THE UNITED REPUBLIC OF TANZANIA

IN THE HIGH COURT OF TANZANIA AT DAR ES SALAAM

(MAIN REGISTRY)

MISCELLANEOUS CIVIL CAUSE NO. 29 OF 2015

JEREMIA MTOBESYA ---------- PETITIONER

Vs

THE ATTORNEY GENERAL ---------- RESPONDENT

Date of Last Order: 26/11/2015

Date of Ruling: 22/12/2015

RULING

RUHANGISA, J;

The Petitioner one Jeremia Mtobesya is asking this Court to declare unconstitutional the provisions of Section 148 (4) of the Criminal Procedure Act, Cap 20, R.E. 2002 (the CPA) that he believes offend the Constitution of the United Republic of Tanzania of 1977, (URT Constitution) Article 13 (6) (a) in particular. The petition came by way of Originating Summons supported by an affidavit of Jeremia Mtobesya, under Articles 26 (2) of the URT Constitution, sections 4 and 5 of the Basic Rights and Duties Enforcement Act, Cap 3 (R.E. 2002) and Rule 4 of the Basic Rights and Duties Enforcement (Practice and Procedure) Rules, 2014.

The Petitioner appeared in person whereas the Respondent was represented by Mr. Abubakari Mrisha learned Senior State Attorney who swore the counter affidavit opposing the petition and also filed a notice of preliminary objection. However, the Preliminary objection was withdrawn by the Respondent on 22nd July, 2015 and subsequently the Court ordered the parties under Rule 13 (1) of the Basic Rights and Duties Enforcement (Practice and Pocedure) Rules, 2014 to file written submissions.

In his Written submission the Petitioner unusually pleaded inadvertence on his part for having wrongly referred to Article 13 (6) (b) of the URT Constitution as the enabling provision instead of Article 13 (6) (a) of the same. He termed this a 'clerical error' and requested the Court to substitute Article 13 (6) (a) for Article 13 (6) (b) wherever it appeared in the Originating Summons. This prayer was objected to by Mr. Abubakari Mrisha Senior State Attorney in his submission who called the approach taken by the Petitioner to amend an error in the pleading at the submission stage as "a strange context of procedure" and "an afterthought." He vehemently argued that the Petitioner was barred from making any amendments to the pleadings at the submission stage and that any attempt to do so was an abuse of the process of the Court. It is because of these legal arguments by both sides that we think this matter should be disposed of first before we go into the merits of the Petition. We need to satisfy ourselves on this aspect whether the Court has been properly moved now that the Petitioner admits to have cited the wrong provision of the law.

Non-citation and wrong citation of enabling provisions of law and the effect thereof have been subject of consideration by both the High Court and Court of Appeal. There are two schools of thoughts on this subject.

One school of thought subscribes to the view that wrong citation of the law, section, sub-sections and/or paragraphs of the law or non-citation of the law will not move the Court to do what it is asked and renders the application incompetent. See some of the Court of Appeal decisions in the cases of *Edward Bachwa & 3 Others v. The Attorney general & Another, Civil Application No. 128 of 2006 (unreported); Chama Cha Walimu Tanzania v. the Attorney General, [2008] 2 EA 57; N.B.C v. Sadrudin Meghji, Civil Application No. 20 of 1997 (unreported).*

The second school of thought emphasizes on the need for the Court to do substantive justice instead of relying on due technicalities in cases of wrong citation or non-citation of the enabling provision of the law by the party to the suit. See the cases of *Samson Ngw'alida v. The Commissioner General v. The Commissioner General Tanzania Revenue Authority, Civil Appeal No. 86 of 2008 (unreported); Elizabeth Michael @ Lulu v. Republic, Miscellaneous Criminal Application No. 46 of 2012 (unreported).*

In neither of the cases where the said two schools of thoughts developed were issues of human rights under consideration, nor were any of the said cases concerned with the enforcement of human rights under the Basic Rights Enforcement Act, Cap 3 (R.E 2002). All these cases were ordinary civil suits/applications or Criminal Applications filed under the Civil Procedure Act, Cap 33 (R.E 2002) or the Criminal Procedure Act, Cap 20 (2002).

