IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUGASHA, J.A., NDIKA, J.A. MWAMBEGELE, J.A., KWARIKO, J.A. And KITUSI, J.A.)

CIVIL APPEAL NO. 175 OF 2020

THE ATTORNEY GENERAL ..... APPELLANT

VERSUS

DICKSON PAULO SANGA ..... RESPONDENT

(Appeal from the Judgment and decree of the High Court of Tanzania, Main Registry at Dar es Salaam)

(Masoud, Kulita and Masabo, JJJ.)

Dated the 18th day May, 2020

in

Miscellaneous Civil Cause No. 29 of 2019

JUDGMENT OF THE COURT

6th July & 5th August, 2020

MUGASHA, J.A.:

What is contested in this matter is the constitutionality of section 148 (5) of the Criminal Procedure Act [CAP 20 R.E.2002] (the CPA) which governs the grant of bail and it is a subject of an appeal by the appellant against the decision of the High Court of Tanzania (Main Registry) in the constitutional petition comprised in Miscellaneous Civil Cause No. 29 of 2020.

To recapitulate the background to the impugned decision of the trial court, it is crucial to briefly state the respective facts as follows: On 2/5/2019 the respondent, a practicing advocate who had represented various persons in courts of law in criminal cases, lodged a petition in the High Court of Tanzania, Tanga Registry, challenging the constitutionality of the provisions of section 148 (5) of the CPA. The petition which was by way of originating summons under Article 26 (2) of the Constitution was based on the following grounds:

1. That, section 148 (5) of the CPA violates the right to personal liberty and presumption of innocence guaranteed by Articles 13 (6) (b) and 15 (1) and (2) of the Constitution.
2. That, the aforesaid impugned provisions oust the constitutional mandate of the courts of law, to protect and adjudicate guaranteed rights.
3. Further, in the wake of the impugned provision, the time frame for investigating and prosecuting the accused person in respect of the aforesaid offences is unknown and left to the discretion of the investigating body, and in most cases is subject to abuse whereby the liberty of the accused is left in the hands of the State.
4. That, the impugned provision is contrary to the very fundamental instrument for the courts to administer criminal justice during court

proceedings which is in line with the universal jurisprudence acceptable in common law jurisdictions to which our country being one of them.

5. That, the impugned provision contravenes various international legal instruments to which Tanzania is a party including Article 11 (1) of the Universal Declaration of Human Rights (UDHR), Article 14 (2) of the International Covenant on Civil and Political Rights (ICCPR) and Article 7 (1) B, D of the African Charter on Human and People's Rights (ACHPR).

On account of the aforesaid, before the High Court, the respondent herein sought the following declaratory orders: **one,** the provisions of section 148(5) of the CPA be declared unconstitutional for being violative of Articles 13(3) and 6(b) and 15(1) and (2) of the Constitution. **Two,** the trial courts vested with jurisdiction to deal with any offences be left to deal with the question of bail upon being properly moved by parties to the criminal disputes and **three,** the High Court to issue directives as it may deem fit to meet the ends of justice and the protection of the constitutional rights of the people.

The petition was accompanied by an affidavit sworn by Mr. Dickson Paulo Sanga, the petitioner, who apart from reiterating what is contained in the grounds of the petition, further deposed that despite the existence

of a fundamental right on presumption of innocence, the courts are strictly prohibited from dealing with questions of bail, therefore treating the accused persons as if they were guilty before the trial. Moreover, it was deposed that, the problem is aggravated by the absence of the time frame for investigation of criminal offences resulting into prolonged incarceration of a number of persons being remanded in police custody and prison facilities. On the said account, it was reiterated that section 148 (5) of the CPA is in violation of the Constitution.

On the other hand, the petition was resisted by the appellant through a counter affidavit sworn on 24/5/2019 by Ms. Jenipher Amos Kaaya, learned State Attorney. Apart from making a general denial of the contents of the petition, the appellant unsuccessfully raised a preliminary point of objection challenging the competency of the petition on the ground that it contravened the provisions sections 6 and 8 (2) of the Basic Rights and Duties Enforcement Act [CAP 3 RE.2002] and urged the High Court to dismiss the Petition. The High Court dismissed the preliminary point of objection because it had no merit and paved way for the petition to be considered on its merits.

Thus, in view of the contending pleadings, the trial court ordered the parties to argue the petition by way of written submissions and scheduled the

respective time frame. At page 680 of the record of appeal, the controlling issues before the High Court and subject for determination were as follows:

1. Whether the impugned provision contains circumstances and a requisite prescribed procedure for denying bail to a person accused of non bailable offence as envisaged under Article 15 (2) of the Constitution.
2. Whether by denying bail to an accused person suspected of a non bailable offence amounts to treating such person as a criminal person contrary to Article 13 (6) (b) of the Constitution;
3. Whether the impugned provision ousts the constitutional mandate of the courts in protecting and determining the right to bail of a person accused of a non bailable offence as enshrined under Article 13 (3) of the Constitution.
4. Whether the impugned provision saved under Article 30 (2) of the Constitution.

After hearing the parties in the manner stated above, the High Court delivered its judgment and declared the whole of section 148(5) of the CPA unconstitutional. The Court reasoned that:

> *"A person may be deprived of personal liberty under certain circumstances and subject to a procedure prescribed by law in accordance with Article 15(2) (a) of*

the Constitution. The envisaged procedure is one of the safeguards by which an accused person may be deprived of personal liberty.

The procedure envisaged under Article 15(2) (a) of the Constitution, which must be a procedure of safeguards by which a person accused of non bailable offence may be deprived of his liberty, is non-existent under section 148(5) of the Criminal Procedure Act. ***Alleged conditions of safeguards were not stated or shown as to how they conform to the procedure prescribed under the law pursuant to Article 15 (2) (b) of the Constitution and how this court can consider them constituting a meaningful procedure capable of affecting the outcome.***

Whereas the circumstances under which a person may be deprived of personal liberty are stated in section 148(5) (a) (ii) and (iii), (b), (c), (d) and (e) of the CPA they are missing in section 148(5) (a) (i), (iv), (v), and (vi) which just list down non bailable offences. There is nothing in the nature of the envisaged circumstances, such omission cannot be said to be consistent with the provision of Article 15(2) (a) of the constitution. And that the provision of section 148(5) of the Criminal Procedure Act ousts the judicial process.

The provision of section 148(5) of the Criminal Procedure Act is too broad thereby depriving personal liberty to persons who cannot be considered to be dangerous and unintended ones. And that the absence of procedures prescribed by law makes the administration of the impugned provision susceptible to not only abuses but also arbitrary decisions."

Finally, at page 699 of the record the High Court allowed the petition as it held as follows:

> *"We hold that section 148(5) of the CPA as amended from time to time violate Article 13 (3), and 15 (1), (2) (a) of the Constitution. Since section 148(5) (a) (i) of the CPA in relation to the denial of bail for armed robbery had already been previously adjudged and found to be violative of Article 15(2) (a) of the Constitution and declared null and void and hence struck out from the statute book, we shall maintain such position. With the exception of the denial of bail for armed robbery which had already been adjudged as herein above shown, we invoke Article 30(5) of the Constitution and hold that the remaining part of section 148(5) of the CPA which includes everything but not armed robbery shall remain to be valid for a further period of eighteen (18) months from the date of this judgment and within such period the Government is directed to make the requisite rectification. In the event the remaining part of the provision of section 148(5) of the CPA herein specified is not rectified within such period of eighteen (18) months from the date of this judgment, it shall forthwith be invalid, null and void and automatically rendered struck out from the statute book as from the expiry of such period. As the petition was in public interest, we make no order as to costs.*

Aggrieved by the decision of the High Court, the appellant now appeals to the Court on the following ten (**10)** grounds:

1. That, the High Court erred in law in holding that section 148(5) of the CPA is violative of Article 13(3) of the Constitution.
2. That the High Court erred in holding that section 148(5) of the CPA is not consistent with Article 15(1) and (2)(a) of the Constitution.
3. That the High Court erred in law in holding that, section 148(5) of the CPA ousts judicial process in considering possibility of admitting to bail a person accused of non bailable offences.
4. That the High Court erred in law in determining section 148(5)(a)(v) of the Criminal Procedure while the matter was res judicata.
5. That the High Court erred in law in holding that section 148(5) of the CPA is unconstitutional despite the fact that the respondent has failed to prove his case beyond reasonable doubt.
6. That the High Court erred in law in determining the constitutionality of section 148(5) of the CPA basing on unpleaded facts.
7. That the High Court erred in law in holding that section 148(5) of the CPA is not saved by Article 30(2) of the Constitution.
8. That the High Court erred in law and fact in misapplying the reasoning and holding advanced in various decisions of the Court of Appeal particularly **DPP versus Daudi Pete** [1993] TLR 22 and **AG versus**

Jeremia Mtobesya, Civil Appeal No. 65 of 2016, in relation to Article 15(2) (a) of the Constitution and section 148(5) of the CPA.

9. That the High Court erred in law in striking out the whole of section 148(5) of the CPA without paying due regard to the likelihood of causing havoc in the entire system of administration of criminal justice in the country.

10. That the High Court erred in law basing its decision on some defective paragraphs of the respondent's affidavit in support of the petition.

