IN THE COURT OF APPEAL OF TANZANIA
AT ARUSHA

(CORAM: NYALALI, C.J., MWAKASENDO, J.A. AND KISANGA, J.A.)

CRIMINAL APPEAL NO. 52 OF 1979

and

CRIMINAL APPEAL NO. 53 OF 1979

BETWEEN

THE HON. THE ATTORNEY GENERAL .....APPELLANT

AND

1. LESINOI NDEINAI @ JOSEPH SALEYO LAIZER
2. MASAI ZEKASIO @ LAIZER SAMORA } RESPONDENTS
3. OMAR JAMALUDDIN UKAYE

IN

CRIMINAL APPLICATION NO. 22 OF 1979

and

CRIMINAL APPLICATION NO. 23 OF 1979

JUDGMENT OF MWAKASENDO, J.A.

MWAKASENDO, J.A.

I have reached the same conclusion as the learned Chief Justice. Needless to remark that ordinarily it would be sufficient for me in a criminal appeal to do no more than express my concurrence with his judgment but as the learned Chief Justice feels that the present case raises important legal issues on which it would be desirable for each member of the Court to express his views separately I have prepared the following judgement.

In this case the Attorney-General appeals from a ruling of the High Court of Tanzania at Arusha, ordering the release from prison of the three respondents, namely: (i) LESINOI NDEINAI alias JOSEPH SALEYO LAIZER (ii) MASAI ZEKASIO alias LAIZER SAMORA and (iii) OMAR JAMALUDDIN UKAYE - vide Arusha High Court Criminal Applications Nos. 22 and 23 of 1979. As the legal issues raised by the ruling in the two cases are the same, this Court has directed, as the trial court also did, that the two appeals be consolidated and they are so considered in this judgement.

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2. The bare facts of the case can be stated quite simply. Each of the respondents was arrested and detained in prison between 7th and the 13th day of August, 1979, under an order made by the Honourable , the Vice-President of the United Republic of Tanzania, the Honourable Mr. Aboud Jumbe, then allegedly performing the functions of the office of President pursuant to the provisions of sub-section (1) of Section 8 of the Constitution of the United Republic of Tanzania of 1977, otherwise cited in Kiswahili as "Katiba ya Jamhuri ya Muungano wa Tanzania ya Mwaka 1977", and hereinafter referred to as "the Constitution". The order directing the detention of the respondents was made under powers conferred on the President by section 2 of the Preventive Detention Act, 1962, Cap. 490 - hereinafter referred to as "the Detention Act" or simply as "the Act". The order is dated the 1st day of August, 1979.

3. The respondents who challenged the validity of their detention applied to the High Court of Tanzania at Arusha for an order of Habeas Corpus supported by affidavits sworn by them and their counsel, deposing to facts which, if accepted, would make their detention utterly misconceived and illegal.

4. At the hearing of the chamber application, facts were elicited indicating beyond doubt that the three respondents were detained under the authority of orders issued under section 2 of the Preventive Detention Act, 1962; that the orders in question were made by Honourable Vice-President of the United Republic of Tanzania; that Honourable the Vice-President in making the said orders, was purporting to act pursuant to powers conferred on him by sub-section (1) of section 8 of the Constitution; that at the time these detention orders were made His Excellency the President of the United Republic of Tanzania was absent from Tanzania attending a Conference of the Heads of State and Governments of the Commonwealth of Nations at Lusaka and, that although the detention orders made by Honourable the Vice-President were under his hand (that is, bore his signature), they were not sealed with the Public Seal as required under the provisions of section 2 of the Preventive Detention Act, 1962.

5. Messrs Mirambo and Mwale, learned counsel representing the three respondents at the hearing of the chamber application, submitted that the detention of the respondents were illegal because at the time when Honourable the Vice-President made the orders directing their detention under section 2 of the Preventive Detention Act, 1962, he was not the President of the United Republic of Tanzania, in terms of the provisions of the Constitution of the United Republic. Elaborating on this point at great length, counsel for the respondents argued that while the Constitution, in sub-section (1) of section 8 thereof, provided for the machinery for an orderly transmission or devolution of the powers and duties of the President when the office of President is vacant or the President is suffering from mental or physical incapacity or the President is merely absent from the United Republic, this provision of the Constitution, the respondents' counsel contended, did not provide for automatic assumption of the political capacity and suthority of the President, in as much as the provision does not say so in clear and unambiguous terms. The two counsel went on to submit that according to their understanding of the true construction of section 8 of the Constitution, particularly with reference to sub-sections (3) and (4) thereof, the only way the Vice-President could have assumed the functions of the office of President in the circumstances then prevailing was under the provisions of sub-section (3), sub-section (3) of section 8 of the Constitution reads in Kiswahili as follows:-

> "(3) Iwapo itatokea kuwa -
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> (a) Rais hayupo katika mji wa Makao Makuu ya Serikali;
>
> (b) Rais hayupo Tanzania kwa muda ambao Rais anafikiria utakuwa si mrefu; au
>
> (c) Rais ni mgonjwa na anatumaini kuwa atapata nafuu baada ya muda si mrefu,
>
> na Rais akiona kuwa inafaa kuwakilisha kwa muda huo madaraka yake, basi anaweza kutoa maagizo kwa maandishi ya kumteua Makamu wa Rais, au akiona kwa sababu yo yote ile kwamba inafaa zaidi kumteua Waziri, basi atamteua Waziri kwa ajili ya kutekeleza kazi na shughuli za Rais wakati Rais hayupo, na Makamu wa Rais au Waziri anayehusika, kadri itakavyokuwa atatekeleza madaraka hayo ya Rais kwa kufuata masharti yo yote yatakayowekwa na Rais:
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> Isipokuwa kwamba masharti yaliyomo katika ibara hii ndogo yafahamike kuwa hayapunguzi wala kuathiri uwezo wa Rais alionao kwa mujibu wa sheria nyingine yo yote wa kuwakilisha madaraka yake kwa mtu mwingine ye yote."