We associate ourselves with the second school of thought that the Court should endeavor to do substantive justice instead of relying on undue technicalities. This is even more so in cases of enforcement of human rights under Cap 3. We will explain.

It is a settled principle of law that Constitution provisions and cases for enforcement of constitutional basic rights have to be given both purposive and generous interpretation as opposed to strict and legalistic meaning. The Court should consider the purpose behind a piece of human rights legislation when interpreting its meaning. The Court is tasked to put itself in the shoes of the draftsman and importantly to consider what statutory objective he had. By enacting the Basic Rights Enforcement Act, Cap 3 (R.E 2002) the Parliament intended to give meaning and effect to the enshrinement of the Bill of Rights in the URT Constitution by providing the procedure for enforcement of constitutional basic rights and duties. That was the purpose of the Parliament and the purposive approach being an approach to statutory and constitutional interpretation is always in conflict with legalistic approach which if applied may defeat the purpose for which basic rights and duties were enshrined in the URT Constitution.

We find that wrong citation of the enabling provision by the Petitioner is no longer fatal, this being the case that should be given generous approach. The same position was taken by the Court of Appeal (Kileo, JA) in the case of *Samson Ngw'alida v. The Commissioner General v. The Commissioner General Tanzania Revenue Authority, Civil Appeal No. 86 of 2008 (unreported)* where at page 2 of the Judgment the Court, had this to say:

> *"We did not consider the non-citation of the relevant provision in the Notice of Preliminary Objection to be something that could deter the delivery of substantial justice"*

While considering the preliminary objection by the Respondent on the effect of wrong citation in the case of *Elizabeth Michael @ Lulu v. Republic,*

Miscellaneous Criminal Application No. 46 of 2012 (unreported), Fauz Twaib, J, at page 4 of the judgment observed that:

> *"...wrong citation of enabling provisions of the law is no longer fatal where justice so requires, and that the Courts should endeavor to do justice rather than allow themselves to be bogged down by technicalities of procedure".*

We find that the case before us is one where justice so requires and that to hold otherwise is to make the enforcement of the basic rights and duties under the URT Constitution difficult, thereby defeating the whole purpose of having these rights enshrined in the URT Constitution. In other jurisdiction such as India there is no strict procedural requirement in filing cases for enforcement of human rights such that the court in *suo mottu* can take a newspaper cutting where human rights violations are reported and proactively engage the infringing party by serving him with the notice. For Tanzania, the law has been specifically enacted to provide for the procedure to be followed as people enforce their basic rights under the URT Constitution. The procedure should be there to guide the process but should not be an inhibiting factor to the enforcement of the basic rights. We find that wrong citation of the enabling law by the Petitioner is not fatal as right from the beginning the parties knew the issue under consideration and the error can be corrected without prejudicing anybody nor can it occasion any injustice to the other party.

After settling the preliminary matter we now turn to the substance of the Petition. The Petitioner's submission attempted to build his case by answering the major three issues namely:

1. *Whether the provisions of section 148 (4) of the Criminal Procedure Act deny a suspect under police custody or an accused person remanded pending trial the right to be heard, contrary to Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977*

2. *Whether the provisions of section 148 (4) of the Criminal Procedure Act deny a suspect under police custody or an accused person remanded pending trial the right to challenge the DPP decision restricting their liberty, contrary to Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977*
3. *What reliefs are the parties entitled to.*

It was the Petitioner's submission that the right of the accused person to defend himself is the constitutional right provided under Article 13 (6) (a) of the Constitution of the United Republic of Tanzania (the URT Constitution). To support his argument, the Petitioner cited the cases of *Dishon John Mtaita v. DPP, Criminal Case No. 132/2004, Court of Appeal of Tanzania at Arusha* (Unreported); *Mbeya-Rukwa Auto Parts & Transport Limited v. Jestina George Mwakyoma. Civil Appeal No. 45 of 2000* (unreported). The Petitioner's concern was the discretionary powers vested in the DPP by Section 148 (4) of the CPA to deny bail to the accused persons by just filing a certificate without substantiating the basis of his decision to deny them bail. According to the Petitioner this is tantamount to taking away the accused person's right to defend himself in relation to the objection by the DPP against bail application and in effect the accused person is virtually condemned unheard at that level thereby violating Article 13 (6) (a) of the URT Constitution. He cited the case of *Daudi Pete v. The Republic, Miscellaneous Criminal Cause No. 89 of 1989* (unreported) to that effect.