The parties filed written submissions containing arguments for and against the appeal which were adopted by the respective learned counsel at the hearing of the appeal. From the outset, we commend the learned counsel for the parties for the industry in the preparation of written arguments for and against the appeal. However, for the time being we will not consider each and every detail of the submissions.

At the hearing, the appellant was represented by Dr. Clement Mashamba, Solicitor General who was assisted by Messrs. Biswalo Mganga, Faraja Nchimbi and Tumaini Kweka, learned Principal State Attorneys, Ms. Alecia Mbuya, also learned Principal State Attorney, Mr. Abubakar Mrisha,

learned Senior State Attorney and Narindwa Sekimanga, learned State Attorney. The respondent had the services of Messrs. Mpale Mpoki, Mbuga Jonathan Mbuga and Jebra Kambole, learned counsel.

In the first ground of appeal, the appellant faulted the High Court in holding that section 148 (5) of the CPA is violative of Article 13 (3) of the Constitution. It was submitted that, the fundamental rights, duties and interests of all citizens are guaranteed under our Constitution as reflected under Articles 12 to 29. It was contended that in terms of Article 13 (3) of the Constitution, and that the bodies vested with powers to protect and adjudicate the fundamental rights, duties and interests of all citizens are the courts of law and other state agencies which include: **one,** the Director of Public Prosecutions (the DPP) who is mandated with authority to institute, prosecute and supervise all criminal prosecutions in terms of Article 59B of the Constitution. It was further contended that, in the course of executing his powers the DPP is duty bound to consider factors stated under sub-Article (4) thereof on the need to dispense justice; not to abuse the procedures for dispensing justice and having due regard to matters of public interest. **Two,** the police under section 3 of the Tanzania Police Force and Auxiliary Services Act (Cap. 322 R.E. 2002), are vested with the powers to protect the rights,

duties and interests of the individual referred to in Article 13(3) of the Constitution. On this, it was argued that, each organ executes the protection function independently and in accordance with the law. In this regard, it was the appellant's submission that, the High Court did not consider that the impugned provision was enacted to protect and determine rights and duties of every person in a criminal trial and on that account, it is fair, just and in tandem with Article 13 (3) of the Constitution. Cases cited to us in support of these propositions were **MARIAM MASHAKA VS THE ATTORNEY GENERAL,** Consolidated Misc. Civil Causes Nos. 88 and 95 of 2010 (HC); **JEETU PATEL AND 3 OTHERS VS THE ATTORNEY GENERAL,** Misc. Civil Cause No. 30 of 2009 (HC); **REV CHRISTOPHER MTIKILA VS THE ATTORNEY GENERAL** [1993] TLR 31, **REPUBLIC VS MWESIGE GEOFREY AND ANOTHER**, Criminal Appeal No. 355 of 2014 (unreported).

In addressing the second ground of appeal, the appellant faulted the High Court in holding that section 148 (5) of the CPA is not consistent with Article 15 (1) and (2) (a) of the Constitution. On this, it was submitted that although Article 15 (1) of the Constitution lays a general rule in respect of personal liberty and security thereof, sub Article (2) stipulates circumstances in which a person may be deprived of that personal liberty in accordance with

the procedure laid under the law. This was argued to bring into play section 148 (5) of the CPA which it was submitted, is not violative of the fundamental rights. Instead, it was contended, to be an exception to situations which individual liberty may be curtailed which is crucial and necessary in a democratic society in the preservation of public safety, peace and security in line with Article 6 of the African Charter on Human and Peoples' Rights. To support the proposition, cases cited were **KUKUTIA OLE PUMPUN AND ANOTHER VS THE ATTORNEY GENERAL AND ANOTHER** [1993] TLR 159, **JULIUS ISHENGOMA FRANCIS NDYANABO VS ATTORNEY GENERAL** [2004] TLR 14 and the decision of the African Court on Human and Peoples Rights in the case of **ANACLET PAULO VS TANZANIA,** Application No 020/2016.

In the third ground of appeal, it was the appellant's complaint that the High Court wrongly held that section 148 (5) of the CPA ousts the judicial process in considering the possibility of admitting to bail a person accused of a non bailable offence. It was submitted that a legislation which prohibits the grant of bail to a person charged with certain offences does not amount to take over of judicial functions. On this, it was pointed out that, the High Court wrongly arrived at such a decision having opted to choose some portions in the case of **DAUDI PETE** (supra) which suited their course leaving

out the crucial determination on the ouster or otherwise of the jurisdiction of the courts. It was also argued that, the Court does not have unlimited powers as it was said in the case of **SILVESTER HILLU DAWI AND ANOTHER VS DPP**, Criminal Appeal No. 250 of 2006 (unreported).

The appellant as well invited the Court to consider that, all offences listed down in section 148(5)(a) (i), (iv), (v) and (vi) of the CPA which include murder, defilement, terrorism, armed robbery, terrorism, human trafficking and trafficking in drugs are crimes against humanity because they have the effect of resulting in either loss of life or subjecting a person or group of persons to continuous suffering or loss or dignity. Thus it was argued that, **one,** the curtailment of bail in such serious offences attracting capital punishment is crucial to ensure that the offender is brought to court for the purposes of adjudication and for ensuring public peace and security. **Two,** preventing interference with ongoing investigation, threatening and even killing the witnesses and whistleblowers before trial or else far reaching consequences resulting to mob justice.

It was further contended that, section 148 (5) (b), (c) and (d) of the CPA does not oust the judicial process because it gives courts the mandate to determine as to whether or not to grant bail.

In relation to the seventh ground, the appellant challenged the High Court decision in concluding that section 148 (5) of the CPA is not saved by Article 30 (2) of the Constitution. It was submitted that, apart from the impugned provision being compatible with Article 15 (2) (a) of the Constitution, were deemed unconstitutional considering that it would still be saved by Article 30 (2) of the Constitution which prescribes permissible limitations of basic rights, freedoms and duties of individuals guaranteed under Articles 12 to 29. This was argued to be in line with the Constitution and International Human Rights Law on permissible measures restricting rights and freedoms provided that there is no arbitrariness and the limitations imposed are reasonable to achieve a legitimate objective. In this regard, the Court was referred to a statement of principle in the case of **KUKUTIA OLE PUMPUN** (supra) as follows:

> *"... a law which seeks to limit or derogate from the basic right of the individual on ground of* ***public interest*** *will be saved by art 30(2) of the Constitution only if it satisfies two essential requirements: First,* ***such law must be lawful in the sense that it is not arbitrary. It should make adequate safeguards against arbitrary decisions, and provide effective controls against abuse by those in authority when using the law.*** *Secondly,* ***the limitation imposed by such law must***

not be more than is reasonably necessary to achieve the legitimate object."

In view of the above it was submitted that, the wording of section 148 (5) of the CPA whereby certain offences are non bailable, does not give room for arbitrariness, ambiguity and there is no likelihood of bringing unintended people which eliminates likelihood of abuse. The appellant advanced a similar argument in respect section 148 (5) (b) of the CPA which in addition, entails an adjudicative process to consider evidence if there exist circumstances warranting denial of bail or not and a remedy by way of appeal is available to an aggrieved party.

Pertaining to the fourth ground of appeal, the appellant faulted the High Court to have as well, declared section 148 (5) (a) (v) of the CPA unconstitutional without considering that it was previously dealt with and determined in the cases of **GEDION WASONGA AND 3 OTHERS VS THE ATTORNEY GENERAL AND TWO OTHERS,** Misc. Civil Application No. 14 of 2016 (HC) (unreported) and **MARIAM MASHAKA** (supra). In this regard, the course taken by the High Court was argued to be against section 9 of the Civil Procedure Code [CAP 33 R.E 2019] (the CPC) which embraces *res judicata* as a doctrine of estoppel in ensuring that there is no endless litigation over the

same matter concerning same parties. In view of the above, the appellant urged the Court to hold that, since section 148 (5) (a) (v) of the CPA on the offence of money laundering being non bailable was declared to be constitutional and decision has not been reversed, the High Court wrongly determined the same to be unconstitutional in the impugned decision.

In the fifth and tenth grounds of appeal, the appellant faults the High Court to have acted on a defective affidavit of the respondent herein to annul the provisions of section 148 (5) of the CPA. It was pointed out that, paragraphs 11 to 14 of the respondent's affidavit accompanying the petition contained extraneous matters such as, the congestion of inmates in prison facilities and police remand cells the information whose source was not disclosed. It was argued that, the respondent could not have personal knowledge of this information which was the sole domain of the Prison and Police Authorities. Therefore, in the oral submissions, the Court was urged us to conclude that, the affidavit contained lies and proceed to expunge the offensive paragraphs. In addition, the appellant urged the Court to make a finding that the respondent did not prove his case beyond reasonable doubt and as such, it was improper for the High Court in the absence of requisite proof to declare unconstitutional section 148 (5) of the CPA.

