IN THE HIGH COURT OF TANZANIA
(MAIN REGISTRY)

AT DAR ES SALAAM

(CORAM: MASOUD, MAGOIGA, AND MASABO, JJJ.)

MISCELLANEOUS CIVIL CAUSE NO. 27 OF 2018

JOSEPH STEVEN GWAZA..... PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1st RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTION.....2nd RESPONDENT

JUDGMENT

28/06/2019 & 22/10/2019

Masoud, J.

The petitioner is an accused person charged with the offence of trafficking in narcotic drugs contrary to section 16(1)(b)(i) of the Drugs and Prevention of Illicit Traffic in Drugs Act [cap. 95 R.E 2002]. He is in this petition challenging the constitutionality of the provisions of section 6(2) of the Appellate Jurisdiction Act [cap. 141 R.E 2002] (AJA) and section 225(6) of the Criminal Procedure Act [cap. 20 R.E 2002] (CPA). The petitioner is of the view that the impugned provisions offend the provisions of articles 13(1), (2), and 13(6) of the Constitution of the United Republic of Tanzania (herein after the Constitution). The infringed provisions of the Constitution relate to, protection against discrimination (article 13(1)), prohibition of enactment of a law that directly or by implication discriminates citizens of Tanzania (article 13(2)); and right to hearing and appeal (article 13(6)(a)).

The petition was brought under the provisions of articles 26(2) and 30(3) of the Constitution, sections 3 and 4 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. It was made by way of petition filed in this court by originating summons. It was supported by an affidavit of the petitioner. It was opposed by the respondents who filed a joint reply to the petition accompanied by a joint counter-affidavit of Daniel Chacha Nyakiha, learned State Attorney on behalf of the respondents.

In his affidavit supporting the petition, the petitioner deposed on the charges pending against the petitioner, facts relating to enactment of the impugned provisions of section 6(2) of the AJA (supra) and section 225(6) of the CPA (supra), curtailment of citizens' constitutional rights of appeal, freedom, and equality before the law by the impugned provisions. On the contrary, the counter-affidavit of Daniel Chacha Nyakiha, learned State Attorney for the respondents, countered the petitioner's statements as to infringements of the above mentioned citizens' rights by the impugned provisions. The counter-affidavit had it that the impugned provisions are constitutional as they are meant to safeguard public interests and safety of an accused person.

We are clear that the context of this petition is the allegation that the impugned provisions of section 6(2) of the AJA (supra) and section 225(6) of the CPA (supra) infringe the constitutional rights of citizens of the United Republic of Tanzania guaranteed under the Constitution. The alleged infringement is in respect of the right to equality before the law guaranteed under article 13(1) of the Constitution, right to fair

hearing, appeal and access to justice guaranteed under article 13(6)(a) of the Constitution. The impugned provisions are, allegedly, discriminatory in their effect to the citizens and militate against the citizens' right to protection and equality before the law and fair hearing guaranteed under article 13(1) & (2) and 13(6)(a) of the Constitution.

It was thus alleged that while section 225(6) of the CPA (supra) discriminates between citizens charged with ordinary criminal offences and those charged with economic offences contrary to guarantees enshrined under article 13(2) of the Constitution, section 6(2) of AJA (supra) discriminates an accused person and the Director of Public Prosecution (D.P.P) in relation to the right of appeal against any order of the court in a criminal case.

Accordingly, since the Parliament is under article 13(2) of the Constitution prohibited from enacting law which discriminates the citizens, the impugned provisions are therefore offensive of the above mentioned constitutional guarantees. As a result, the petitioner was in this petition seeking the following declarative orders to be issued:

a) *The provisions of section 6(2) of the Appellate Jurisdiction Act [cap. 141 R.E 2002] is unconstitutional hence null and void for offending the provisions of articles 13(1), (2), and 13(6) of the Constitution of the United Republic of Tanzania as amended from time to time.*

b) *The provisions of section 225 (6) of the Criminal Procedure Act [cap. 20 R.E 2002] is unconstitutional hence null and void for offending the provision of article 13(1), (2) of the Constitution of the United Republic of Tanzania as amended from time to time.*

c) *Each party to bear its own costs.*

The petitioner appeared in this court in person. The petition was argued by way of written submissions. Mr Abubakar Mrisha, learned Senior State Attorney, appeared for the respondents. He filed written submissions in reply to those filed by the petitioner strongly opposing the petition.

The rival written submissions and the affidavits in respect of both sides addressed the issue whether the impugned provisions violate the rights of citizens relating to protection against discrimination, protection and equality before the law, as well as right to a fair hearing and appeal guaranteed under the provisions of article 13(1), (2) and 13(6)(a) of the Constitution. We do not intend to reproduce the submissions in their details except the extent necessary in disposing of the issue at stake.