6. An unauthorized English version of sub-section (3) reads as follows:

> "(3) Whenever the President -
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> (a) is absent from the city which is the seat of the Government;
>
> (b) is absent from Tanzania for a period which he believes will be of short duration; or
>
> (c) by reason of illness that he has reason to believe will be of short duration, considers it desirable so to do, he may, by directions in writing, appoint the Vice-President, or, if for any reason he considers it expedient so to do, some other Minister, to discharge, subject to such restrictions and exceptions as he may specify, the functions of the office of President during such absence or illness:
>
> Provided that nothing in this sub-section shall be construed as derogating from the power of the President contained in any other law to delegate any function to any other person.".

7. To revert to counsel's submissions on the issues of delegation and validity of the detention order made by Honourable the Vice-President, counsel for the respondents urged the High Court judge to hold that since the public officials detaining the three respondents had failed to produce before the HighCourt any instrument made by the President under sub-section (3) of section 8 of the Constitution delegating his functions generally or specifically relating to his powers under the Detention Act, the detention order produced on behalf of the State purporting to have been made under the provisions of section 2 of the Act, were null and void, and, accordingly, the three respondents were entitled to an immediate release from prison. That was mainly the submission advanced before the High Court by the three respondents in support of their application for an order for directions in the nature of Hebeas Corpus - see Section 348 of the Criminal Procedure Code, Cap. 20.

8. The other point that could have been taken up on behalf of the respondents but was not seriously pursued in argument by their counsel or satisfactorily dealt with by the learned High Court judge, relates to the question: whether the failure to affix the Public Seal to the detention order as required by section 2 of the Act had any effect on the validity of the order or not. This question has been canvassed before this Court and has been fully and ably argued before us by counsel of both sides.

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9. The learned High Court judge, in a wide ranging ruling touching on our country's political ethos, beliefs, the independence of the Judiciary and personal liberties, upheld the respondents' submission and accordingly directed the immediate discharge of the three respondents from prison. The respondents' victory however, was to be a very short one, a pyrrhic victory, as it were, for as soon as the learned judge had delievered his ruling the respondents learnt to their utter consternation that an order for their deportation from Arusha Region had been made by the President the previous day, that is, the 21st day of August, 1979.

10. He that as it may, these then are the facts which form the basis of the appeal before us by theAttorney-General.

11. The learned Attorney-General in his Memorandum of Appeal sets out five grounds of appeal which read as follows:

(1) The learned trial judge erred in law in holding that "Katiba ya Jamhuri ya Muungano wa Tanzania, ya Mwaka 1977, hereinafter referred to as 'the Constitution' did not, under the circumstances of this case, provide for the automatic exercise of the Presidential powers by the Hon. Vice-president in absence of His Excellency the President of the United Republic of Tanzania from the country.

(2) The learned trial judge erred in law in failing to appreciate the fact that when the President does not delegate his powers to the Vice-President in writing as per section 8(3) of the said Constitution, then in his absence, the provisions of section 8(1) of the Constitution applies automatically.

(3) The learned trial judge erred in law in failing to appreciate the fact that the provisions of section 8(1) and 8(3) of the Constitution are two distinct provisions, that is section 8(1) providing for automatic exercise of Presidential powers under the circumstances stipulated therein; and section 8(3) giving the President option of when to delegate his powers and further that he erred in holding that interpretation of each of these sections should be done in the context of the other.

(4) The learned trial judge erred in law in holding that the applicable section in the case was section 8(3) of the said Constitution.

(5) The learned trial judge erred in fact in holding that the President's one week absence from the country during the material time was a short one as contemplated in section 8(3) of the Constitution and hence the necessity of invoking the provisions of that section so as to give Presidential powers to the Vice-President.

12. In support of these grounds of appeal the Hon. the Attorney-General who appeared in person assisted by Messrs Huka and Mlawa, State Attorneys, started his long and learned submission by giving what he said was a

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short historical origin of section 8 of the Constitution. The Attorney-General in his historical narrative said that section 8 of the Constitution is derived from the Tanganyika (Constitution) Order in Council, 1961 (Statutory Instruments 1961 No. 2274), the Second Schedule thereof, which contained the details of the Independence Constitution of Tanganyika, hereinafter referred to as "the 1961 Constitution". Under the 1961 Constitution Her Majesty the Queen became the Head of State of Tanganyika exercising her executive functions through her representative, the Governor-General. Besides being the commander-in-Chief of the Armed Forces, the Governor-General also carried out many or the executive functions which are now conferred on the President. Sections 13 and 45 of the 1961 Constitution provided for the devolution of the powers and functions conferred on the Governor-General and Prime Minister respectively, when either the office of Governor-General or that of the Prime Minister was vacant or the holder of either office was absent from Tanganyika or was for any reason unable to perform the functions conferred on him by the 1961 Constitution. Interesting as I found the Attorney-General's historical exposition on the origins of section 8, I do not think we need dwell any further on it, since I am satisfied that his assertion thatthe text of section 8 of the Constitution has its roots in the 1961 Constitution is incorrect. One has in fact to look to Ghana to find the structural roots of section 8 as well as that of a number of the important provisions of the 1962 Republican Constitution which were subsequently re-encated with necessary modifications in the Interim Constitution of 1965 and further re-enacted in the present Constitution in 1977. Tracing the origins of section 8, for example, one discovers that the text of this section was inspired and modelled on the provisions of Article 18 of theGhana Republican Constitution of 1960. It appears under our 1962 Republican Constitution as section 7 and under the Interim Constitution of 1965 as section 9. So much for the historical origins of section 8 of the Constitution.

13. However, to understand the general scheme of our present Constitution it is important to appreciate the political sentiments which prompted the TANU Party and Government to opt for a Republican system of Government only one year after independence. The Government's views at the time, which reflected the general feeling of the population as a

whole, was that the 1961 Constitution left the ardent desires of the people of Tanganyika for real independent and sovereign existence unfulfilled. By and large, informed opinion of most people in Tanganyika then was that the 1961 Constitution was an artificial, and undesirable British autochthonal creation, which was incapable of being understood by the ordinary people of Tanganyika, many of whom could hardly distinguish between the role of the Governor-General and that of the Cabinet headed by the Prime Minister. To remove such doubts and confusion in the minds of the people it was important that Tanganyika should have an executive President. "The honour and respect accorded to a Chief or a King or, under a Republic, to a President, is for us indistinguishable from the power he wields," so stated the Government in its proposals for a republic - vide Proposals of the Tanganyika Government for a Republic (Govt. Pap. No. 1 - 1962, 2) and The New Commonwealth and Its Constitutions by S. A. de Smith, 1964, at p. 248.