On issue number two, the Petitioner's argument was the same with his previous submission on the first issue that section 148 (4) of the CPA denied the suspect under police custody as well as the accused person

pending trial the right to challenge the DPP's decision restricting their liberty thereby violating Article 13 (6) (a) of the URT Constitution. He reiterated the Court of Appeal decision in *Attorney General v. Lohay Akonaay and Joseph Lohay [1995] TLR 80* that any provision which denies remedy to the accused person contrary to Article 13 (6) (a) of the URT Constitution should be declared unconstitutional.

The last segment of the Petitioner's submission related to his prayer for the reliefs that he was entitled to. To a large extent the Petitioner attempted to plead with the Court not to award the costs to either party irrespective of who wins the case. The only reason given for this prayer was that the suit before the Court was of public interest litigation nature. He cited a litany of authority to that effect.

In his written submission, Mr. Abubakari Mrisha the learned Senior State Attorney agreed on the framed issues but went on to oppose the petition vehemently. He requested the Court to read in unison and not in isolation both the rights and duties under Chapter III of the URT Constitution as complementing each other and that, rights and duties of the individual are limited by the rights and duties of the society as per Article 30 (1) of the Constitution. The learned State Attorney termed the attempt by the Petitioner to amend the pleadings at the submission level as "strange" and abuse of the Court process.

It was the view of the learned State Attorney that although the DPP has wide powers under Section 148 (4) of the CPA, the exercise of such powers is limited by the existence of one of the two conditions namely, if the safety or interest of the Republic would be prejudiced. Contrary to that and if the DPP acts in *mala fide* he would be contravening Article 90 (4) of the URT Constitution. According to the learned State Attorney the

Parliament may under Article 30 (2) of the URT Constitution enact laws such as Section 148 (4) of the CPA which is derogative or restrictive of the Basic Rights, Freedoms and Duties of human beings provided that it serves a legitimate purpose or aim to protect the society. To support his argument he cited the cases of *Director of Public Prosecutions v. Daudi Pete [1993] TLR 22 ; Kukutia Ole Pumbun and Another v. Attorney General and Another [1993] TLR 159* and *Julius Ishengoma Francis Ndyanabo v.* Attorney General [2004] TLR 38.

On the second issue Mr. Abubakari Mrisha submitted that a person who is denied bail by DPP under Article 148 (4) of the CPA can appeal and challenge that decision under Article 13 (6) (a) of the URT Constitution if that decision was made contrary to Article 59B (4) of the URT Constitution or contravened the provisions of section 8 of the National Prosecution Services Act, 2008. He may also challenge that DPP's act in the High Court by way of Judicial Review under Section 17 of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap 310 (R.E 2002).

Mr. Abubakari Mrisha did not spend much time on the third issue but he emphasized that the award of costs should remain in the discretion of the Court as required under section 18 (1) of the Basic Rights and Duties Enforcement (Practice and Procedure) Rules, 2014.

For ease of reference and appreciation of the matter under contention We produce here below the impugned section 148 (4) of the CPA:

> *148. (1) ....*
> *(2) ....*
> *(3) ....*
> *(4) Notwithstanding anything in this section contained, no police officer or court shall, after a person is arrested and while he*

is awaiting trial or appeal, admit that person to bail, if the Director of Public Prosecutions certifies in writing that it is likely that the safety or interests of the Republic would thereby be prejudiced; and a certificate issued by the Director of Public Prosecutions under this section shall take effect from the date it is filed in court or notified to the officer in charge of a police station and shall remain in effect until the proceedings concerned are concluded or the Director of Public Prosecutions withdraws it. (emphasis added)

(5) ....

For the same reasons as above we produce below Article 13 (6) of the URT Constitution alleged to have been violated by the Respondent.

*13. **Equality before the law***

(5) ....