On our part, there was no dispute as to the construction of the impugned provisions. Our view is notwithstanding that the petitioner was attacked for misconstruing sections 6(1)(a)&(b) and 6(2) of the AJA (supra) which, according to the learned State Attorney for the respondents, are distinct and should be construed according to their distinct and befitting circumstances.

Both sides were in our considered opinion at one that section 6(2) of the AJA (supra) provides only for the right of the D.P.P to appeal against any acquittal, sentence or order made or passed by the High Court or by a subordinate court exercising extended powers whilst section 6(1)(a) & (b) of the AJA only accord a convicted person the right to appeal against conviction and sentence. We did not see any misconception in the interpretation of the provisions.

Our view is that the dispute was on the argument of the petitioner that the provision of section 6(2) of the AJA is discriminative and militates against the citizens' right to protection and equality before the law and fair hearing guaranteed under article 13(1) & (2) and 13(6)(a) of the Constitution. It is his argument that the impugned provisions are discriminative because while the provision gives the D.P.P right to appeal in criminal proceedings against any acquittal, sentence or order made or passed by the High Court or by a subordinate court exercising extended powers, an accused person is denied that right of appealing against any order made or passed by the High Court or by a subordinate court exercising extended jurisdiction.

Consistent with the foregoing, the petitioner maintained that the provision of section 6(2) of the AJA is discriminatory of itself and in its effect in relation to ensuring fair trial to all parties in criminal proceedings. The petitioner concluded that section 6(2) of the AJA is therefore offensive of the above mentioned provisions of the Constitution.

We were likewise satisfied that both parties were not in dispute that the provision of section 225(6) of the CPA bars the application of section 225(1)-(5) of the CPA in respect of an accused person charged with any offence triable only by the High Court under the Economic and Organised Crime Control Act, cap.200. Thus, an accused person, who stands charged with an economic offence triable by the High Court, does not benefit from what is provided for under the provisions of subsections 225(1)-(5) of the CPA which in a nutshell relates to timeline fixed for adjournments, remanding an accused person in custody, and completion of investigation.

The dispute on section 225(6) of the CPA is, once again, on the argument of the petitioner that the provision has discriminative effect between an accused person charged with an economic offence triable by the High Court and an accused person charged with another offence triable by other courts. While the latter benefits from the protection available under section 225 of the CPA, the former does not. In such context, the petitioner strongly argued that the provision is offensive of the above mentioned provisions of the Constitution.

As we pointed out above, the petitioner was attacked for misconstruing the distinct provisions of section 6(1)(a)&(b) and 6(2) of the AJA. In addition, the learned Senior State Attorney for the respondents countered the allegations that the impugned provisions are violative of the specified provisions of the Constitution.

Reasons assigned in the reply included the following, if we understood the learned Senior State Attorney well. One, the distinctive circumstances which should be read and construed in respective befitting situations of each of the two distinct provisions of sections 6(1)(a)&(b) and 6(2) of the AJA. Each of the provisions of sections 6(1)(a)&(b) and 6(2) of the AJA gives a right of appeal to a respective aggrieved party in a criminal case, depending on circumstances of each case. And two, the wider constitutional responsibility of the D.P.P in all criminal prosecutions in the country was also mentioned. In this respect, article 59B of the Constitution as well as regulation 4 of the National Prosecutions Services (Establishment) Order, GN No. 49 of 2018, and the Penal Code, cap. 16 and the CPA were relied on, seemingly, to bring home the point on the D.P.P's wider responsibility in the criminal justice system.

In the light of the above, it was argued by the learned Senior State Attorney that there were justifications in having provisions for the distinct circumstances of the criminal prosecution side (i.e the D.P.P) as is section 6(2) of the AJA and those dealing with the convicts of criminal offences as is section 6(1)(a)&(b) of the AJA. We were urged in this respect to rely on **Jackson Ole Nemeteni and 19 Others vs The Attorney General** (supra) in relation to the duty of the court to look at the impugned provisions and not how it is applied when determining the constitutionality of the provisions.

With specific reference to section 225(6) of the CPA (supra), it was argued in reply by the learned Senior State Attorney that the exclusion of an accused person charged with an economic offence triable by the High Court is based on the distinct nature of economic offences. Unlike other offences, such offences are organized, sophisticated and complex in nature. Being diverse and organized as they are, it was argued, economic offences triable by the High Court require special treatment, investigation and trial. Their nature also explains why they are, among other laws, governed by the Economic and Organised Crimes Control Act (supra), and their trials are conducted by criminal sessions after committal proceedings.