14. This, it was in order to satisfy the genuine and universal desire of the people, that the framers of the 1962 Constitution decided to devise a Republican Constitution which would be an effective scheme for Governing the country. The results of their labours is the 1962 Constitution which, although textually and structurally follows the Ghana precedent, may be said without any equivocation to be essentially home-grown or autochthonous.

15. A notable feature of the 1962 Constitution, which is also to be seen in the Interim and the present Constitution, is the dominant role of the President under the Constitution. The President in all the three Constitutions is the national leader in every sense of the word - he is the Head of State, Head of the Executive, Commander-in-Chief of the Armed Forces and the Fountain of honour. In view of this dominating and elevated role of the President it became necessary for the framers of the 1962 Republican Constitution to bear in mind that Tanganyika as a Republic had to have a machinery of devolution of executive authority different from that which operated under the Monarchical 1961 Independence Constitution. Under a Republican type of Government unlike Monarchy, there is no natural successor as such to the Presidency.

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Indeed, there is no heir apparent or heir presumptive to the Presidency who could take over the executive functions of the State if the holder of the office dies or is absent or is suffering from mental or physical infirmity. It therefore follows that under the Presidential system of Government it is necessary that the Constitution should provide for a special scheme or machinery whereby the executive functions of the President are to be exercised in the event of the President dying or becoming incapacitated by reason of serious mental or physical illness or being absent from the country. The general scheme of devolution devised by the framers of the 1962 Republican Constitution was enacted as section 7 of that Constitution and subsequently re-enacted with modifications as section 9 of the Interim Constitution of the United Republic of Tanzania of 1966. The substance of section 9 of the Interim Constitution is what now appears as section 8 of the Constitution of 1977.

16. Since the Attorney-General's submissions before us hinge on the construction of the provisions of section 8 of the Constitution it will be convenient here to set out in full the provisions of section 8 of the Constitution. The section reads in Kiswahili as follows:-

> "8.-(1) Endapo Baraza la Mawaziri litaona kuwa Rais hawezi kumudu kazi zake kwa sababu ya maradhi, basi Baraza hilo laweza kuwasilisha kwa Jaji Mkuu azimio la kumwomba Jaji Mkuu athibitishe kwamba Rais hamudu kazi zake kwa sababu ya maradhi. Baada ya kupokea azimio kama hilo na baada ya kufikiria maelezo ya daktari, Jaji Mkuu atawasilisha kwa Halmashauri Kuu ya Taifa ya Chama taarifa ya kuthibitisha kwamba Rais hamudu kazi zake kwa sababu ya maradhi. Kila itakapopokea taarifa ya namna hiyo, Halmashauri Kuu ya Taifa itatoa tamko kwamba Rais hamudu kazi zake kwa sababu ya maradhi, na iwapo Halmashauri Kuu ya Taifa haitabatilisha tamko hilo kutokana na Rais kupata nafuu na kurjea kazini, basi itaheshimiwa kwamba Rais hayupo. Katika hali hiyo na pia ikitokea kuwa kiti cha Rais ki wazi, au kwamba Rais hayupo Tanzania, basi wakati wote Rais atakapokuwa hayupo kazi na shughuli za Rais zitatekelezwa na mmojawapo wa watu wafuatao, kwa kufuata orodha kama ilivyopangwa, yaani -
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> (a) Makamu wa Rais, au kama naye hayupo, basi
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> (b) Waziri aliyeteuliwa na Rais kwa ajili hiyo, au kama naye hayupo, basi
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> (c) Waziri aliyechaguliwa kwa ajili hiyo na Baraza la Mawaziri.
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> (2) Endapo itatokea kuwa kiti cha Rais ki wazi kutokana na Rais kujiuzulu au kufariki, au kwamba Rais hayupo Tanzania, au kuwa Rais hamudu kazi zake kwa sababu ya maradhi, na Jaji Mkuu baada ya kufikiria maelezo ya daktari, atawasilisha kwa Halmashauri Kuu ya Taifa taarifa ya ya kuthibitisha kwamba Rais hamudu kazi zake, wakati ambao hayupo Makamu wa Rais wala Waziri aliyeweza kutekeleza kazi ...../9-

na shughuli za Rais kwa mujibu wa masharti ya ibara ndogo ya (1), na ikiwa hawapo Mawaziri wengine katika Baraza la Mawaziri wanaoweza kukutana kwa shughuli yoyote, basi katika hali hiyo mambo yatakuwa ifuatavyo -

(a) taarifa ya uthibitisho itakayowasilishwa na Jaji Mkuu kwa Halmashauri Kuu ya Taifa itahesabiwa kuwa ni halali kama kwamba imetolewa naye baada ya kupokea azimio la Baraza la Mawaziri la kumwomba atoe taarifa hiyo, na haitachunguzwa katika mahakama yo yote japokuwa imetolewa bila ya Jaji Mkuu kupokea kwanza azimio la Baraza la Mawaziri; na

(b) Halmashauri Kuu ya Taifa ya Chama itamchagua mtu atakayeonekana anafaa, kutekeleza kazi na shughuli za Rais wakati wote Rais atakapokuwa hayupo kazini au mpaka atakapopatikana Makamu wa Rais au Waziri atakayetekeleza kazi na shughuli hizo kwa mujibu wa masharti ya ibara ndogo ya (1),

(3) (This provision has already been set out above).