In the sixth ground of appeal the appellant challenged the High Court for considering facts which were not pleaded. The alleged unpleaded facts are as follows:

One, the impugned provision is so wide that it includes an accused person who is not dangerous in terms of Article 30(2) of the Constitution. **Two,** the impugned provision does not contain adequate safeguards and effective controls against arbitrary decisions and abuse by the prosecution when using the law to charge an accused person with a non bailable offence. **Three,** the impugned provision vests in the prosecution unfettered powers of framing any charge against any accused person and thereby affecting the liberty of that accused person. **Four,** the impugned provision does not set a time frame for completion of investigation, prosecution and detention prior to investigation or trial. **Five,** the impugned provision ousts due process and directs the court to just refuse bail notwithstanding the circumstances of a case. **Six,** to make it worse there are no controls or safeguards imposed against abuse or arbitrary decisions by which an accused person may be deprived of personal liberty. **Seven**, the lack of procedure prescribed by law under which a person may be denied bail. **Eight,** lack of time frame within which an accused person may remain in detention. **Nine,** Substitution of a

charge. **Ten,** Inordinate delays in completion of investigation and prosecution at the expense of personal liberty of an accused person. **Eleven,** dropping of charge laid down against an accused person and subsequent and immediate arrest and recharging of the accused person and **twelve,** large number of persons accused of non bailable offences held indefinitely in remand custody.

In a nutshell, the appellant's complaint is to the effect that the High Court relied and acted on extraneous considerations to declare the impugned provision unconstitutional. Thus, the appellant urged the Court to quash the un-pleaded facts from the record contained in the judgment of the High Court.

In relation to the eighth ground of appeal, it was the appellant's complaint that the High Court misapplied the reasoning and holdings advanced by the Court in the cases of **DAUDI PETE** (supra) and **JEREMIA MTOBESYA,** (supra) in relation to Article 15(2)(a) of the Constitution and section148(5) of the CPA**.** On this, it was pointed out that, the High Court did not consider what was said by the Court in **DAUDI PETE** (supra) that the denial of bail to accused persons is on the basis of their conduct which is very dangerous to society's peace, security and preservation of law and order, pending determination of cases on merit and that section 148(5) of the CPA

conforms with the proportionality test. In this regard, the appellant urged the Court to reverse the impugned decision on account of being erroneous.

Finally, and that is indeed the gist of the 9th ground of appeal, the appellant faulted the High Court in not considering that the striking out of the entire provisions of section 148 (5) of the CPA would subject the country into a state of havoc posing a threat to peace and security in the country. It was thus argued that, the High Court ought to have carefully dealt with the impugned provision in order to strike a balance between the individual interest *vis a vis* societal interest and preservation of morality in the nation as a whole.

On the other hand, the respondent herein, earlier on filed a notice of affirmation of the decision of the High Court in terms of Rule 100 (1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). However, in the course of the hearing the appeal, the notice was withdrawn and we marked it so.

At the outset, the respondent supported the decision of the High Court and urged the Court to dismiss the appeal. On the first ground of appeal that the protection and adjudication of rights of the people is in the domain of both the courts and other state agencies, the respondent challenged the

same arguing that the DPP is not one of the institutions vested with the mandate to protect and adjudicate on the rights of the people envisaged by Article 13 (3) under Part III of the Constitution which regulates on the right of equality before the law. It was argued that, in carrying out the constitutional mandate, the courts execute the protection and adjudication function as guardian of the Constitution in ensuring among other things, that the enacted legislation is not incompatible with the Constitution and not otherwise in as far as the fundamental rights and duties are concerned. In this regard, it was the respondent's argument that, the appellant's contention that each state organ works independently while executing the protection and adjudication function is a constitutional misinterpretation on the mandate of the courts. Relying on the cases of **REV. CHRISTOPHER MTIKILA VS THE ATTORNEY GENERAL** [1995] TLR 58, and **ATTORNEY GENERAL VERSUS LOHAY AKONAAY AND ANOTHER** [1995] TLR 80, the respondent concluded in respect of ground one by stating that, the trial Court was justified to hold that the impugned section is violative of Article 13(3) of the Constitution.

In response to the second ground of appeal on section 148 (5) not being violative of Article 15 (1) and (2) of the Constitution, the respondent in contrast supported the findings of the High Court that the impugned

provision does not prescribe circumstances and procedure to determine bail as envisaged by Article 15 (2) (a) of the Constitution. It was argued that, since every person is entitled to due process of the law, the glaring absence of the requisite procedure makes the impugned provision susceptible to abuse at the expense of an individual's liberty which is a violation of Article 15 (2) (a) of the Constitution. As to what entails procedure established by law, the respondent argued this to be the due process of the law which requires matters of bail to be adjudicated upon by courts and prior to that an accused person be given notice of the intended denial of bail and given opportunity to adduce reasons by way of evidence as to why bail should not be denied. To support the proposition, the respondent invited the Court to follow the decision of the Supreme Court of India in **A.K GOPALAN VS THE STATE OF MADRAS UNION OF INDIA** 1950 AIR 27 and a Ghanaian case of **MARTIN KPEBU VS THE ATTORNEY GENERAL** ACCRA – A. D 2016.

The respondent distinguished the application of the case of **ANACLET PAULO** (supra), arguing that it was inapplicable because the decision of the High Court in the case of **JACKSON OLE NEMETENI @ OLE SAIBUL @ MJOMBA AND 19 OTHERS VS THE ATTORNEY GENERAL,** Misc. Civil Cause No.117 of 2004 (HC) (unreported) which declared section 148 (5)(a) of the CPA to be

unconstitutional, was not brought to the attention of the African Court in the case of **ANACLET PAULO VS TANZANIA** (supra). It was thus contended that, **OLE NEMETENI** (supra) which declared of section 148 (5) (a) unconstitutional remains good law having not been overturned by the Court. As such, the respondent urged the Court to consider that, since the circumstances and prescribed procedures are lacking, the impugned provision is unconstitutional as held by the High Court.

The respondent supported the stance by the High Court that the impugned provision ousts the judicial process which is contrary to the gist of the appellant's complaint in the third ground of appeal. It was submitted that, the power of the court in considering bail to a person charged with committing an offence listed under the impugned provision is ousted, instead, the role is left in the hands of the DPP, the Police and the Prevention and combating of Corruption Bureau regardless of the fact that, an accused person may remain behind bars for a prolonged period until his innocence is determined by the courts. The respondent argued this as ouster of the judicial process curtails the individual liberty of an accused person. To support this proposition, we were referred to the case of **SMITH VS THE ATTORNEY GENERAL BOPHUTASWANA** [1984] 1 S.A 196 (B) which was

referred to in the Ghanaian case of **MARTIN KPEBU** (supra) on the fate of a statute which ousts the judicial process holding that:

> "The *universal method of safeguarding individual liberty is to entrust it to an independent judiciary operating in public and compelled to give reasons. Every man is entitled to due process of the law..."*

In view of the above the respondent urged the Court to find that the High Court was justified to annul the impugned provision to the extent of its violation of the constitutional provision.

Pertaining to the seventh ground of appeal, in disputing the appellant's assertion that the impugned provision is saved by Article 30 (2) of the Constitution, the respondent argued that, the said Article cannot be invoked without initially subjecting the impugned provision to the test of lawfulness and proportionality as expounded in the case of **KUKUTIA OLE PUMPUN** (supra). It was thus argued that, while the impugned provision fails the test laid down, it does not have the safeguards against the arbitrary decisions of other state agencies.

Regarding the appellant's complaint that the High Court wrongly determined section 148 (5) (a) (v) of the CPA to be unconstitutional while it

was earlier determined by the same court, it was the respondent's argument that the plea of *res judicata* was never raised by the appellant before the High Court and therefore the Court should not entertain the complaint.

Moreover, it was contended that in the absence of the appellant mentioning the two cases alleged to have determined the constitutionality of section 148 (5) (v) of the CPA on the offence of money laundering being non bailable the Court will have nowhere to make reference to the question of *res judicata*. It was added that, what transpired in the cases of **MARIAM MASHAKA** and **GEDION WASONGA** is materially different from the case at hand. The respondent referred us to the decision of the Supreme Court of India in the case of **SMT RAJESHWARI VS T.C SARAVANABAVA** Civil Appeal No. 7653 and 7654 whereby, apart from the Court stating that the rule of *res judicata* does not bar the jurisdiction of the court to try the subsequent suit, it is a rule of estoppel by judgment based on public policy that there should be finality to litigation and no one should be vexed twice for the same cause.

In relation to the fifth and tenth grounds, the respondent challenged the appellant's complaint which is to the effect that, the case before the High Court was not proved beyond reasonable doubt and in addition, that the High

Court erred to act on the defective affidavit of the respondent which contained extraneous matters. Apart from the respondent submitting that the issues raised by the appellant were not initially raised before the High Court and should not be entertained by the Court, it was argued that since the respondent had established a *prima facie* case it was then incumbent on the appellant to prove what it was clinging on regarding the impugned provision being valid. Moreover, it was the respondent's contention that, at the trial, the appellant neither categorized nor explained as to how each of the non bailable offences in the impugned provision is saved by Article 30 (2) of the Constitution be it in the counter affidavit or the written submissions which was also not the case as the appellant did not demonstrate as to how the impugned provision meets the proportionality and legitimacy test. To support the propositions, the respondent referred the Court to the cases of **LEGAL AND HUMAN RIGHTS CENTRE AND OTHERS VS THE ATTORNEY GENERAL**; Misc. Civil Cause No. 77 of 2005 (HC) (unreported) and **JEREMIAH MTOBESYA** (supra). Thus, the Court was urged to dismiss the complaint on the respondent's case lacking proof beyond reasonable doubt.