The exclusion of economic offences triable by the High Court from section the purview of section 225 of the CPA is thus informed by the complexity of the offences involved, country's criminal justice system which is not advanced, the need to accord ample time and space for thorough investigation, and collection of sufficient evidence needed for a fair trial.

We were referred to **Jackson Ole Nemeteni** (supra) by the learned State Attorney for the respondents with regard to the observation of this court on the application of section 225 of the CPA against the backdrop of the criminal detection mechanism of the country which was not yet advanced. We were finally told that the foregoing position means that section 225(6) of the CPA is saved by article 30(2) of the Constitution.

The issue for our determination as earlier stated is whether the impugned provisions violate the rights of citizens relating to protection against discrimination, protection and equality before the law, as well as right to a fair hearing and appeal guaranteed under the provisions of article 13(1), (2) and 13(6)(a) of the Constitution.

Our understanding of the record before us leaves us in no doubt that the issue at stake is one of law which could be disposed of by arguments from the rival submissions of the parties filed pursuant to rule 13 of the Basic Rights and Duties Enforcement (Practice and Procedure) Rules (supra) and not entirely by evidence from the affidavits of the parties. We are in this guided by the position taken by this court in **Legal and Human Rights Centre and Two others vs Attorney General** [2006] TLR 240.

Before we examine the constitutionality of the impugned provisions, we first undertook to appreciate the legal position emanating from the impugned provisions as interpreted by the High Court and the Court of Appeal. In so doing, we saw it fit to reproduce the impugned provisions in full as and where appropriate. We started with section 225(6) of the CPA followed by section 6(2) of the AJA.

We are of the view that the provisions of subsection 225(1),(2),(3),(4),(5)&(6) of the CPA are interlinked. For ease of reference, the provisions read thus:

> *S.225. Adjournment and remand of accused*
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> *(1) Subject to subsections (3) and (6), before or during the hearing of any case, it shall be lawful for the court in its discretion to adjourn the hearing to a certain time and place to be then appointed and stated in the presence and hearing of the party or parties or their respective advocates then present, and in the meantime the court may suffer the accused person to go at large, or may commit him to prison, or may release him upon his entering into a recognisance with or without sureties at the discretion of the court, conditioned for his appearance at the time and place to which such hearing or further hearing shall be adjourned.*
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> *(2) Notwithstanding the provisions of subsection (1), no adjournment shall be for more than thirty clear days or, if the accused person has been committed to prison, for more than fifteen clear days, the day, following that on which the adjournment is made being counted as the first day.*
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> *(3) The court may commit the accused person to police custody–*
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> *(a) for not more than three clear days if there is no prison within five miles of the court house and may from time to time further commit the accused person to police custody for a period of not more than fifteen days in the aggregate;*
>
> *(b) for not more than seven clear days if there is no prison within five miles of the court house and the court does not intend to sit again at such court house within three days, and may from time to time further commit the accused person to police custody for a period of not more than fifteen days in the aggregate; or*
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> *(c) at the request of the accused person, for not more than fifteen clear days.*
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> *(4) Except for cases involving offences under sections 39, 40, 41, 43, 45, 48(a) and 59, of the Penal Code or*

offences involving fraud, conspiracy to defraud or forgery, it shall not be lawful for a court to adjourn a case in respect of offences specified in the First Schedule to this Act under the provisions of subsection (1) of this section for an aggregate exceeding sixty days except under the following circumstances–

(a) wherever a certificate by a Regional Crimes Officer is filed in court stating the need and grounds for adjourning the case, the court may adjourn the case for a further period not exceeding an aggregate of sixty days in respect of offences stated in the First Schedule to this Act;

(b) wherever a certificate is filed in court by the State Attorney stating the need and grounds for seeking a further adjournment beyond the adjournment made under paragraph (a), the court shall adjourn the case for a further period not exceeding, in the aggregate, sixty days;

(c) wherever a certificate is filed in court by the Director of Public Prosecutions or a person authorised by him in that behalf stating the need for and grounds for a further adjournment beyond the adjournment made under paragraph (b), the court shall not adjourn such case for a period exceeding an aggregate of twenty four months since the date of the first adjournment given under paragraph (a).

(5) Where no certificate is filed under the provisions of subsection (4), the court shall proceed to hear the case or, where the prosecution is unable to proceed with the hearing discharge the accused in the court save that any discharge under this section shall not operate as a bar to a subsequent charge being brought against the accused for the same offence.

(6) Nothing in this section shall be construed as providing for the application of this section to any proceedings in a subordinate court in relation to any offence triable only by the High Court under the Economic and Organised Crime Control Act [Emphasis is ours].