(4) Rais aweza, akiona inafaa kufanya hivyo, kumwagiza kwa maandishi Waziri ye yote kutekeleza kazi na shughuli zozote za Rais ambazo Rais atazitaja katika maagizo yake, na Waziri aliyeagizwa hivyo kwa mujibu wa masharti ya ibara hii ndogo, atakuwa na mamlaka ya kutekeleza kazi na shughuli hizo kwa kufuata masharti yo yote yaliyowekwa na Rais, lakini bila ya kujali masharti ya Sheria nyingine ye yote;

Isipokuwa kwamba -

(a) Rais hatakuwa na mamlaka ya kuwakilisha kwa Waziri kwa mujibu wa masharti ya ibara hii ndogo kazi yo yote ya Rais iliyotajwa katika Sheria yo yote ya Jumuiya ya Afrika Mashariki ikiwa kisheria Rais haruhusiwi kuwakilisha kazi hiyo kwa mtu mwingine ye yote;

(b) iwapo Rais amemwagiza Waziri ye yote kutekeleza kazi na shughuli zo zote za Rais kwa mujibu wa masharti ya ibara hii ndogo, basi ifahamike kuwa maagizo hayo hayatamzuia Rais kutekeleza kazi na shughuli hizo yeye mwenyewe.

(5) Kanuni zifuatazo zitatumika kwa madhumuni ya ufafanuzi wa ibara ndogo ya (1) na ya (2) -

(a) Kwa madhumuni ya ibara ndogo ya (1) na ya (2), Rais hatahesabiwa kuwa hayupo Tanzania kwa sababu tu ya kupitia nje ya Tanzania wakati yuko safarini kutoka sehemu nyingine, au kwa sababu kwamba ametoa maagizo kwa mujibu wa masharti ya ibara ndogo ya (3) na maagizo hayo bado hayajabatilishwa;

(b) kwa madhumuni ya ibara ndogo ya (1) peke yake, mkutano wa Baraza la Mawaziri uliofanywa kwa ajili ya kuwasiliana kwa Jaji Mkuu azimio kuhusu hali ya Rais utahesabiwa kuwa ni mkutano halali hata kama mjumbe mmojawapo waBaraza hilo hayupo au kiti chake ki wazi, na itahesabiwa kuwa Baraza limepitisha azimio hilo ikiwa litaungwa mkono, kwa kauli ya wajumbe walio wengi waliohudhuria mkutano na kupiga kura.

(6) Bila ya kujali, masharti yaliyoelezwa hapo awali katika ibara hi, mtu atakayetekeleza kazi na shughuli za Rais kwa mujibu wa ibara hii hatakuwa na mamlaka ya kumwondoa Makamu wa Rais katika madaraka yake.

(7) Waziri, Mbunge au mtu mwingine ye yote atakayetekeleza kazi na shughuli za Rais kwa mujibu wa masharti ya ibara hii hatapoteza kiti chake katika Bunge wala hatapoteza sifa zake za kuchaguliwa kuwa Mbunge kwa sababu tu ya kutekeleza kazi na shughuli za Rais kwa mujibu wa masharti ya ibara hii".

17. An unauthorized English version of Section 8 reads as follows:

"8.-(1) Whenever the Cabinet considers that the President is, by reason of physical or mental incapacity, unable to discharge the functions of his office, it may by resolution passed in that behalf, request the Chief Justice to certify that the President is, by reason of physical or mental incapacity, unable to discharge the functions of his office. The Chief Justice after receiving such resolution from the Cabinet and acting in his discretion, after considering medical evidence, certify to the National Executive Committee of the Party that the President is, by reason of physical or mental incapacity, unable to discharge the functions of his office. When the Certificate of the Chief Justice made as aforesaid is received by the National Executive Committee of the Party, the National Executive Committee of the Party shall declare that the President is, by reason of physical or metnal incapacity, unable to discharge the functions of his office and if the National Executive Committee has not subsequently withdrawn such declaration on the ground that the President has recovered his capacity and resumed the functions of his office, then in any such event, the President shall be deemed to be absent. In such event and in the event of the office of President falling vacant or when the President is absent from Tanzania, the functions of the office of President shall be discharged by the first of the following Ministers who is present and able to act -

(a) the Vice-President;

(b) some other Minister appointed by the President in that behalf;

(c) some other Minister appointed by theCabinet in that behalf.

(2) If the President dies or resigns office, or is absent from Tanzania, or is, by reason of physical or mental incapacity, unable to discharge the functions of his office, and the Chief Justice acting in his discretion after considering medical evidence certifies to the National Executive Committee that the President is, by reason of physical or mental incapacity, unable to discharge the functions of his office, at any time when, due to vacancy in any office, absence or inability to act, there is no Vice-President and no Minister is empowered by subsection (1) to discharge the functions of the office of President and there are no other Ministers in theCabinet present and able to act -

(a) the certificate of the Chief Justice to the National Executive Committe shall have effect as if it had been exercise by a resolution of the cabinet requesting him to exercise his powers in that behalf and shall not be questioned in any court notwithstanding that it was not preceded by such resolution; and

(b) the National Executive Committee of the Party shall appoint a suitable person who appears to it able to discharge the functions of the office of President during the vacancy in the office, or the absence or incapacity, as the case may be, of the President, or, if such an appointment is made during the absence or inability to act of the Vice-President or any Minister empowered by subsection (k) to discharge the functions of the office of President, until the Vice-President or such Minister is present and able to act.

(3) (This provision has already been set out above).

(4) The President may, if in his opinion it is desirable so to do, by directions in writing, authorize a Minister to discharge, subject to such limitations and restrictions as he may direct, such of the functions of the office of President as he may specify, and where directions under this sub-section are given the Minister specified therein shall be entitled to so discharge such functions notwithstanding the provisions of any other written law:

Provided that -

(a) the President shall not, by directions given under this sub-section, authorize a Minister to discharge any function conferred upon the office of President by any Act of the Community where such function cannot otherwise be lawfully delegated by the President;

(b) where by directions under this sub-section the President has authorized a Minister to discharge any function of the office of President, such directions shall not be construed as precluding the President from discharging such function himself.

(5) (a) For the purposes of sub-section (1) and (2) the President shall not be regarded as absent from Tanzania by reason only of the fact that he is in passage from one part of Tanzania to another or where he has given a direction under sub-section (3) and that direction is in force;

(b) For the purpose of sub-section (1), the Cabinet shall be deemed to be duly constituted notwithstanding any vacancy or absence of any member, and, a resolution of the majority of the members of the Cabinet who are present and voting shall be deemed to be a resolution of the Cabinet.