Pertaining to the offensive paragraphs in the affidavit, it was the respondent's contention that the affidavit which accompanied the petition

before the High Court was properly verified by the respondent based on his own knowledge being an advocate of the High Court. In the alternative, it was asserted that even if the Court expunges the alleged offensive paragraphs in the affidavit, the remaining paragraphs sustained the affidavit.

Regarding the complaint that the High Court acted on unpleaded facts, which is the gist of the sixth ground of appeal, in contrast the respondent contended the complaint as being baseless because what is contained in the affidavit of the respondent is analogous to the contents of the pleadings which were amplified at the hearing which was conducted by way of written submissions. On that basis, the respondent urged the Court to dismiss the appellant's complaint.

In respect of the complaint on misapplication of the decisions in **DAUDI PETE** (supra) and **JEREMIAH MTOBESYA** (supra) by the High Court, which is the gist of part of the eighth ground, it was the respondent's contention that, the material facts in the two cases are similar to the case at hand and as such, the requirement of prescribed procedures under which the courts can determine the issue of bail to an accused person remain to be vital in the absence of which the judicial process is shattered.

As to the complaint in ground nine that the annulment of the impugned provision would plunge the country into havoc and chaos in the entire system in the administration of criminal justice, the respondent challenged the same arguing that it was unfounded considering that, the appellant has been given a period of eighteen (18) months to put in place the respective circumstances and procedures mandating the courts to determine and admit accused persons to bail. Ultimately, the respondent urged the Court to uphold the decision of the High Court and proceed to dismiss the appeal in its entirety.

In a brief rejoinder, the appellant urged the Court not to condone illegality by acting on the affidavit which violates the law and determining on the constitutionality of non bailable offence of money laundering because there is no such appeal before the Court. The case of **FWEDA MWANAJOMA AND JOHN DANIEL VS REPUBLIC**, Criminal Appeal No. 174 of 2008 (unreported) was cited to us. It was also argued that apart from the lawfulness and legitimacy principles stated in the case of **ANACLET PAULO** being applicable, there are safeguards including the remedy of judicial review which makes the impugned provision not susceptible to abuse or arbitrariness.

Having carefully considered the submissions of parties and the record we shall determine the appeal commencing with the threshold issues which cover the fourth, tenth, sixth and fifth grounds in that order. Finally, we shall dispose the remaining substantive grounds of appeal.

In relation to the provision stipulating on the offence of money laundering as being non bailable and the rule of res judicata, parties marshalled contending arguments on the propriety of the High Court's decision to declare section 148 (5) (v) of the CPA unconstitutional in the impugned decision while previously it was found by the High Court to be constitutional in the cases of **GEDION WASONGA** (supra) and **MARIAM MASHAKA** (supra).

The principle of *res judicata* is embodied in section 9 of the CPC which stipulates:

> *"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which*

such issue has been subsequently raised and has been heard and finally decided by such court".

The rationale behind the doctrine of res judicata is to ensure certainty in the administration of justice – see: **EAST AFRICAN DEVELOPMENT BANK VS BLUELINE ENTERPRISES LIMITED,** Civil Appeal No. 110 of 2009 (unreported).

Professor M.P JAIN in his book titled **Indian Constitutional Law**, 5th Edition Reprint, 2004 at page 1314 also articulates on the rationale of the rule of *res judicata* as follows:

"...The rule of res judicata is based on considerations of public policy as it is in the larger interests of the society that a finality should attach to binding decisions of courts of competent jurisdiction, and that individuals should not be made to face the same kind of litigation twice..."

At page 1315 he proceeds to state as follows:

"The principle of res judicata envisages that if a judgment had been pronounced by a Court of competent jurisdiction, it is binding between the parties unless it is reversed or modified in appeal, revision or other procedure prescribed by law... The High Court's decision can be attacked in an appeal to the Supreme Court but not through a writ of petition."

In paragraph 5 of the originating summons at page 16 of the record, the respondent herein categorically stated that the power of court is ousted in granting bail to a person accused of the offence of money laundering. In opposition, the appellant, made a general denial as reflected in paragraph 3 of the counter affidavit which is found at page 30 of the record of appeal. In the written submissions, at page 647 of the record, the case of **GEDION WASONGA** was cited to argue that section 148 (5) (a) (v) of the CPA reasonably interferes with individual rights and public interest and it is valid in terms of Article 30 (1) and (2) of the Constitution. Notwithstanding that the case of **GEDION WASONGA** was brought to the attention of the High Court in the course of hearing which was conducted by way of written submissions, the High Court surprisingly concluded that the case had dealt with different provisions which in actual fact was not the case as we shall soon demonstrate. **One,** it is glaring at page 2 of the judgment in **GEDION WASONGA** that the petitioner invited the High Court to declare unconstitutional section 148 (5) (a) (v) of the CPA which precludes bail to a person accused of the offence of money laundering because it was alleged to be in violation of Articles 13 (6) (a), (b) (c) and (d), 15 (1) and 17 (1) of the Constitution. **Two,** at page 27 the High Court concluded that:

"It is our findings that, the provisions of both section 148 (5) (a) (v) of the Criminal Procedure Act as amended by Act Number 15 of 2007 and section 36 (2) of the Economic and Organised Crime Control Act are constitutional."

In the circumstances, both in the case of **GEDION WASONGA** and the present matter, facts giving rise to the cause of action and known to both the respondent and the High Court, were on the alleged unconstitutionality of the section 148 (5) (v) of the CPA which precludes the grant of bail. As such, it is our conclusion that, the principle of *res judicata* is applicable and on that account we agree with the appellant. Thus, in the absence of any decision of the Court reversing the case of **GEDION WASONGA**, the High Court with respect, misdirected itself to sit afresh to entertain and determine a petition challenging section 148 (5) (v) of the CPA for the second time. This was with respect, a total disregard of a sound policy that there should be a finality to litigation, ensuring certainty in the administration of justice and that individuals should not be made to face the same kind of litigation twice. In this regard, the case of **RAJESHWARVIS T.C SARAVABBAWA** (supra) cited to us by the respondent's counsel is in support of the stated sound policy on the doctrine of *res judicata.* Since the existence of the **GEDION WASONGA** case was brought to the attention of the High Court in the course of hearing which

was conducted by way of written submissions, we do not agree with the respondent's contention that it has been raised for the first time before the Court.

Moreover, in declaring section 148 (5) (a) (i) of the CPA in respect the offence of armed robbery to be unconstitutional, clause (a) was spared on account that it was previously determined so by the High Court in the case of **OLE NEMETENI** (supra) and it has not been reversed because no appeal to the Court was pursued by the Attorney General in that regard. However, in the impugned judgment, the High Court struck out that provision from the statute book merely because of expiry of time given to the Attorney General to rectify the provision.

It really taxed our minds if the course taken by the High Court was proper. Our answer is in the negative because the pronouncement to strike out section 148 (5) (a) (i) of the CPA was in essence to vary the decision in **OLE NEMETENI** (supra) which is not in order. We say so because in **OLE NEMETENI**, the High Court, having considered factors including an upsurge of unprecedented armed robberies organized within and outside the country and the Government's effort to equip the police to meet the related challenges, it did not strike out section 148 (5) (a) (i) of the CPA and instead,

gave the Government a period of eighteen (18) months to prescribe requisite procedure to regulate the determination of bail in respect of that offence. In this regard, we are constrained to quash the portion in the impugned judgment striking out section 148 (5) (a) (i) of the CPA from the statute book. The aforesaid notwithstanding, in the absence of any appeal against the decision of **OLE NEMETENI**, we decline the invitation by the appellant to determine the matter for the simple reason that we are not sitting on its appeal.

We also deem it crucial at this stage to consider the propriety or otherwise of the respondent's affidavit at the trial which is alleged to contain extraneous matters. It was the respondent's take that the affidavit was valid as verified by the respondent to be true according to his own knowledge and that, if the Court finds the alleged paragraphs to be offensive the remaining paragraphs can still sustain the affidavit.

The law regulating what the affidavit shall be confined to is Order XIX rule 3(1) of the CPC which states:

> *"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications on which statements of his belief may be admitted."*

Since an affidavit is a substitute to oral evidence, it should only contain statements of facts based on deponent's actual knowledge or information received and it should not contain extraneous matters. Where an affidavit is made on information, it should not be acted upon by any court unless the sources of such information are specified – see: **UGANDA v. COMMISSIONER OF PRISONS EX PARTE MATOVU** [1966] EA 514 and **SALIMA VUAI FOUM v. REGISTRAR OF COOPERATIVES SOCIETIES & 3 OTHERS.** [1995] TLR 75. In the latter case, the Court held:

> *"The principle is that where an affidavit is made on an information, it should not be acted upon by any court unless the sources of the information are specified".*

What can be gleaned from the said principles governing the law of affidavits is that where an averment is not based on personal knowledge, the source of information should be clearly disclosed.

In the light of the stated position of the law we have considered it pertinent to revisit what is contained in paragraphs 11 to 14 of the respondent's affidavit which accompanied the petition before the High Court. These read as follows:

"11. That various common law jurisdictions, presumption of innocence is recognized as the universal [right] hence bail is matter of right and not privilege in their laws and order. Courts of law are left to deal with question of bail on either to grant the same or denial but upon being properly moved with strong reasons.

