is the `ensuring` or protection of the “the interests of defence, public safety, public order”, etc, section 148(5)(e) would be saved if the denial of bail is aimed only at accused persons who are capable of being a danger or threat t the interests of defence, public

safety or public order.

In our considered opinion the provisions of section 148(5)(e) are so broad that they encompass even accused persons who cannot reasonably be construed to be such a danger in terms of the relevant paragraph of the Constitution. For instance, these provisions cover an accused person who, while defending himself or his property against robbers uses excessive force resulting in the death of one or more of the robbers. They also cover an accused person who finds someone committing adultery with that person's spouse, and being provoked, seriously assaults and causes grievious bodily harm to the adulterer. Similarly, the provisions also encompass an accused persons who, to the knowledge of everyone, inherits a firearm from his or her parent but forgets to obtain a firearm licence, thereby unwittingly committing the offence of being in possession of a firearm without a licence. Section 148(5)(e) would also cover every person who, though licensed to possess a firearm, forgets to renew his or her licence within the prescribed period. Many mere such examples may be given. None of these persons can reasonably be said to be dangerous.

It is thus plain that the provisions of section 148(5)(e) are so broadly drafted that they are capable of depriving personal liberty not only to persons properly considered to be dangerous, but even to persons who cannot be considered to be dangerous in terms of the meaning of paragraph (b) of sub-Article (2) of Article 30. Such a statutory provision amounts to the Kiswahili proverbial rat-trap which catches both rats and humans, without distinction. A provision of that nature

attempts to protect society by endangering society. Section 148(5)(e) is such a provision. It does not therefore fit into Article 30(2)(a) of the Constitution and is consequently null and void.

In the final analysis therefore, but for different reasons, we agree with Mwalusanya, J. that section 148(5)(e) is unconstitutional and is therefore struck out of the statute book of the country. This means that the courts have discretion to grant bail to persons accused of the offences specified under section 148(5)(e) in accordance with the law as it existed before the enactment of section 148(5)(e). This discretion ought always to be exercised judicially by the courts taking into account both the interests of the individual, and the community of which the individual is a part.

Thus we dismiss the appeal. Since the respondent is already a free man, we make no order inrespect of him.

DATED at DAR ES SALAAM this day of 16th May, 1991.

F. L. NYALALI

CHIEF JUSTICE

L. M. MAKAME

JUSTICE OF APPEAL

A. S. L. RAMADHANI

JUSTICE OF APPEAL

I certify that this is a true copy of the original.

F. L. K. WAMBALI

DEPUTY REGISTRAR