

**IN THE HIGH COURT OF TANZANIA
(MAIN REGISTRY)**

AT DAR ES SALAAM

(CORAM: MUNISI, MASOUD, AND KULITA, JJJ.)

MISCELLANEOUS CIVIL CAUSE NO. 27 OF 2017

JEBRA KAMBOLE..... PETITIONER

VERSUS

THE ATTORNEY GENERAL.....RESPONDENT

RULING

Masoud, J.

The petitioner challenges the constitutionality of the provisions of sections 7 and 15 of the Regional Administration Act, cap. 97 R.E 2002 which according to him confer powers in District and Regional Commissioners to arrest and detain any person for forty eight (48) hours with options to take or not to take that person to the court. In this respect, the petitioner alleges as follow. That, the impugned provisions contravene provisions of the Constitution of the United Republic of Tanzania as amended from time to time. That, the provisions violate the fundamental rights and freedoms of the people, suppress the rule of law and the

due process of the law, and encourages abuse of power and authority. That, the Government and the Parliament breached its obligation under articles 26(1) and 64(5) of the Constitution by failing to observe the Constitution and enacting the provisions which contravene the provisions of the Constitution respectively.

The petition was brought by filing a twelve (12) paragraph petition duly verified by Jebra Kambole of his own knowledge. In addition to making the foregoing allegations, the petitioner provided factual background relating to the enactment of the Regional Administration Act (supra) which comprises the impugned provisions; the constitutional framework for the implementation of the above Act; and the allegation as to how the impugned provisions violate the provisions of articles 13(1),(2),(4),(6)(a)(d)&(e), 15(1) and 29(1),(2) of the Constitution. In particular, the petitioner alleged that the impugned provisions confer coercive police powers of arrest and detention to the District and Regional Commissioners; which powers attract arrest, detention and harassment of individuals driven by discriminative and political motives, personal grudges and desire to harass opponents. The relevant paragraph providing for such allegations read thus”

9. That, sections 7 and 15 of the Regional Administration Act which are similar in substance;

a) Attracts politically and discrimination motivated arrests, detentions and harassment;

b) Encourages and attracts arrests and detention based on personal grudges, harassment of opponents;

c) May lead to breach of peace, law and order.

Based on the foregoing allegations, the petitioner invited the court to make the following declaratory orders: -

- a) *Declaratory order that the government, (executive, judiciary and the parliament) has constitutional duty and mandate to observe, protect and preserve the rights and freedoms guaranteed, enshrined, guarded and/or protected by the provisions of the Constitution of the United Republic of Tanzania of 1977.*
- b) *Declaratory order that the provisions of section 7 and 15 of the Regional Administration Act...are unconstitutional for contravening the provisions of Article 13(1),(2),(4),(6),(a),(d), and (e); article 15(1) and Article 29(1) and (2) of the Constitution.....are unconstitutional, null and void and same sections be expunged from the statute book.*
- c) *Each party to bear its own costs.*
- d) *Any other or further order which the Honourable Court shall deem fit to grant.*

The petition was opposed by the respondent who filed a reply to the petition verified by Mr Kabyemera Lushagara, learned State Attorney. Essentially, the respondent disputed all the allegations on substantive grounds and put the petitioner to strict proof thereof. In particular terms, the respondent made the following factual statements among others. The Act was assented on 12/06/1997 and became operational on 28/06/1997. The Act does not contravene the provisions of the Constitution. Any charge levelled against an individual is

inquired into, tried and dealt with in accordance with the law. Matters relating to bail and detention under the impugned Act are governed by the Criminal Procedure Act, cap. 20 R.E 2002. Sections 7 and 15 of the Act provide for the impugned powers within strict framework of the objects of the Act.

It was further stated in the reply to the petition that the Act provides for mandatory requirement of taking the arrested person to a magistrate, failure of which lead to the restoration of the person's freedom upon the expiry of the forty eight (48) hours. The provisions only relate to matters of breach of peace and public tranquility where the breach is not preventable by any other means other than the immediate detention of the person responsible for the breach. The provisions also stipulate steps that follow after the arrest and detention, which steps are meant to protect the right to liberty of the concerned person as provided under article 15 of the Constitution. The sections provide for the right to protection of the law and are not open for abuse. In all, the provisions do not violate the state provisions of the Constitution as alleged by the Petitioner. The petition should therefore be dismissed with costs.

The Petitioner appeared in court represented by Mr Mpale Mpoki and Mr Daimu Halfani, both learned counsel. The respondent was represented by Ms Alesia Mbuya, learned Principal State Attorney. When the pleadings were complete and the matter came before us, the counsel for the petitioner urged the court to have the

matter disposed of by way of written submissions. By consensus of the counsel for both parties, the matter was ordered to be disposed of by way of filing written submissions. Indeed, counsel for both parties complied with the filing schedule set by the court, having respectively filed detailed written submissions in chief and in reply which we thoughtfully examined in relation to the pleadings before us.