(6) Notwithstanding the foregoing provisions of this section, a person discharging the functions of the office of President under this section shall not have the power to remove the Vice-President from office.

(7) A minister, a member of the National Assembly or other person shall not, by reason of his exercising the functions of the office of President under this section, vacate his seat in, or be disqualified for election as a constituency member of the National Assembly."

18. As properly, and, with respect, correctly submitted by the learned Attorney-General, the framers of our Constitution of 1977, realising the grave dangers that are likely to befall the body politic when there is a vacancy in the office of President or the President is absent from the country or is incapable of exercising the functions of his office for any cause whatsoever, wisely provided for an effective and convenient constitutional arrangement whereby in the event of any of the situations mentioned above arises, the functions of the office of President would automatically be exercised by another fit and proper person. Section 8 of the Constitution therefore, as rightly pointed out by the learned Attorney-General, provides for an effective constitutional machinery for preventing the dissolution and entire disintegration of society whenever there is a vacancy in the office of President or the President is seriously incapacitated or the President has left the country without delegating his functions to the Vice-President or any other Minister who is present and able to direct the machinery of Government. This section, as it will no doubt be noted from a proper reading of its provisions, provides for two distinct methods of devolution of the functions of the office of President. The first scheme of devolution is automatic and is only dependent upon the happening of one or the other of the situations or circumstances which are outlined in great detail in subsections (1) and (2); whereas the second scheme of devolution depends entirely on the discretion of the President and only comes into operation when the President considers it desirable to delegate and in fact delegates all or any of the functions of the office of President to the Vice-President, or a Minister - See the provisions of sub-section (3) and (4) of section 8 of the Constitution, supra.

19. In answer to the Attorney-General's formidable submission, Mr. Mahatane, learned counsel, who appeared before us on behalf of all three respondents, assisted by Mr. Mwale, learned counsel, has put up an equally strong argument urging us to reject the Attorney-General's submissions on this point as an untenable and unnatural construction of section 8 of the Constituion. And, if I understood Mr. Mahatane's argument correctly, I think what he is contending amounts to this, that the circumstances as disclosed in this case could by no stretch of the ordinary meaning of the words used in section 8 amount to a [illegible]

entitling the Vice-President of the United Republic to an automatic exercise of the functions of the office of President under sub-section (1) of section 8 of the Constitution. Mr. Mahatane, of course, concedes the fact that the intention of the framers of section 8 of our Constitution was to devise a convenient and effective scheme of devolution of the office of President. He has no quarrel whatsoever with the intention of the framers of our Constitution. What however, he vigorously disputes is the contention of the Attorney-General that sub-section (1) of section 8 deals with a scheme of automatic assumption of Presidential functions at all. In any case, Mr. Mahatane contends, in the scheme outlined in section 8 of the Constitution there can be no room for automatic devolution of Presidential functions when the President has merely left the country for a short period, such as the one week's absence of the President in Lusaka, in July/August 1979. In such a situation, Mr. Mahatane submits, the only course of devolution open is by way of delegation as contemplated by the provisions of sub-section (3) of section 8 of the Constitution.

20. Although at first I found it difficult to resist Mr. Mahatane's overwhelming and exceedingly persuasive and fascinating argument, I have however, after considerable vacillation, come to a firm opinion that his construction of the provisions of section 8 of the Constitution is untenable and must be rejected. To hold, as the learned High Court judge did, that on the facts found established in this case, the Honourable the Vice-President, in the absence of the President in Lusaka for a week attending the Commonwealth Heads of Government Conference, could not exercise the functions of the office of President pursuant to the powers conferred upon him under the provisions of sub-section (1) of section 8 of the Constitution, would, as it seems to me, defeat the whole object of the provisions of sub-section (1) of Section 8 of the Constitution. Indeed, if the learned High Court judge is right in his construction of section 8 of the Constitution, it means that in the circumstances of the present case the nation would have found itself without anybody present and able to exercise the functions of the office of President. As already stated earlier in this judgement, such a vaccum of executive authority in the State was clearly the kind of

situation that the framers of the Constitution wanted to avoid by providing for automatic devolution of powers and functions of the office of President under sub-section (1) of section 8 of the Constitution. In any case, it seems to me that the learned High Court judge has fallen into a common, though unforgivable error, of trying to construe the provisions of sub-sections (1), (2), (3) and (4) of section 8 of the Constitution in isolation and out of context of the rest of the section.

21. In this connection suffice here to refer to the provisions of sub-section (5)(a) of section 8, which provides, inter alia:

> "(5)(a) For the purpose of sub-sections (1) and (2) the President shall not be regarded as absent from Tanzania by reason only of the fact that he is in passage from one part of Tanzania to another or where he has given a direction under sub-section (3) and that direction is in force;".

The words I have underlined: For the purpose of sub-section (1) and (2) the President shall not be regarded as absent from Tanzania where he has given a direction under sub-section (3) and that direction is in force, shows clearly the futility of respondents' argument. Conceding, as they have undoubtedly done in this case, that at the time when the President left for Lusaka he had given no directions under sub-section (3) - an important condition for the devolution scheme prescribed under sub-section (3) to operate, I cannot see how he can now be heard to contend that in the circumstances the Honourable Vice-President was not empowered to exercise the functions of the office of President under the provisions of subsection (1). With respect, to accede to respondents' construction of section 8 of theConstitution would, in my considered view, be to overlook a long established principle of interpretation of constitutional provisions. This salutary rule of interpretation was stated by Chief Justice Marshall more than a hundred years ago in these memorable terms:

> "A constitutional provision should not be construed so as to defeat its evident purpose, but rather so as to give it effective operation .....",

Speaking on the same subject, Mr. Justice Frankfurter of the United States Supreme Court, reminds us in BELL versus UNITED STATES, 349 U.S. 81, 83 (1955), to read all enactments "with the saving grace of common sense."