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

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

(b) ....

Section 148 of the CPA has been subject of various judicial pronouncements when bail was denied or objected to at the Magistrate Court, High Court and Court of Appeal levels. However, the issue of constitutionality of section 148 (4) of the CPA in particular is being tested for the first time much as the arguments are not new neither are they different from what has always been presented before to oppose or to support the impugned law.

Personal freedom is the right of every citizen in Tanzania as prescribed by Article 15 of the URT Constitution. As such every person has the right to freedom and to live as a free person. Arrests, imprisonments, confinements, detention and deportation are forms of interferences with personal freedom. This right cannot be arbitrarily taken away by any one **unless a due process is followed including fair hearing**. Inevitably, the courts of law have therefore

become the guardian of the citizens' liberty. Determination by the court or other agency whether a person's liberty should be curtailed is the hearing envisaged under Article 13 (6) (a) of the URT Constitution to be a fair hearing. Undoubtedly a person under police custody has his freedom curtailed such that consideration by the court or other agency of his request for bail has to be conducted in a manner that accords him a fair hearing. Subscribing to this view which we associate ourselves with, was Mwalusanya, J (as he then was) in his ruling for an application for bail pending trial in the case of ***Daudi Pete v. The United Republic of Tanzania, High Court of Tanzania in Mwanza, Miscellaneous Criminal Cause No. 80 of 1989 (unreported)*** when he said:

> *"... for any hearing to be worthy it, the accused person should be given an opportunity of controverting any statement or accusations or reports that are prejudicial to him; and that includes the right to challenge any smug presumption that the law in question is constitutional or not."*

A fair hearing in criminal justice is one that offers equal opportunity to both sides, prosecution and defence to present their respective parts of the story. It means the accused person or suspect for that matter is given an opportunity to present evidence to support his case among others the same way the prosecution side is treated. The right of being heard is the mother of fair hearing before any decision can be taken in criminal justice proceedings. However, the way Section 148 (4) of the CPA is coached there is no room for the accused person or remanded person to be heard before the Court or police officer can decide whether to admit such person to bail or otherwise. As a matter of fact neither the Police officer under whose custody is the suspect nor the court before which the accused person is arraigned can consider bail application if the DPP files a certificate to the effect that the safety or interests of the Republic would be prejudiced by the suspect's admission to bail. It is the constitutionality of this law that the Court is required to determine in this particular case.

Section 148 (4) of the CPA does not accord the accused person or a person under police custody the required fair hearing or any hearing at all when the issue of bail is to be considered by the Court or by the police officer and the DPP files the certificate of objection. By so doing the impugned law section 148 (4) of the CPA deprives the accused person or the suspect of his constitutional right for fair hearing thereby contravening the Constitution. When considering the issue of condemning the accused person unheard, the Court of Appeal, Rutakangwa JA, in *Dishon John Mtaita v. DPP, Criminal Case No. 132 of 2004.* observed that it was the appellant's constitutional right to be heard. The Court at page 9 of the typed judgment said:

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

Indeed hearing both sides as a component of fair hearing is one of the common law principles of natural justice. To underscore this the Court of Appeal in *Dishon John Mtaita (Supra)* reiterated its firm position on this issue earlier given in *Mbeya-Rukwa Auto Parts & Transport Limited v. Jestina George Mwakyoma, Civil Appeal No 45 of 2000 (unreported)* where it held that:

> *"In this country natural justice is not merely a principle of common law; it has become* ***a fundamental constitutional right****. Article 13 (6) (a) includes the right to be heard amongst the attributes of the equality before the law,"* (emphasis added)