12.[Unlike] in our jurisdiction, we have greater number of criminal offences termed as non bailable offences and worse courts of law are strictly prohibited to deal with question of bail despite the existence of the fundamental right of presumption of innocence in our constitutional law and order.

13. Further to the above, existence of the above unconstitutional provision does not even provide time frame for investigation of the aforesaid criminal offences or in which courts of law are required to deal with such offences, ***as result many people are still remanded both in police custody and in prison despite courts have not proven their [guilt].***

14.That I am challenging the constitutionality of the above provisions of the Criminal Procedure Act, taking into account the fact that the only option available is to move this Constitutional Court being the High Court of Tanzania to deal with the unconstitutionality of the aforesaid provision of the law."

[Emphasis supplied]

In view of the settled position of the law on affidavits, we are satisfied that, the contents in paragraphs 11,12 and 14 of the

respondent's affidavit are statements of facts based on the respondent's knowledge on the position in other common law jurisdictions on the issue of bail and role of courts; existence in the country of non bailable offences *vis a vis* the presumption of innocence as a fundamental right and that he sought to challenge the constitutionality of the provisions of section 148 (5) of the CPA. The respondent verified such facts to be true based on his own knowledge. However, the contents of paragraph 13 of the affidavit are a combination of both statements of facts and extraneous matters in the form of opinion. What constitutes statements of facts is the deposition that the unconstitutional provision does not provide time frame for investigation of the aforesaid criminal offences. As to the remaining contents, since the respondent is not an official of the Police Force or Prisons departments, the factual deposition on the number of inmates cannot be from his own knowledge but information from other sources which ought to have been disclosed by the deponent.

In this regard, the offensive area of the affidavit is part of paragraph 13. Nevertheless, we find the same inconsequential not affecting the entire affidavit and proceed to expunge it leaving the substantive parts of the affidavit intact – see: **STANBIC BANK TANZANIA**

LIMITED VS KAGERA SUGAR LIMITED, CIVIL APPLICATION NO. 57 OF 2007 (unreported) which was cited in the case of **PHANTOM MODERN TRANSPORT (1985) LIMITED VS D.T. DOBIE (TANZANIA) LIMITED**, Civil References Nos 15 of 2001 and 3 of 2002 (unreported) and **DEVRAM VALAMBHIA VS THE PRINCIPAL SECRETARY, MINISTRY OF DEFENCE AND NATIONAL SERVICE** [1992] TLR 387.

On account of the inconsequential defects in the affidavit we are satisfied that the petition was accompanied by a valid affidavit and this renders the tenth ground of appeal partly merited to the extent stated.

This takes us to the appellant's complaint that while the respondent failed to establish his case, the High Court determined the petition relying on extraneous facts which were not pleaded by the respondent. In contrast, the respondent challenged the same arguing that considering that the hearing was by way of written submissions, the contents of the respondent's affidavit were amplified in the written submissions. This ground need not detain us as we are guided by the case of **JULIUS NDYANABO** (supra) where the Court held:

> *"...there is a presumption of constitutionality of legislation, save where a claw back or exclusion clause is relied upon*

> *as a basis for constitutionality of legislation,* ***the onus is upon those who challenge the constitutionality of the legislation; they have to rebut the presumption.... where those supporting a restriction on fundamental right rely on a claw back clause in doing so, the onus is on them; they have to justify the restriction."***

[Emphasis supplied]

In the light of the cited case, we agree with the respondent that, while the respondent had a duty to establish a prima facie case which he discharged, the burden shifted to the appellant who was duty bound to prove that the impugned provision is not violative of the Constitution. We need not say more. In the premises, we do not agree with the appellant that in constitutional petitions it is incumbent on the petitioner to prove his case beyond reasonable doubt. This renders the fifth ground of appeal not merited.

We have gathered the complaint on the High Court having relied on extraneous matters in determining the petition is partly untrue. We say so because the High Court in its judgment had considered what was contended by the respondent in the originating summons, the petition, the affidavit and the written submissions. Besides, some of the facts

complained constituted the reasoning of the High Court on the matter and as such, it cannot be blamed in that regard to have considered the extraneous matters. However, in its decision the High Court observed that sometimes the DPP withdraws charges under section 91 of the CPA and in some instances substitutes them under section 234 of the CPA. The High Court was with respect, wrong to venture into such aspects which were not pleaded be it in the petition, the originating summons or the accompanying affidavit. Thus, the sixth ground of appeal is partly merited.

We now turn to the three substantive remaining issues. In this regard, we begin with the following principles on the interpretation of the Constitution and fundamental rights and freedoms as laid down in case law and some authors on constitutional law. In the case of **REV CHRISTOPHER MTIKILA** (supra) the High Court held:

> *"The constitutionality of a statutory provision is not found in what could happen in its operation but in what it actually provides for;* ***the mere possibility of a statutory provision being abused in actual*** **operation** ***will not make it invalid."***
>
> [Emphasis supplied]

The High Court relied on the Indian case of **PRAKALAD JENA VS STATE, AIR 1950** Orissa 157 where it was held:

> *"In order to determine whether a particular law is repugnant or inconsistent with the Fundamental Rights, it is the provisions of the Act that must be looked at and not the manner in which the power under the provision is actually exercised.* ***Inconsistency or repugnancy does not depend upon the exercise of the power by virtue of the provisions in the Act but on the nature of the provisions themselves.***"

In the decision we rendered as recent as 16/10/2019 in **ATTORNEY GENERAL VS BOB CHACHA WANGWE AND TWO OTHERS,** Civil Appeal No, 138 of 2019 (unreported), we fully subscribed to the decision in **CHRISOPHER MTIKILA** (supra). We are guided by the position we took in the case of **CHACHA WANGWE** (supra).

It is also settled that, the Constitution is the supreme law of the land and the general principles governing constitutional interpretation were stated in the case of **JULIUS NDYANABO** (supra) where the Court dealt with a statute which impeded access to justice for those wishing to challenge Parliamentary election results being mandatorily required to deposit a sum which was considered to be on the higher side. In that case, the Court

among other things, stated: **one,** that, the constitution is a living document with soul and consciousness as reflected in the Preamble and Fundamental Objectives and Directive Principles of state policy. It should not be crippled by technical or narrow interpretation. **Two,** that provisions founding on fundamental rights have to be interpreted in broad, liberal and strict manner to jealously guard those rights. **Three,** that, legislation is presumed to be constitutional until the contrary is proved and the onus is upon the person challenging the constitutionality of a legislation to prove so. It should receive construction that will make it operative and not inoperative. **Four,** that, the onus is on person supporting a restriction on a fundamental right in reliance of claw back or exclusion clause to justify the restriction.

In **DAUDI PETE** (supra) in which part of the impugned provision on non bailable offence of armed robbery by then, was tested, the Court among other things, held at page 33 to 34 as follows:

> *"In our considered 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 interpret 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 the West, recognizes and*

guarantees basic human duties. ***It seems that the framers of our Constitution realized that the individuai human being does not exist or live in isolation, but exists and lives in society... 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."***

[Emphasis supplied]

The bolded expression is supported by the observation by Dr. Durga Basu in his Book the **SHORTER CONSTITUTION OF INDIA,** 12th Edition at page 104 commenting on the Constitution of India, the learned author states as follows:

> *"There cannot be anything like absolute or uncontrolled liberty wholly free from restraint for that would lead to anarchy and disorder. The possession and enjoyment of all rights are subject to such reasonable condition as may be deemed to the governing authority of the country to be essential to the safety, health peace, and general order and moral of the community... On the other hand, for the very protection of these liberties the society must arm itself with certain powers. What the constitution therefore attempts to do is to strike a balance between individual liberty and social control."*

We shall as well be guided by among others, the stated principles.

At this juncture we wish to reproduce the whole of section 148 (5) which is a subject of this appeal as follows:

> *"(5) A police officer in charge of a police station or a court before whom an accused person is brought or appears, shall not admit that person to bail if–*
>
> *(a) that person is charged with–*
>
> *(i)murder, treason, armed robbery, or defilement;*
>
> *(ii) illicit trafficking in drugs against the Drugs and Prevention of Illicit Traffic in Drugs Act, but does not include a person charged for an offence of being in possession of drugs which taking into account all circumstances in which the offence was committed, was not meant for conveyance or commercial purpose;*
>
> *(iii) an offence involving heroin, cocaine, prepared opium, opium poppy (papaver setigerum), poppy straw, coca plant, coca leaves, cannabis sativa or cannabis resin (Indian hemp), methaqualone (mandrax), catha edulis (khat) or any other narcotic drug or psychotropic substance specified in the Schedule to this Act which has an established value certified by the Commissioner for National Co-ordination of Drugs Control Commission, as exceeding ten million shillings;*

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

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

(vi) Trafficking in persons under the Anti-Trafficking in Persons Act.

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

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

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

(e) the offence with which the person is charged involves actual money or property whose value exceeds ten million shillings unless that person deposits cash or other property equivalent to half the amount or value of actual money or property involved and the rest is secured by execution of a bond:

Provided that where the property to be deposited is immovable, it shall be sufficient to deposit the title deed, or if the title deed is not available such other evidence as

is satisfactory to the court in proof of existence of the property; save that this provision shall not apply in the case of police bail."

The burning issue and subject of the third ground of appeal and part of the eight ground of appeal is whether the impugned provision ousts the judicial process in admitting to bail a person accused of non bailable offence.