22. To conclude this part of my judgement, I think, I have sufficiently shown in the preceding paragraphs that the concerted attack by the Honourable the Attorney-General on the ruling of the learned High Court judge in so far as it is based on the judge's erroneous construction of section 8 of the Constituion, is fully justified and, as it appears to me, if that was all there was to this appeal, I would have had no hesitation in granting the Attorney-General's prayer and allowing this appeal in toto. But, in my opinion, the matter goes further than merely finding fault with the learned judge's reasoning on the construction of section 8 of the Constitution. That this is in fact the position in this case, is evidenced by the animated arguments and counter-arguments that we have heard in this case on the issue of the Public Seal and what, if any, is the consequence of omitting to affix it to a detention order as required under section 2 of the Detention Act.

23. Now then, since I have held in favour of the Attorney-General that during the one week absence of the President from the United Republic in July/August, 1979, the Honourable the Vice-President properly assumed the functions of the office of President under the provisions of sub-section (1) of section 8 of the Constitution, the question that immediately presents itself is this: whether in those circumstances, the Vice-President could properly make an order under the provisions of section 2 of the Preventive Detention Act, 1962, directing the detention of the three respondents. I think the answer to this question must be: Yes, he could properly do so, because in terms of the provisions of the Constitution, the Vice-President at the material time, was a person performing the functions of the office of President and as such person, in terms of section 3 of the Interpretation of Laws and General Clauses Act, 1972, and sub-section (2) of section 94 of the Constitution, he was empowered not only to exercise the executive power of theUnited Republic but also to exercise any other powers and duties conferred or imposed on the President by theConstituion or any other law, that is, including powers and duties of the President conferred or imposed on him by the Preventive Detention Act, 1962. For ease of reference the relevant part of section 3 of the interpretation of Laws and General Clauses Act, 1972, and subsection (2) of section 94 of the Constitution are set out below:

(i) Sub-section (2) of Section 94 of the Constitution reads in Kiswahili as follows:

"(2) Kanuni zifuatazo zitatumika kwa madhumuni ya ufafanuzi wa masharti ya Katiba hii, yaani -

(a) Kila yanapotajwa madaraka ya Rais, ifahamike kuwa madaraka ya kutekeleza shughuli na kazi mbali mbali na vile vile wajibu wa kutekeleza shughuli na kazi mbali mbali kama Mkuu wa Serikali ya Jamhuri ya Muungano, na pia mamlaka mengine kama hayo au wajibu mwingine kama huo ikiwa imeelezwa katika Katiba hii au katika Sheria nyingine yo yote kwamba mamlaka hayo mengine ni ya Rais au kwamba wajibu huo mwingine ni wa Rais."

(ii) An unauthorized English version of this provision reads as follows:

"(2) In this Constitution, references -

(a) to the functions of the office of President shall be construed as references to his powers and duties in the exercise of the executive powers of the United Republic and to any other powers and duties conferred or imposed on the President by this Constitution or by any other law;".

(iii) The relevant parts of section 3 of the Interpretation of Laws and General Clauses Act, 1972, Act No. 30 of 1972, reads:

"3.-(1) In this Act and in every other Act, and in all public documents enacted, made or issued before or after the commencement of thisAct, the following words and expressions shall have the meanings assigned thereto respectively in this section, unless it is therein expressly or by necessary implication otherwise provided -

'President' means the President of the United Republic, and includes any person performing the functions of the President under section 9 of the Constitution."

It should be noted here that section 9 of the Interim Constitution has been re-enacted, with necessary modifications, not affecting substance, as section 8 of the Constitution of 1977.

24. Thus, in view of the foregoing conclusions, the only major question left to be resolved in this case is whether the order made by Honourable the Vice-President directing the detention of the three repondents is valid or not. But before deciding this issue, I propose first to deal with the question of jurisdiction. This Court has to decide whether courts have jurisdiction to examine and determine the propriety of the order made by the Vice-President pursuant to the provisions of section 2 of the Preventive Detention Act in view of the provisions of section 3 of the Act saying: "No order made under thisAct shall be questioned in any court."

25. The provisions of section 3 of the Preventive Detention Act, 1962, are a classic example of an ouster of jurisdiction clause. This type of provision excluding the right of an individual to challenge executive action in the courts has regretably become a common feature of a number of our recent statutes. Be that as it may, does the provision of section 3 of the Act mean that courts of law in this country are completely powerless to inquire into an executive order made under the Preventive Detention Act, the authenticity of which has been impugned. Although the learned trial judge did not deal with this question in his ruling, I do not think that there can be any doubt in my mind that a court of law can inquire into the authenticity of an order under the Preventive Detention Act, 1962. That courts of law should have such power is, I think, a well established fundamental principle of law which cannot now be jettisoned except by clear and explicit statutory provision in that behalf. A number of eminent judges have spoken about this matter with a clear and firm voice. Lord Simonds in PYX GRANITE CO. LTD. v. MINISTRY OF HOUSING AND LOCAL GOVERNMENT (1960) A.C. 260 at p. 286 has said of this principle:-

> "It is a principle which is not by any means to be whittled down that the subject's recourse to ..... courts for the determination of his rights is not to be excluded except by clear words."

And Lord Denning in his usual lively style has spoken of this fundamental principle in these terms:

> "It is a serious matter for the courts to declare that a minister .... has exceeded his powers. So serious that we think hard before doing it. But there comes a point when it has to be done. These courts have the authority - and I would add, the duty - in a proper case, when called upon to inquire into the exercise of a discretionary power by a minister or his department. If it is found that the power by a minister has been exercised improperly or mistakenly so as to impinge unjustly on the legitimate rights or interests of the subject, then these courts must so declare. They stand, as ever, between the executive and the subject, alert, as Lord Atkin said in a famour passage - "alert to see that any coercive action is justified in law: See Liversidge v. Anderson (1942) A.C. 206, 244. To which I would add, alert to see that a discretionary power is not exceeded or misused." See LAKER AIRWAYS versus DEPARTMENT OF TRADE (1977) Q.B. 643.

26. The attitude of the courts on this matter may perhaps be best highlighted by Lord Reid's apt illustration in the case of ANISMINIC LTD. v. FOREIGN COMPENSATION COMMISSION AND ANOTHER (1969) 2 W.L.R. 163, at page 169.