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

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

It is true as observed by Msumi, J in *R. v Peregrin Mrope, Criminal case No. 43 of 1989, High Court of Tanzania at Dar es Salaam (unreported)* the right of an accused person to be released on bail is not absolute but could be enjoyed with necessary qualifications. The Court of Appeal in *Julius Ishengoma Francis Ndyanabo v. Attorney General (2004) TLR* at page 38 agrees with this view provided such limitations must not be arbitrary. By referring to necessary qualifications, we think Msumi, J (as he then was) had in mind the law that is validated by the derogation clauses. In our considered opinion, the unquestionable but objectionable DPP's certificate of objection for bail does not meet the requirements of the necessary qualifications referred to by Msumi, J (as he then was) in the above cited case for it does not allow the accused person to argue his application for bail at a stroke of the DPP's certificate of objection. Further, for the same reasons stated above, the restrictions put on liberty by Section 148 (4) of the CPA cannot enable it pass a proportionality test put by the Court of Appeal in *DPP v. Daudi Pete, Criminal Appeal No. 28 of 1990, Court of Appeal of Tanzania at Dar es Salaam.* The Court of Appeal articulated the situation where a law that violates the rights guaranteed under the Constitution can be saved by a derogation clause. As observed by J. E. Ruhangisa in his work *Human Rights in Tanzania: The Role of the Judiciary* at page 176:

> *"In considering bail applications the court hears both sides and finally grants or rejects the application after weighing the submissions. It means bail could be refused by the court but after the accused person had been given chance to reply to the prosecution's objections. All in all, such prosecution objections should be strong enough to warrant the court's early pronouncement restricting the liberty of the accused person."*

Section 148 (4) of the CPA lacks the above qualities. It takes away the court's power to consider bail application and grant or refuse it after hearing and weighing the arguments by two sides to determine the one that outweighs the

other. It takes wholesale the wish of the DPP who incidentally is also a party (complainant/prosecutor) in the case before the Court. The constitutional mandate of the Court as a neutral arbiter is totally washed away at bail application level or suspended at the instance of the DPP's certificate which is the outcome of his unilateral decision and for the reasons only known to him alone. Undoubtedly the playground is not leveled at all. This is not safe for the accused person in a country cherishing rule of law as there are no safeguards against possible abuse or arbitrary exercise of powers. In his written reply to the written submission in support of the petition, Mr. Abubakari Mrisha learned Senior State Attorney attempted to convince the court that there are safeguards against possible abuse of powers by the DPP as he must do so only if the safety or interest of the Republic would thereby be prejudiced. He goes on to say in his written submission:

> *"It is obvious that if the Director of Public Prosecutions acted malafides, this would not be in the safety of the suspect, it would not be in the interest of the Republic and above all it would be an abuse of legal process. Under section 90 (4) of the Constitution it is obligatory on the Director of Public Prosecutions to have regard to the public interest, the interests of justice and the need to prevent abuse of the legal process, when exercising his powers under the Act. The Director of Public Prosecutions is therefore bound by the Constitution to pay special regard to Article 90 (4) whenever he decides to exercise his power under section 148 (4) of the Criminal procedure Act. To that effect, he is compelled by the Act to certify in writing the reasons of denying are for the safety or interests of the Republic." [Sic]*

With all due respect to the submission by the learned Senior State Attorney, we could not find Section 90 (4) of the Constitution. If reference to section 90 (4) of the Constitution intended to be a reference to Article 90 (4) of the Constitution, then the whole submission on this issue is misplaced. Article 90 (4) of the Constitution has nothing to do with the powers of the DPP but it is about the Summoning and dissolution of Parliament by the President. We do not think this Article is in any way connected or related to the fact in issue

The argument by the learned Senior State Attorney that Section 148 (4) of the CPA is saved by the provisions of Article 30 (2) of the URT Constitution and that Parliament may enact laws which under certain circumstances may be derogative or restrictive of the Basic Rights provided they serve a legitimate purpose and aim to protect the society, is similar to the argument advanced by Mr. Muna Principal State Attorney in *Daudi Pete v. R (Supra).* Before making a detailed expose against it, which we will not reproduce but we fully associate ourselves with, Mwalusanya, J (as he then was) called this "a naïve argument which somewhat displays a chauvinist attitude to the problem". There is a long time established principle that Parliament is not to be presumed to act unfairly. The taking away by Parliament through section 148 (4) of the CPA, of the accused person's right to be heard, is a clear manifestation of Parliament acting unfairly.