Parties marshalled contending arguments as we said on section 148 (5) of the CPA ousting the judicial process in the grant of bail to an accused person. Whereas the appellant claimed that the impugned provision does not oust the power of courts but rather limits such power, the respondent, on the other hand, contended that the power of courts is ousted by the impugned provision. In the impugned decision, the High Court decided as reflected at page 686 to 687 of the record of appeal:

"...It was clear to us that section 148 (5) of the CPA prohibits courts of law or a police officer from admitting to bail a person accused of a non bailable offence. It means that once the accused person is charged with any offence listed under section 148 (5) of the CPA or he fits into any listed situations under the impugned provision, the courts of law or a police have no option apart from denying him bail... the impugned provision ousts the judicial process in considering the possibility of admitting to bail a person accused of non bailable offence.... The impugned provision

to say the least circumvents the jurisdiction vested in courts of law in determining and balancing the rights and interests of an individual against others and the public."

In the case of **SILVESTER DAWI** (supra), the Court having considered that, the provisions of section 148 (5) (e) of the CPA and section 36 (4) of the Economic and Organised Crime Control Act [CAP 200 R.E.2002] were unambiguous and specific though appearing to be harsh and perhaps unjust, observed that the mandate given to courts to administer justice in the country is very clear and the Constitution cannot be circumvented. We wish to extract the holding as follows:

The Judiciary, as provided under Article 107A (1) of the Constitution, is the only organ of the State having the final say in the administration of justice. But it does not have unbridled powers. The courts must operate within the parameters of the Constitution. The Constitution in Articles 107A and 107B enjoins us to administer justice in accordance with the law of the Land being guided by the five principles enunciated in Article 107A (2). So, ...to disregard the clear provisions of the law for the sake of breaking new grounds is not only an invitation to anarchy but an invitation to violate the Constitution..."

Ultimately the Court made the following observation:

"We take it as settled law that if the language of a statute is clear, it must be enforced at all time to the letter. We

cannot ignore it for the sake of venturing into the realms of idealism or breaking new grounds of law. If we attempt to do so we shall not only lose the confidence of the society which we are supposed to serve but also our legitimacy. Yes, in appropriate cases, but within the confines of the law, we shall not be afraid of breaking new grounds in order to improve the quality of justice we deliver. We are afraid to say that this is not one of those cases."

In the case of **DAUDI PETE** (supra), part of the impugned provision was challenged for the first time following the introduction of the Bill of Rights vide the Fifth Amendment to the Constitution in February 1984 and its operationalization in March, 1988. The Court proceeded to lay the following principle:

"... In our view, the Doctrine of Separation of Powers cannot be said to be infringed when either the Executive or the Legislature takes over the function of the Judicature involving the interpretation of laws and the adjudication of rights and duties in dispute either between individual persons or between the State and individual persons. ***Legislation which prohibits the grant of bail to persons charged with specified offences does not in our view amount to such a takeover of judicial functions by the Legislature.*** "

[Emphasis supplied]

In view of the above we find it disquieting that the High Court concluded that the impugned provision ousts the jurisdiction of courts despite the contrary position of the Court which was binding on the High Court. This was against the common law doctrine of precedent, which is one of the strong pillars of the law of this land, that all courts and tribunals below this Court, are bound by its decisions, regardless of their correctness – see: **JUMUIYA YA WAFANYAKAZI TANZANIA VS KIWANDA CHA UCHAPISHAJI CHA TAIFA** [1988] TLR 153. We have no doubt that this is a sound position which is vital for the rule of law in the administration of justice.

Apart from the Judiciary being the only organ of the State having final authority in the administration of justice, the courts must operate within the confines of the Constitution and in accordance with the law of the land. In this regard, where the powers are limited by a statute, like it is the case in the impugned provision, that cannot be said to be an ouster of the courts' mandate to administer criminal justice. This is so because it is settled law that, a piece of legislation which prohibits the grant of bail to persons charged with specified offences does not amount to a takeover of judicial functions by the legislature. Moreover, the High Court and the respondent herein relied on the case of **JEREMIAH MTOBESYA** (supra) which is in our

considered view distinguishable from the matter under scrutiny. We are fortified in that account because in that case, the Court was confronted with a quite distinct scenario and had to determine the validity of the sole statement of the DPP 's certificate denying bail to the accused person. Thus, we said:

> *"Despite the numerous statutory powers accorded to the DPP, it should be appreciated that, in a criminal proceeding, she is no more than a party who, along with the accused person, deserves equal treatment and protection before the law. In this regard, we should clearly express that it is utterly repugnant to the notion of fair hearing for the legislature to allot so much power to one of the parties to a proceeding so that [she] is able to deprive the other party of [her] liberty by merely her say so and; much worse to the extent that the victimized party as well as the court or, as the case may be, a police officer is rendered powerless. The right of a fair hearing, by its very nature, requires there be equality if the legislature, as we have said allows one party to deprive the other of his personal liberty by her say so...."*

Since it is settled law that a legislation which prohibits grant of bail does not oust the judicial function, the cases of **SMITH VS AG** (supra) and **MARTIN KPEBU** (supra) are distinguishable considering that they had dealt with the fate of a statute which ousts judicial process which is not the case in the present matter. In this regard, it was with respect, wrong for the High Court

to conclude that, the impugned provision ousts judicial process which renders the third ground of appeal merited.

Next for consideration is whether or not the impugned provision is in violation Articles 13 (3) and 15 (2) (a) of the Constitution which is in respect of the first, second and the remainder of ground eight.

While the appellant contended that the impugned provision prescribes circumstances and procedures in which a court can determine bail of an accused person, in contrast the respondent maintained that it has none which is in violation of Articles 13 (3) and 15 (1) and (2) (a) of the Constitution which stipulate as follows:

> *"13 (3): Haki za raia, wajibu na maslahi ya kila mtu na jumuiya ya watu yatalindwa na kuamuliwa na mahakama na vyombo vinginevyo vya Mamlaka ya Nchi vilivyowekwa na sheria au kwa mujibu wa sheria."*

The English rendering is to the effect that, the civil rights, and duties and interests of every person and community shall be protected and adjudicated upon by courts of law or other state agencies established by or under the law.

As for Article 15, it stipulates as follows:

"15 (1) Kila mtu anayo haki ya kuwa huru na kuishi kama mtu huru"

(2) Kwa madhumuni ya kuhifadhi haki ya mtu kuwa huru na kuishi kwa uhuru, itakuwa ni marufuku kwa mtu yeyote kukamatwa kufungwa, kufungiwa kuwekwa kizuizini, kuhamishwa kwa nguvu au kunyang'anywa uhuru wake vinginevyo isipokuwa tu-

(a) katika hali na kwa kufuata utaratibu uliowekwa na sheria".

The rendering in English is: every person has the right to freedom and to live as a free person. For the purposes of preserving individual freedom and the right to live as a free person, no person shall be arrested, imprisoned, confined, detained, deported or otherwise be deprived of his freedom except under circumstances and in accordance with procedures prescribed by law.

In view of the referred state agencies, we initially had to determine if the DPP and the Police are among the state agencies envisaged under Article 13 (3) of the Constitution falling under Part III which deals with equality before the law and the respective role of courts and state agencies in the protection and adjudication of individual rights and community rights. This need not detain us. We understand that, under the Police Force and Auxillary Services Act [CAP 322 R.E. 2002], the police are obliged to maintain peace

and order within the country whereas in terms of Article 59B of the Constitution, the DPP is mandated to conduct criminal prosecutions and is required under sub-Article (4) to have due regard to public interest and not to abuse the respective constitutional mandate. In criminal proceedings before the courts, the DPP is not more than a party who along with the accused person all deserve equal treatment and protection before the law – see: **JEREMIA MTOBESYA** (supra). In other words, in all criminal cases, it is the domain of courts to protect and determine the rights of the parties including the DPP. That apart, in our strong firm view, the envisaged state agencies are organs with adjudicative powers such as the Electricity and Water Utility Regulatory Authority (EWURA) when dealing with related disputes, the Commission for Mediation and Arbitration (CMA), the Tax Revenue Appeals Tribunal and the District Land and Housing Tribunals. On that account, the DPP does not fall within the scope and purview of state agencies mandated to protect and adjudicate upon the rights of the parties under Article 13(3) of the Constitution. We need not say more.

Advancing the argument on the impugned provision being unconstitutional, the respondent's counsel invited the Court to rely on the case of **GOPALAN** (supra). In that case the expression 'procedure established

by law under Article 21 of the Indian Constitution was interpreted to be synonymous with the American concept of 'procedural due process' and therefore, for that matter any law affecting a person's life or liberty, should be justiciable in order to assess whether the person affected was given a right of fair hearing.

In terms of the Fourteenth Amendment of the Constitution of the United States, 'due process of the law' is an idea that laws and legal proceedings must be fair whereby the Constitution guarantees that government cannot take away a person's basic rights to life, liberty or property, without due process of the law. The components of due process of law include **one,** an unbiased tribunal, **two,** notice of proposed action and grounds asserted for it, **three,** opportunity to present reasons why the proposed action should not be taken and **four**, the right to present evidence including the right to call witnesses – see: https://www.upcounselcom.legal and https://www.investopedia.com.