Informed by the pleadings, we were of a considered opinion that the issues for our consideration and determination pursuant to section 8(1)(a)&(b) of the Basic Rights and Duties Enforcement Act, cap. 3 R.E 2002 are as follow. Firstly, whether the impugned provisions of the Act attract arrests and detentions which are driven by discriminative motives, political motives, personal grudges, and harassment of opponents and are therefore likely to lead to breach of peace. Secondly, whether the impugned provisions violate the fundamental rights and freedoms of the people, suppress the rule of law and the due process of the law guaranteed under the Constitution, and encourages abuse of power and authority contrary to the provisions of the Constitution. And thirdly, whether the impugned provisions of the Act violate the specified provisions of the Constitution.

Our perusal of the written submissions against the backdrop of the pleadings and the above issues made it clear that the counsel for both parties have extensively dealt with relevant principles for determination of any constitutional petition like the present. A good number of authorities were relied upon. The learned State

Attorney did not dispute those principles which we however need not to reproduce them here as they are of common knowledge and we think not all of them are necessarily relevant in determining the issues before us. We shall not also endeavour to reproduce the other part of the submissions of both counsel which mirror the petitioner's allegation as they are not relevant for reasons which will become obvious subsequently.

Apart from submitting on the principles, the petitioner submitted generally that the powers conferred to the District and Regional Commissioner to arrest and detain a person for forty eight (48) hours under the impugned provisions violate the rights guaranteed under the above mentioned provisions of the Constitution. The submissions on this point expounded on the allegations in the petition and added that the impugned provisions make the District and Regional Commissioners, not only complainants, but also arresting officers, detention officers, investigators, and prosecutors. In so doing, they also deny arrested persons the right to be heard against the subjective decisions of arrest and detention.

Towards the end of the submissions in chief, the petitioner's counsel submitted on the following aspects of the petition. The abuse of the powers and authority under the impugned provisions citing **Hamisi Masisi and 6 Others vs Republic** [1985] TLR 24; and the discriminatory nature of the impugned provisions citing such authorities like **Legal and Human Rights Centre and Others vs Attorney**

General [2006] 1 EA 141 and **Julius Ishengoma Francis Ndyanabo vs Attorney**

General [2004] TLR 14. We were than invited to grant the prayers.

On the contrary, the learned State Attorney insisted that the impugned provisions do not violate any of those rights shown in the petition. According to the learned State Attorney, the provisions only empower the relevant officials to cause the arrest of any person who commits or has committed any offence as prescribed under the said provisions or whenever it is necessary in order to maintain law and order or when it is reasonably believed that any person is likely to commit a breach of peace or disturb the tranquility or anything that occasion breach of peace. It was also insisted further that the powers of causing such arrest are only applied in accordance with objects and purposes of the Act which is maintenance of law and order. It was in this respect argued that the objects and purposes of the Act is reflected in sections 5(1)&(2) and 14(1)&(2) of the Act. The said sections relate to the responsibilities of the District Commissioners and Regional Commissioners to secure maintenance of law and order in relevant districts and regions.

We spent time to examine the impugned provisions in relation to the pleadings and submissions of both counsel. In so doing, our attention was drawn to the following features that characterize the provisions. **One**, the provisions confer powers to the District/Regional Commissioner of causing to be arrested any person. **Two**, the provisions set conditions upon which the said commissioners may cause to be

arrested any person. Such conditions include, commission of an offence by a person in the presence of the Commissioner; knowledge on the part of the commissioner of the commission of an offence by a person; reason to believe that a person is likely to commit a breach of the peace or disturb the public tranquility, or to do any act that may probably occasion a breach of the peace or disturb the public. And **three**, the offence in respect of which a person is arrested must be one for which a person may be arrested and tried.

In addition to the foregoing elements, the impugned provisions also set out procedural requirements for dealing with an arrested person under the impugned provisions. These are as follow. **First**, criminal proceedings against a person arrested must be commenced before a magistrate within not more than forty-eight hours after he is taken into custody. **Second**, if a person arrested is not brought before a magistrate for criminal prosecution within forty-eight hours after he was taken into custody, he must be set free upon the expiration of that period. **Third**, once a person is set free after expiration of the period of forty eight hours, he must not again be arrested by or under an order of the Commissioner for the same cause. **Fourth**, the Commissioner must, at the time of ordering arrest of a person, record in writing reasons for ordering arrest of that person and a copy of his recorded reasons must be delivered to the magistrate when the person is brought before the