By his own admission, the learned Senior State Attorney appreciates in the quotation above the fact that if the DPP acted in bad faith (*mala fide),* this would not be in the safety of the suspect, it would not be in the interest of the Republic but an abuse of legal process. It is this particular possibility and the lack of safeguards against possible abuse of legal process by the DPP that makes section 148 (4) subject of question as to its constitutionality. On this position the Court of Appeal of Appeal in *Kukutia Ole Pumbun and Another v. Attorney general and Another (1993) TLR 159* at page 166 had this to say:

> *"...a law which seeks to limit the rights of the individual on ground of public interests will have special requirements / first such law must be lawful in the sense that it is not arbitrary. It should make adequate safeguards against arbitrary decision and provide effective control against abuse by those in authority when using the law."*

The law as it is, even if the DPP abuses the powers vested in him by filing the certificate objecting to the granting of bail to the accused person, the said accused person has no platform to stand on and challenge it by revealing the abuses if any.

While we appreciate the submission on the validation by the derogation clause in Article 30 (2) of the URT Constitution, of the otherwise unconstitutional law and the holding in *DPP v. Daudi Pete* (Supra) that because of the coexistence between the basic rights of the individual and the collective rights of the society, it is common to find limitations to the basic rights of individual in every society, we wish to emphasize that the role of the court as an arbiter has not been taken away by the Constitution. In this situation, it is the Court after hearing both sides that takes into account and strikes a balance between the interests of the individual and those of the society of which the individual is the component.

It is our strong view that presently the Court cannot perform this noble role for it has been taken away by Section 148 (4) of the CPA which vests it in the DPP what is otherwise judicial role to grant or not to grant bail. This is not safe for the citizens in a State that cherish rule of law as the DPP is a party (complainant/ prosecutor) just as is the accused person in a criminal case before the court. Allowing one party to the dispute before the court (in this case the DPP) to exercise the judicial function, as Section 148 (4) of the CPA does, is to make him a stronger party in a "contest" while the other side remains looking weaker prematurely. This is prejudicial as the playground for the bout is not leveled. Section 148 (4) of the CPA makes the DPP a judge in his own cause contrary to the principle of natural justice. In our considered opinion, it is irrational to justify in any way the limitations of basic rights in the sweeping and controversial expressions like those of Section 148 (4) of the CPA.

It was also submitted by Mr. Abubakari Mrisha Senior State Attorney that under Article 13 (6) (a) of the URT Constitution a person who thinks that his right was prejudiced by the Court decision or by that of the agency can appeal or find other legal remedies against the decision of the court or agency. In this case he advised the person aggrieved by the decision of DPP to make use of other remedies of *mandamus and certiorari* to vindicate his rights taken away by the DPP's certificate of objection for bail. We produce here below Article 13

(6) (a) of the URT Constitution referred to above, for ease of understanding of its import.

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

The Article is speaking for itself in a loud and clear voice. According to this provision of the URT Constitution a person is entitled to a fair hearing and also to a right of appeal or other legal remedy against the impugned decision. The Constitution does not in any way state or suggest that appeals and other remedies are substitutes or alternatives to fair hearing as the learned State Attorney would like this Court to believe. The conjunctive **"and"** in the quoted provision of the Constitution means that in addition to a fair hearing the aggrieved person should have a right to appeal or seek other remedy. As sufficiently discussed denying the accused person the right to present and be heard on his application for bail or to challenge the certificate by the DPP, constitutes unfair hearing thereby contravening Article 13 (6) (a) of the URT Constitution. It would be a grave misconception and absurd to hold that simply because the accused person has more options other than Section 148 (4) of the CPA to pursue his rights, then that makes section 148 (4) of the CPA constitutional.

Article 59B of the URT Constitution creates the Office of the DPP but it does not provide for the manner in which the DPP shall exercise his powers nor does it prescribe what to do should the DPP abuse his powers or fails to take into consideration what the Constitution prescribes for him. The details on how to exercise his powers are prescribed in the National Prosecution Service Act, 2008, the law providing for the principles to guide the DPP during the discharge of his duties. It is stated under Section 8 of the National Prosecution Services Act, 2008 that:

> *"In the exercise of powers and performance of the powers of his functions, the Director shall observe the following principles:*
>
> *(a) The need to do justice;*