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> "Let me illustrate the matter by supposing a simple case. A statute provides that a certain order may be made by a person who holds a specified qualification or appointment and contains a provision ... that such an order made by such person shall not be called in question in any court of law. A person aggrieved by an order alleges that it is a forgery or that a person who made the order did not hold that qualification or appointment. Does such a provision require the court to treat that order as a valid order? It is a well established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly - meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdication of the court."

Lord Reid then concludes his statement of the principle involved in these words:

> "If the draftsman or Parliament had intended to introduce a new kind of ouster clause so as to prevent any inquiry even as to whether the document relied on was a forgery, I would have expected to find something much more specific than the bald statement that a determination shall not be called in question in any court."

27. It is quite clear from cases decided on this very important matter that courts of law have power and a duty to see that the powers of detention conferred by statute on any person are rightly exercised under the statute and to ensure that the powers so conferred have been exercised honestly and bona fide, and not merely under some pretence of using the statutory power for the purpose of detaining a person on grounds other than those laid down under the statute. Further, according to these authorities, it seems that the courts would have power to inquire whether the detaining authority has detained the right person, that is, the person aimed at by the order; and the courts may also properly inquire whether the detaining authority has adhered to the procedure and all necessary requirements laid down by the Statute which governs the executive authority's powers on the matter. In the light of the correct principle enunciated in decided cases it appears to me that the High Court properly examined the propriety of the order which directed the detention of the three respondents. I now turn to deal with the respondents' contention that the order made by the Vice-President on 1st August, 1979, directing their detention is a nullity and therefore illegal.

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28. As already indicated hereinabove, the three respondents allege that the order for their detention made by Honourable the Vice-President is a nullity because, as they allege, a valid order under the Act must not only be under the hand of the President but it must also have affixed to it the Public Seal, which, as conceded by the learned Attorney-General, the order directing the detention of the three respondents did not have. The learned Attorney-General in reply to the respondents' contention has argued that while it is desirable that an order under the Act should both be under the hand of the President and be affixed with the Public Seal, failure to seal such an order is not fatal - it does not invalidate the order, so long as the President has signified his intention that the person named in the order should be detained by appending his signature to the document, With respect, I am unable to accept the contention by the learned Attorney-General. From immemmorial times sealing a document has been accepted as a solemn mode of expressing assent to a written instrument and when done with that intention the instrument becomes a deed. Although the practice of expressing assent to written instruments by the formal affixing of a seal has been greatly curtailed in recent times, the law may still require certain documents relating to matters of great consequence to the State such as the declaration of war, entering into treaties, making certain appointments of State or authorising certain executive action to be taken, to be executed by signature of theChief Executive and Head of State and the Public Seal. Under our law, for example, both the appointment and revocation of appointment to Ministerial office is required to be by instrument under the Public Seal, the emblem of Sovereignty. See sections 12(3) and 15(a) of theConstitution, respectively. In view of the importance that the law attaches to the PublicSeal, I find it difficult to accept the contention by the learned Attorney-General that when the law says that an executive action shall be authorized by an instrument under the hand or signature of the Chief Executive and Head of State and shall be affixed with the Public Seal, failure to affix the Public Seal to such an instrument does not affect the nature and legal consequences flowing from such a defective instrument, if I may so term it. Surely, Parliament would not trouble itself in enacting a law requiring the use

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of a Public Seal to authorize executive action if, in fact, its intention was that failure to comply with this requirement would not affect the validity of any executive action taken without such authority or imprimatur. I cannot accept that, that could have been the intention of Parliament when it decided to enact the Preventive Detention Act, 1962, and prescribed conditions under which the preventive justice which it sanctions, would be invoked by the Executive Authority of the United Republic. The proposition now advance by the learned Attorney-General was clearly rejected by the Court of King's Bench nearly three hundred years ago in the Case of REX versus BROWNE, CORBET, etc. (1686), 2 SHOW. 484; 16 Digest 259, 497. In that case the defendants appeared on an habeas corpus: Corbet being an attorney, had, on Browne's suit arrested a soldier without leave and had him committed to a messenger's custody. The law then appears to have required that a warrant of arrest had to be under the sign manual or the King's own hand and Seal or the hand of any Secretary of State or officer of State or Justice. The Court of King's Bench found the warrant of arrest to be bad because it was under the King's own hand, without Seal, and it was not under the hand of any Secretary of State or officer of State or Justice and the soldier was accordingly discharged. The point of this case is that it underscores the fact that an order or warrant which is bad on its face, can give no legal justification for imprisonment of a person. See GREENE versus SECRETARY OF STATE FOR HOME AFFAIRS (1942) A.C. 284 at page 307, per Lord Wright.

29. The requirement that those who procure the imprisonment of others must strictly abide by every form and every step prescribed for procuring such imprisonment was described by Brett, L.J. in the case of THE REVEREND THOMAS PELHAM DALE, (1886) 6 Q.B.D. 376 pages 461 - 463, to be "a general rule which has always been acted upon by the courts of England." Brett, L.J., then continued:-

> "that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the court will not allow the imprisonment to continue."

And concluding the matter, Brett, L.J., said:-

> "I desire to state that, although in this case I consider that irregularity a matter of substance, I should be of the same opinion if it were only a matter of form;

> because, as I said before, I take it to be a general rule that the dourts at Westminister will not allow any individual in this Kingdom to procure the imprisonment of another, unless he takes care to follow with extreme precision every form and every step in the process which is to procure that imprisonment. I consider this to be a wholesome and good rule, and to be in accordance with the great desire which English Courts have always had to protect the liberty of every one of Her Majesty's subjects."