The Sixth Amendment which is applicable to the States through 'Due process clause' of the Fourteenth Amendment, guarantees an accused person of a fundamental right to be clearly informed of the nature and cause of charges against him. In order to determine whether an accused person has

received constitutionally adequate notice, the court looks first to the information whereby its principal purpose is to provide the defendant with a description of the charges against him in sufficient detail to enable him to prepare his defence – see: **JAMES V BORG** 24 F.3d.20.24 (9th Cir). cert. 1115 S Ct. 333 (1994). However, the contention in **GOPALAN** which followed the due process clause was rejected by the Supreme Court of India in the case of **MANEKA GANDHI VS UNION OF INDIA** AIR 1978 SC 597 (1978) where the Supreme Court was concerned with the 'procedure established by law' to be as laid down in the statute and in that regard: **one,** there must be a law; **two,** it should lay down a procedure; and **three,** the executive should follow this procedure while depriving a person of his life or personal liberty. In the case of Tanzania, the due process of the law in both civil and criminal trials is embodied in Article 13 (6) of the Constitution.

In considering if the impugned provision prescribes circumstances and lays down a procedure governing non bailable offences, the High Court in its impugned decision stated as follows:

> *"The procedure envisaged under Article 15(2) (a) of the Constitution, which must be a procedure of safeguards by which a person accused of non bailable offence may be deprived of his liberty, is not existent under section 148(5)*

of the Criminal Procedure Act. Alleged conditions of safeguards were not stated or shown as to how they conform to the procedure prescribed under the law pursuant to Article 15 (2) (b) of the Constitution and how this court can consider them constituting a meaningful procedure capable of affecting the outcome."

In addition, apart from the High Court relying on the case of **DAUDI PETE**, (supra) it was of the view that, although the Court held that in the light of the principle of Separation of Powers, denial of bail does not amount to the taking over of judicial function, the Court was not invited to consider Article 13 (3) the Constitution. We found this proposition wanting in merit and shall state why. In considering the principle of Separation of Powers, the Court was aware that the Judiciary is the only organ of the State having final say in the administration of justice. Therefore, in concluding that a piece of legislation which prohibits the grant of bail does amount to take over of the judicial functions by the legislation, the Court had in mind Article 13 (3) of the Constitution which vests in the courts the very adjudicative role in the protection and adjudication of rights and duties and interests of every person. This we insist is the very foundation of courts' constitutional mandate because as earlier stated, the Judiciary is the only organ of the State having final say in the administration of justice.

Since the High Court was bound to follow the decision of the Court we were greatly concerned in the manner in which, with respect, it selected portions of the judgment which resulted in the misapplication of the principles as stated in the case of **DAUDI PETE** (supra). Thus, we agree with the appellant that to the extent stated, and shall at a later stage revert to this aspect.

Regarding the circumstances in which bail can be denied, it is glaring that, in the case of **DAUDI PETE** (supra), the Court was crystal clear on the existence of the circumstances on denial of bail under section 148 (5) (e) of the CPA. This is in our view applicable to the whole of the impugned provision herein. However, the High Court with respect, went its own way and concluded that:

> *"... we toyed on the impugned provision in a quest for 'circumstances' envisaged under Article 15 (2) (a) of the Constitution. We had no difficulty in finding such circumstances under section 148 (5) (a) (ii) &(iii), (b) (c) (d) & (e) of the CPA...However, we could not find such "circumstances" under section 148 (5)(a) (i), (iv), (v) of the CPA. The latter just mention offences. There is nothing in the nature of the envisaged circumstances. We are satisfied that such omission cannot be said to be consistent with the provision of Article 15 (2) (a) of the Constitution."*

This is, with respect, wrong because the offences stated in the impugned provision constitute circumstances in which bail can be denied. In view of the above as earlier intimated, we were greatly concerned with the stance taken by the High Court not to follow the principles laid in the case of **DAUDI PETE** (supra) in respect of ouster of judicial powers and circumstances under the impugned provision regulating non bailable offences. We have already stated that this was in disregard of the doctrine of precedent as articulated by the Court in **JUMUIYA YA WAFANYAKAZI TANZANIA** (supra).

We now turn to the question of 'prescribed procedure' for deprivation or denial of personal liberty through prohibition of bail. In terms of Article 15 of the Constitution a person may be deprived or denied personal liberty under conditions stipulated under paragraphs (a) and (b) of sub-Article (2). In our case paragraph (a) is relevant as it sanctions the deprivation or denial of liberty under certain circumstances and subject to a procedure both of which must be prescribed by the law. However, circumstances under section 148 (5) (b) to (e) of the CPA before granting bail, the court must satisfy itself on the conditions stated therein. In this regard, for the criminal matters triable by the subordinate courts, the said provision envisages that, where the prosecution intends to object bail, it must establish before the court that on

account of any of the reasons stated in the law, the accused person should not be admitted to bail. Then, the accused person will be heard on the matter before the court determines as to whether or not to grant bail. That apart, in case bail is denied, the accused has a right of appeal to the High Court in terms of section 161 of the CPA where the order refusing bail may be reviewed. In addition, in case one is aggrieved by the decision of the first appellate court, the right of appeal to the Court is available under section 4 of the Appellate Jurisdiction Act [CAP 141 RE. 2019]. The right of appeal, in our considered view, is part of the concept of fair procedure which is essential in seeking bail. Thus, we are satisfied that, section 148 (5) (b) to (e) of the CPA has prescribed procedure which must be complied with in determining as to whether or not to admit to bail an accused person.

In respect of the non bailable offences, in **DAUDI PETE** the Court held that the then section 148 (5) (e) does not prescribe any requisite procedure for denial of bail contrary to Article 15 (2) (a) of the Constitution. We hold the same view. It is glaring that, although the circumstances are prescribed in the impugned provision, no envisaged procedure is prescribed. This could be attributed to the historical context of the legislation whereby, from its

enactment to date, apart from increasing the offences which are non bailable, it has not gone beyond that.

Our finding to the effect that the impugned provision infringes Article 15 (2) (a) of the Constitution does not automatically mean that the same is *ex facie ultra vires the Constitution*. On the contrary, we bear in mind that the Constitution itself permits derogation from basic rights in certain circumstances as provided under Article 30 and 31 of the Constitution. In this regard, where the court finds a statutory provision to have infringed one or several fundamental rights, it must determine if the same is saved by Article 30 or 31 of the Constitution. In this particular case, of relevance is Article 30 (2) which stipulates as follows:

> *"(2) Ifahamike kwamba masharti yaliyomo katika sehemu hii ya Katiba hii, yanayofafanua misingi ya haki, uhuru na wajibu wa binadamu, hayaharamishi sheria yoyote iliyotungwa wala kuzuia sheria yoyote kutungwa au jambo lolote halali kufanywa kwa mujibu wa sheria hiyo, kwa ajili ya–*
>
> *(a) kuhakikisha kwamba haki na uhuru wa watu wengine au maslahi ya umma haviathiriwi na matumizi mabaya ya uhuru na haki za watu binafsi;*

(b) kuhakikisha ulinzi, usalama wa jamii, amani katika jamii, maadili ya jamii, afya ya jamii, mipango ya maendeleo ya miji na vijiji, ukuzaji na matumizi ya madini au ukuzaji na uendelezaji wa mali au maslahi mengineyo yoyote kwa nia ya kukuza manufaa ya umma;

(c) kuhakikisha utekelezaji wa hukumu au amri ya mahakama iliyotolewa katika shauri lolote la madai au la jinai;

(d) kulinda sifa, haki na uhuru wa watu wengine au maisha binafsi ya watu wanaohusika katika mashauri mahakamani; kuzuia kutoa habari za siri; kutunza heshima, mamlaka na uhuru wa mahakama;

(e) kuweka vizuizi, kusimamia na kudhibiti uanzishaji, uendeshaji na shughuli za vyama na mashirika ya watu binafsi nchini; au

(f) kuwezesha jambo jingine lolote kufanyika ambalo linastawisha au kuhifadhi maslahi ya taifa kwa jumla."

The English rendering is to the effect that, it shall not be unlawful for any existing law to restrict the rights, freedoms and duties if such law for the purposes of ensuring the following: **one,** rights and freedoms of other people or interests are not prejudiced by the wrong exercise of the freedoms and rights of individuals; **two,** the defence, public safety, public peace, public morality, public health; **three,** rural and urban development planning and

exploitation and utilization of minerals or the increase and development of property of any other interests for the purpose of enhancing the public benefit; **four,** the execution of a judgment or order of court given or made in any civil or criminal matter; **five,** protecting the reputation, rights and freedoms of others or the privacy of persons involved in any court proceedings prohibiting the disclosure of confidential information for safeguarding the dignity, authority and independence of the courts; **six,** imposing restrictions supervising and controlling the formation, management of activities of private societies and organisations in the country or **seven,** enabling any other thing to be done which promotes or preserves the national interests in general. These circumstances, are considered to be interest of justice under Article 35 (1) (f) the Constitution of the Republic of South Africa and its Criminal Procedure Code under section 60 (1) when courts consider whether or not to grant bail. This is to the effect that even if the prosecution does not object bail, the courts can still deny bail on account of interests of justice. Therefore, the question here is whether or not the impugned provision is saved by any of the extracted derogation provisions.