(b) The need to prevent abuse of legal process; and
(c) The public interest

Basing on the above legal principles, Mr Abubakari Mrisha the learned Senior State Attorney was of the view that if the DPP in exercise of his powers under Section 148 (4) of the CPA acts contrary to the prescribed principles, the aggrieved person can challenge his decision by a Judicial Review of administrative action under Cap 310. We find it difficult to agree with the learned Senior State Attorney's line of thinking because the matter before this court is to examine the constitutionality of Section 148 (4) of the CPA. The fact that the DPD acts in exercise of his powers under Section 148 (4) can be challenged through judicial review of the administrative action, does not by itself make that law constitutional as long as it has elements which contravene the URT Constitution as highlighted earlier. Indeed section 148 (4) of the CPA strictly forbids a suspect under police custody or an accused person remanded to challenge the DPP's decision restricting their liberty. Actions which are brought under section 17 of Cap 310 concerns administrative actions that result from irregularities by a public officer or tribunal or a subordinate court. In the case of section 148 (4) of the CPA, the DPP is by law allowed to file a certificate of objection to bail with final and conclusive effect over the issue. What is being questioned here is the law that gives finality of the DPP's certificate of objection to bail over the accused person's application for bail or of a person under police custody.

Further, the way section 148 of the CPA is coached, it is enough for the DPP to merely state in writing that it is likely that the safety or interests of the Republic would thereby be prejudiced, and then the Court's hands will be closed. It is not anywhere stated as a requirement that the DPP must assign reasons for him to assume or think that the safety or interests of the Republic would be prejudiced. As it is, this is a dangerous and sweeping statement which can be abused if safeguards are not provided.

Issue number two therefore is also answered in affirmative that the provisions of section 148 (4) of the CPA deny a suspect under police custody or an accused person remanded pending trial the right to challenge the DPP decision restricting their liberty, contrary to Article 13 (6) (a) of the URT Constitution.

We don't intend to dwell so much on the submission by the Petitioner concerning the award of costs as a relief to the winning party since we don't intend to tamper with the common law tradition that costs follow the event, meaning that the losing party bears the costs of litigation incurred by the winning party who was either dragged to court or forced to go to court by the losing party. This common law principle operates under the discretionary powers of the court taking into account the circumstances of the case itself. This is in agreement with section 18 (1) of the Basic Rights and Duties Enforcement (Practice and Procedure) Rules, 2014 as rightly submitted by Mr. Abubakari Mrisha the learned Senior State Attorney that "the award of costs shall be in the discretion of the Court". For the cases of public interest litigation nature, the court barely awards costs to either side. We take the Petitioner's submission on this to be a reminder to the Court about the need to consider the good faith of the proceedings, public interests and the Court's role in advancing human rights in the United Republic of Tanzania. At this stage we can only assure the Petitioner that the Court will as it has always done, take all these into account when it comes to making a verdict on costs.

We take the conspicuous and loud silence of the Petitioner on prayer (c) of the Originating Summons to mean an implied abandonment of the same as it shows nowhere on court record that it was withdrawn.

It is against the foregoing reasons that the petition is allowed. The provisions of Section 148 (4) of the Criminal Procedure Act, Cap 20 (R.E 2002) are hereby declared unconstitutional for offending the provisions of Article 13 (6) (a) of the Constitution of the United Republic of Tanzania of 1977 as amended. It is

ordered that a suspect under police custody or an accused person should be given the right to defend themselves before their right to liberty is curtailed by the Director of Public Prosecution's objection to grant them bail.

We make no order as to costs since neither the Petitioner nor the Respondent has personal interest in the outcome of the case but the case was filed for the interest of the public. It was just enough for the Petitioner to show that he was presenting a *bona fide* claim for public interest. He succeeded to show that in the pleadings to our satisfaction and we find that it was a public interest litigation case.

It is so ordered.

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S. A. LILA, JK
22/12/2015

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S. S. S. KIHIO, J
22/12/2015

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J. E. RUHANGISA, J
22/12/2015

Court: Ruling delivered in Chambers this 22nd day of December, 2015 in the presence of the applicant in person and Mr. Abubakari Mrisha the learned Senior State Attorney for the Respondent.