30. In the instant case, it cannot with respect, be gainsaid that the failure by the Executive to affix the Public Seal to the instrument directing the detention of the three respondents is a matter of mere form and not one of substance. Incarceration of a person without trial cannot by any distortion of language be said to be a matter of mere form. The liberty of the individual is so precious and fundamental to the concept of the Rule of Law that the Courts are duty bound to see that it is not taken away except under express provisions of the law of the land. In this case the making of the order purporting to detain the three respondents under the provisions of section 2 of the Preventive Detention Act, 1962, did not, as conceded by the learned Attorney General, strictly comply with all the requirements that are laid down under the Act - the Act clearly says that where grounds, which are described in the Act, exist for the preventive detention of a person: "the President may, by order under his hand and the Public Seal, direct the detention of that person," and then goes on to provide that an order made as aforesaid, "shall constitute an authority to any police officer to arrest the person in respect of whom it is made and for any police officer or prison officer to detain such person." It seems to me obviously to follow from these provisions, as night follows day, that an order for detention which is not affixed with the Public Seal is a complete nullity and therefore illegal. It cannot found any authority for the arrest of any person by the police and his subsequent detention by them or by the prison authorities. This is what the learned trial judge found, though as indicated supra, he arrived at this conclusion on the basis of the construction of theprovisions of the constitution which we have found to be erroneous. That error apart, there can be no doubt that the result that he reached, that the order made by Honourable the Vice-President was bad on its face is correct. The learned trial judge accordingly allowed the respondents' application for an order of

habeas corpus and ordered their immediate release from prison. I entirely agree with him. Accordingly the prayer by the learned Attorney-General that "the order of issuing the writ of habeas corpus against them together with that of ordering the release of the respondents be set aside and the respondents be detained accordingly", should, in my view, be denied. This conclusion is, of course, without any prejudice to any steps that may have been taken or are contemplated to be taken by the Executive to put right the defective detention orders.

31. I cannot leave this matter without referring briefly to Mr. Mahatame's final ingenious, if misconceived, submission. Mr. Mahatane has attacked the Preventive Detention Act, 1962, as a serious violation of the inalienable rights declared in the Preamble to the Constitution and has invited this Court to say that this Act which gives extensive powers to the Executive to imprison people without trial in time of peace is unconstitutional. In support of his contention, Mr. Mahatane refers us to the Preamble to the Constitution which affirms and specifies the inalienable rights of all members of the human family, spells out their aspirations, objectives and moral abligations and, declares that these directive principles are best protected in a democratic society where Government is responsible to a freely elected representative Parliament and where the courts of law are independent and impartial. With respect to Mr. Mahatane, I do not think the directive principles contained in the Preamble to the Constitution create any legal obligations enforceable through the medium of the courts. They are mere moral obligations which as observed by Chief Justice Korsah of the Supreme Court of Ghana in Re AKOTO AND SEVEN OTHERS, 1961, Vol. III JOURNAL OF THE INTERNATIONAL COMMISSION OF JURISTS, 86 at p. 99, provide a political yardstick by which the conduct of statecraft can be measured by the electorate. The people's remedy for any departure from these directive principles lies through the ballot box, and not through the courts. And while I agree with Mr. Mahatane that ideally it is desirable that fundamental rights especially the right to personal liberty should be written and entrenched in the Constitution and that such personal liberty should not in peace time be restricted without trial in a court of law, it seems to me,

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quite unarguable that every sovereign nation has the right, an absolute one, in its wisdom to choose either to entrench such rights in its constitution or not. Our Government rejected suggestions for a constitutional Bill of Rights a early as 1962, and explained the omission of any justiciable quarantees from the 1962 Republican Constitution in these words: "A Bill of Rights merely invites conflict between the executive (sic) and the judiciary; that is the kind of luxury which we could hardly afford to entertain." See S.A. de Smith: The New Commonwealth and Its Constitutions, 1964 at pages 213 and 250; and Proposals of the Tanganyika Government for a Republic (Govt. Pap. No. 1 - 1962, 6).

32. One may, of course, with quite understandable justification find the Government's stand on this matter unsatisfactory but that, with respect, is another issue altogether, a discussion into which I find it unnecessary to enter. Finally, a brief comment on the last issue raised by Mr. Mahatane. This issue relates to the validity of the Preventive Detention Act, 1962, in the light of the directive principles contained in the Preamble to the Constitution. I find Mr. Mahatane's arguments in this connection completely untenable and accordingly. I have no hesitation in rejecting them. There is perhaps no better answer to his contentions on this matter than the following apt comment made by the Supreme Court of Ghana when rejecting a similar contention advanced before it with regard to the Ghana Preventive Detention Act, 1958. The Court said, in Re. AKOTO, Op. Cit., Supra:

> "We do not accept the view that Parliament is competent to pass Preventive Detention Act in war time only and not in time of peace. The authority of Parliament to pass laws is derived from the same source, the Constitution, and if by it, Parliament can pass laws to detain persons in war time there is no reason why the same Parliament cannot exercise the same powers to enact laws to prevent any person from acting in a manner prejudicial to the security of the State in peace time".

To conclude, I think it will not make my judgement unduly long, if I refer very briefly to one other matter which has caused us a great deal of concern. This matter is the question whether the person for whom a detention order is made under the Preventive Detention Act, 1962, is entitled to be shown before his arrest, the original of the detention order or not. The learned Chief Justice and my learned brother

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KISANGA, J.A., have dealt with this matter at some length in their judgements and I think properly so. There should, I think, be no doubt in anybody's mind that our law requires that where an arrest proceeds on a warrant, the warrant should state the reason why the arrest is made. And since preventive detention under the Preventive Detention Act, 1962, proceeds on the authority of a detention order made under the Act, there can, in my opinion, be no valid ground whatsoever for incarcerating any person in prison when such an order is on existent or when in existence, it is not in the actual possession of the prison authorities If, as suggested by my learned brothers, the law enforcement officer ensured that before proceeding to arrest anyone under the Preventive Detention Act, they had lawful authority to do so, it seems to me that a situation such as occurred in connection with the respondents in this case, would never arise. The reason for insisting that law enforcement officers should follow the procedure which my learned brothers have outlined in detail in their judgements, is not far to seek. The procedure we approve is designed to secure nothing less than the liberty of the individual against any form of arbitrariness.

For the foregoing reasons I agree that the Writ of Habeas Corpus must remain undisturbed and I would accordingly dismiss this appeal.

DATED at DAR ES SALAAM this 23rd day of July, 1980.

M. M. MWAKASENDO
JUSTICE OF APPEAL

I certify that this is a true copy of the original

L. A. A. KYANDO
DEPUTY REGISTRAR