It was the appellant's argument that restriction of liberty in the offences listed in the impugned provision is crucial so as to strike a balance of

the individual rights with wider societal rights and interests. However, the respondent was of the view that, every offence must be bailable because the police are there to maintain internal security which covers the person charged with a serious offence and the larger community interests.

The non bailable offences of murder, treason, illicit trafficking in drugs, human trafficking and defilement, are serious offences necessitating detention pending trial which is crucial in ensuring the availability of the accused during trial and to ensure peace and order to the community whose rights are fundamental and must be protected. This is because of the co-existence between the basic rights of the individual and the collective rights of the society, and it is common to find limitations to individual liberties. The question to be answered is how can the two be harmonized. We agree with the appellant that, what the Constitution attempts to do is to strike a balance between individual liberty and social control and this is envisaged by Article 30 (2) of the Constitution subjecting the individual rights to restraint for the sake of public good and in particular, moral of the community.

That apart, Tanzania has signed and ratified various International and Regional Human Rights Instruments embodied in our Bill of Rights. On this accord, in the case of **DAUDI PETE** (supra), the Court categorically stated

that, account must be taken of that Charter in interpreting our Bill of Rights and Duties. In that regard, the African Court in the case of **ANACLET PAULO** (supra) had the occasion to adjudicate on the Tanzanian law which denies bail to a person accused of the offence of armed robbery and considered as to whether refusal to grant bail to an accused violated personal liberties. The court said:

> *"...to determine whether the refusal to grant bail...violated right and freedom, the Court will determine whether the said denial of bail is provided by law, whether it is justified by legitimate reasons and whether the said restriction is proportional..."*

The African Court also went ahead asking itself if restriction on the liberty is prescribed by law and if the reasons for restriction are legitimate in serving public or general interest. Having considered that the provision which denies bail and instances warranting restriction of individual liberty vis a vis Article 15 (2) of the Constitution, the court besides noting that section 148(5)(a)(i) of the CPA is aimed at enabling individuals to adapt their behaviour to the rule as required by international standards and jurisprudence it found the restriction on liberty to be duly provided by law. We find it apt to reproduce the relevant part of the judgment as follows:

"66.... the restriction on liberty provided under Section 148(5) (a)(i) of the Criminal Procedure Act aims to preserve public security, protect the rights of others and avoid possible repetition of the offense insofar as this provision covers cases of armed robbery. The restriction is further justified by the need to ensure the actual appearance of the accused for the purposes of proper administration of justice. The Court, consequently, notes that the restriction on liberty is underpinned by legitimate objectives.

"67. The Court also notes that the restriction is necessary and appropriate to ensure the reality of the aim pursued without compromising the ideal of liberty and personal security provided under Article 6 of the Charter. In circumstances such as those set out in Section 148(5)(a)(i) of the Criminal Procedure Act, pre-trial detention is undoubtedly the necessary restriction for attainment of the desired objective.

"68. The Court finds, in conclusion, that the Applicant's detention pending trial was not without reasonable grounds and that the refusal to grant him bail does not constitute a violation of his right to liberty. Article 6 of the Charter has therefore not been violated."

We fully subscribe to the said decision which equally applies in the case at hand with equal force because it is related to instances on restriction of individual liberties as stated in the law. Before answering the question, we earlier posed as to whether the impugned provision would be saved by Article

30 (2) of the Constitution, we find it pertinent to address as to whether section 148 (5) (a) (i), (ii), (iii), (b), (c), (d) and (e) of the CPA affects unintended persons if bail is denied. This brings into the scene another issue on the modus of testing legitimacy and proportionality of a piece of legislation if it can be looked at in isolation with the very statutes which create the non bailable offences.

In **DAUDI PETE**, in determining as to whether the then section 148 (5) (e) of the CPA could net unintended people in denial of bail, the Court scrutinized the definition of robbery by then and positively concluded that it was widely drafted to the extent of affecting unintended people. In the case at hand, though robbery is not a subject in this appeal, apart from the High Court pegging all offences listed in the light of the then robbery definition, it did not consider the change in the categories of that offence. We take note of the amendment of the Penal Code vide the Written Laws (Miscellaneous Amendments) (No. 2) Act, 2004 and the Written Laws (Miscellaneous Amendments) Act, 2011 which amended section 287A adding three categories of robbery such as, armed robbery; attempted robbery and gang robbery. In this regard, testing the lawfulness and proportionality of the impugned provision restricting bail, should not be considered in isolation with

the very statutes which create the respective offences so as to understand the scope, nature and gravity of the offence and in order to discern the intendment of the legislature in restricting bail and if it affects unintended persons.

In the matter under scrutiny the offences under consideration are murder, defilement and treason contrary to sections 196, 137 and 39 respectively of the Penal Code; Trafficking in drugs contrary to section 15 of the Drug Control and Enforcement Act [CAP 95 R.E 2019], Terrorism contrary to section 4 of the Prevention of Terrorism Act, 2002, Trafficking in persons contrary to section 4 of the Anti-Trafficking in Persons Act, 2008. The respective legislation defines and categorise what constitutes non bailable offences and read together with the impugned provision, the unintended people are not affected considering that individuals must adapt their behaviour to the rule of law as required by the international standards and jurisprudence.

In view of what we have endeavoured to discuss, we are satisfied that while it is true that section 148 (5) (a) (i), (ii), (iii), (b), (c), (d) and (e) of the CPA has no prescribed procedure regulating refusal of bail on the offences listed, it meets the test of proportionality, legitimacy and lawfulness and thus

saved by Article 30 (2) of the Constitution. Thus, the detention pending trial is undoubtedly the necessary restriction for attainment of the desired objective which include among others, the interests of public safety and public order, defence and protection of those involved in judicial proceedings such as witnesses. Thus the seventh ground of appeal is merited.

The ninth ground of appeal will not detain us considering that since the Government was given a period of eighteen (18) months to put in place the requisite mechanism, we do not agree with the appellant that the annulment could have plunged the nation into havoc. We find this ground not merited and reject it.

Before penning off, we feel obliged to observe the following: we are aware of the prolonged investigation and prosecution which make some of the persons accused of non bailable offences to stay in remand for so long and in some instances beyond the prescribed term of imprisonment of the offence, if found guilty. It is thus very probable that this is what precipitated the case at hand which is subject of the present appeal. We consider these to be operational problems adversely impacting on the criminal justice which can still be addressed by the Executive arm of the State. On our part, as earlier intimated, when the constitutionality of statute is pursued, we look at

the provision itself and not what would happen in its operation. We are fortified in that account because it is not possible to legislate on each and every behaviour of a human being since what the legislation seeks to achieve is to cure the mischief and yet it cannot be exhaustive. However, in the 14th Constitutional Amendments vide Act No 1 of 2005, apart from the DPP being made a creature of the Constitution, it embodied a crucial safeguard in Article 59B (4) which gives the following mandatory directions to the DPP in criminal prosecutions as it stipulates:

> *"In exercising his powers, the Director of Public Prosecutions shall be free, shall not be interfered with by any person or with any authority and shall have regard to the following:*
>
> ***(a) The need to dispensing justice;***
>
> *(b)* ***Prevention or misuse of procedures for dispensing justice****; and*
>
> *(c) Public interest."* [Emphasis supplied]

In terms of the cited Article the DPP is obliged not to abuse the execution in the conduct of criminal justice. In his oral submissions, the Solicitor General contended that, a remedy of judicial review is available to the accused person, on alleged abuse of authority by the DPP. Apart from agreeing with the Solicitor General, it is our firm view that the Constitution

which is the supreme law of the land frowns on the abuse or misuse of procedures in dispensing criminal justice. Thus, in case of any abuse by the DPP the safeguard and remedy is to seek judicial review before the High Court by invoking the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, [CAP 310 R.E.2002] as correctly asserted by the Solicitor General.

In view of what we have endeavoured to discuss, we are satisfied that section 148 (5) (a) (i), (ii), (iii), (b), (c), (d) and (e) is not unconstitutional as it is saved by Article 30 (2) of the Constitution as earlier stated. On that account, we quash and set aside the decision of the High Court and allow the appeal to the extent stated. We make no order as to costs this being a public interest litigation.

DATED at **DAR ES SALAAM** this 3rd day of August, 2020.

S.E.A. MUGASHA
JUSTICE OF APPEAL

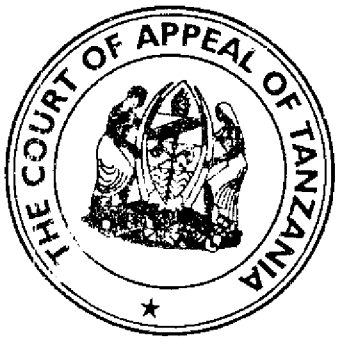
G. A. M. NDIKA
JUSTICE OF APPEAL

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

Judgment delivered this 5th day of August, 2020 in the presence of Mr. Gabriel Malata, Solicitor General assisted by Mr. George Mwandepo, Mr. Faraja Nchimbi, Mr. Tumaini Kweka and Mr. Deogratius Nyoni all learned Principal State Attorneys, Ms. Narindwa Sekimanga, learned State Attorney for the appellant and Mr. Jebra Kambole, learned counsel for the respondent, is hereby certified as a true copy of the original.



E. K. NKYA
Ag. SENIOR DEPUTY REGISTRAR
COURT OF APPEAL