magistrate. **Fifth**, a magistrate is powered to order the release and restoration to freedom of any person brought before him pursuant to the impugned provisions without the reasons of the arrest being furnished to him in writing by or on behalf of the relevant District/Regional Commissioner. **Sixth**, a magistrate before whom an arrested person is arraigned under the impugned provisions has a discretion to detain that person in custody until the completion of the inquiry prescribed under section 79 of the Criminal Procedure Act, cap. 20 R.E 2002 without prejudice to the power of the court to grant bail. **Seventh**, every District or Regional Commissioner and every police officer or other person carrying out the orders of District Commissioner or Regional Commissioner under the impugned sections must execute the order of the court releasing, and restoring the freedom of, an arrested person and failure or neglect to execute the order constitutes an offence of contempt of court to be dealt with under section 114 of the Penal Code. And **eighth**, where a District Commissioner or Regional Commissioner exercises the powers conferred on him by the impugned sections in abuse of the authority of his office, he is guilty of an offence and may be proceeded against in accordance with section 96 of the Penal Code, cap. 16 R.E 2002. This applies also to any other person who was involved in procuring the District Commissioner or Regional Commissioner to exercise the power in abuse of authority,

We have no doubt that the above elements characterize the substance of the provisions of the Act which the petitioner allege that they offend the relevant provisions of the Constitution specified herein above in so far as they violate the fundamental rights and freedoms of the people, suppress the rule of law and the due process of the law, and encourages abuse of power and authority. We also take into account the function of the District Commissioner and Regional Commissioner to maintain law and order in their relevant Districts and Regions pursuant to sections 5(1)&(2) and 14(1)&(2) of the Regional Administration Act (supra). The details which were have provided above suffices. We undertake not to reproduce the relevant provisions here.

We are aware of a settled principle of law that breach of the Constitution is such a grave and serious matter that cannot be established by mere inference but beyond reasonable doubt. We are equally aware of the principle of presumption of constitutionality of legislation or a statutory provision, which principle assigns onus of proof upon those who challenge the constitutionality of legislation or a statutory provision. We do not entertain any doubt that the above principles call for evidence from the petitioner to prove the alleged complaints of violation of the constitution.

The petitioner indicated that he preferred the petition under articles 26(2) and 30(3) of the Constitution and section 4 of the Basic Rights and Duties Enforcement Act, Cap. 3 R.E 2002 among other provisions. The petitioner is by virtue of article 30(3) of the Constitution which entitles a person who alleges that a basic right is being or is likely to be contravened in relation to him to institute proceedings for relief in the High Court, as well as by virtue of article 26(2) of the Constitution which entitles every person to institute proceedings for the protection of the Constitution and of legality; to provide a sufficient proof on how the alleged rights are being violated or are likely to be infringed. No wonder that section 4 of the Basic Rights and Duties Enforcement Act (supra) requires any allegation of violation of the Constitution to be proved by evidence, be it by affidavit in addition to or in substitution for oral evidence.

We asked ourselves whether the record before us reveals any evidence that answers the above issues in the affirmative, and if so whether the reliefs sought can in view of the evidence on the record be granted. The allegations raised in the petition and on the basis of which the petitioner challenges the constitutionality of the impugned provisions were reflected mainly in paragraph 9 of the petition. We reproduced the relevant paragraph herein above for ease of reference. We are of a firm view that the allegations need to be proved by evidence be it by affidavit in addition to or in substitution of oral evidence. It is evident that there was neither

evidence by affidavit nor oral evidence from the petitioner in a bid to provide proof of the allegation that the impugned provisions violate the Constitution as alleged. What is before us is just unproved averments of the petitioner and arguments of the counsel for the petition in relation to the petition. In view of the record before us, it is clear that we have been denied materials on basis of which we could have formed opinion and tell whether this is the appropriate and momentous occasion for invoking the Constitution and knock down the impugned provisions or whether the allegations raised only reflect matters which can easily be taken up by administration initiative.

We are of the above finding because whereas the petitioner alleged that the impugned provisions infringes basic rights and violates the Constitution, the respondents opposed the allegations and stated that the provisions do not take away the rights but only empowers the District and Regional Commissioners to step in for preserving peace and order whenever for example any person is likely to cause a breach of the peace. Unlike the petitioner, the respondent is of the view that the provisions only seek to ensure public safety and public order and they are valid provisions saved by article 30(2)(b) of the Constitution. We are satisfied that in the absence of the evidence from the petitioner, there are only mere allegation in the petition and the submissions in chief of the possibilities of the statutory provisions being abused in actual operation which possibilities do not necessarily make the

provisions invalid. See **Rev. Christopher Mtikila vs Attorney General** [1995] TLR 31. In the absence of such evidence, the allegations of the petitioner remain unestablished.

In the event and for the reasons herein above stated, we find no merits in the petition. The petition is dismissed without orders as to costs because this is a public interest litigation case. We order accordingly.



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A.A. MUNISI
JUDGE
16/08/2019

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B.S. MASOUD
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