The above provisions of subsections 225(1)&(4) of the PCA were considered by the Court of Appeal in **John Joseph Onenge** (supra). The Court of Appeal held that the provisions create mandatory procedural requirements for adjournments which seek to mainly safeguard the liberty of an accused person. It was further held that the breach of such procedural requirement which does not affect the substance of the trial does not render the trial a nullity.

Whilst re-stating and applying the principle enunciated in **John Joseph Omunge** (supra) which dealt with section 225(1) & (4) of the CPA, the Court of Appeal in **D.P.P vs Fonja Mathayo** [1995] TLR 23 held that section 225 of the CPA as a whole was designed to protect and safeguard the liberty of an accused person in a criminal case. It further held that the breach of section 225(4) and (5) of the CPA does not necessarily vitiate the trial unless it is shown that the accused has been prejudiced in his defence or that the adjournments affected the substance of the conduct of the trial.

The case of **Abdallah Kondo vs Republic** CAT Dar es Salaam Criminal Appeal No. 322 of 2015 provides a further perspective as to the import of section 225(5) of the CPA and powers of the court to control proceedings generally. Among other things, the Court of Appeal stated that apart from powers of the subordinate court to dismiss the charge and discharge the accused under section 225(5) of the CPA, both the High Court and subordinate court have inherent power to dismiss the charge and discharge the accused as part of the court's power to control or regulate its own proceedings.

It is clear from the above authorities that section 225 of the CPA provides for procedural requirements for adjournment of a case in subordinate court and remanding an accused person in custody and their timeframe except upon certificate by specified officers stating the need and grounds for such further orders of adjournment and of remand custody of the accused pursuant to section 225(4)(a),(b),&(c) of the CPA.

We further deduced from the above authorities that the purpose of the provision of section 225 of the CPA is to protect and safeguard the liberty of an accused person in a criminal case although the provision does not apply to an accused charged with economic offence triable in the High Court. The powers of the High Court and subordinate courts to control or regulate their own proceedings, and when necessary in the circumstances, to dismiss the charge and discharge the accused person as indicated in **Abdallah Kondo** (supra) serve the same purpose of protecting and safeguarding the liberty of the accused person.

The constitutionality of failure to comply with section 225(4) of the CPA was tested in **Jackson Ole Nemeteni and 19 Others vs The Attorney General** Misc. Civil Cause No.117 of 2004. Relying on the above decisions in relation to the import of section 225 of the CPA, this court was settled that the failure to comply with the said provision is not violative of article 107A (2)(b) of the Constitution. The Court of Appeal was satisfied that failure to comply with the said provision is a question of administration and not of deficiency of the provision itself. The court reasoned that the criminal justice system in this country is still growing. The country was yet to reach a stage where all investigations including those involving transnational and organized crimes are carried

out before arrest. Reflecting further on section 225(5) of the CPA, the Court of Appeal stated:

> *What has given us anxious moments are the provisions of section 225(5) of the Act,..... We think this subsection totally defeats the very purpose of subsection (4) the logical thing to do for the trial magistrate is to discharge the accused. This is because he cannot force the prosecution to proceed if they are ready nor can the magistrate prosecute the case himself. Discharging the accused, will almost surely result in his immediate rearrest and the charges being laid at his door again. This means the pendulum starts afresh. We are satisfied that this is not in the interest of the accused, unless it was clearly stated in a proviso that the discharged person may not be rearrested before investigations are completed.*

The constitutionality of section 225(5) of the CPA came under this court's scrutiny in **Joseph Seven Gwaza vs Attorney General and Another** Misc. Civil Cause No. 19 of 2018, when sub-section 225(5) of the CPA was challenged for being violative of article 13(1) & (6) (a) of the Constitution. The court held that:

> *Section 91 of the CPA concerns withdrawal of a case by nolle prosequi while section 225(5) concerns dismissal of a charge by the court for failure to complete investigation.*
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> *With regard to the foregoing, we do understand that in both situations the accused person is discharged, therefore, his rights to freedom are not affected in any way. These are processes towards the hearing of the case to a final judgement. As we noted at the beginning, these orders are interlocutory and are not decisions that involve full hearing of the parties. In this regard, we see nothing in the decisions made under these sections which affect the right of the accused to be heard because such proceedings terminate the criminal process against him. Equally so we see nothing which violates the right of appeal because there is nothing the accused person can appeal against.*
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> *Lastly, on committal proceedings, the accused person is indeed not allowed to state anything because the committing court has*

no jurisdiction. This is just a process towards a hearing at a later stage before a court of competent jurisdiction. This process may delay the accused to be heard but we do not see how it violates the right to be heard. It is in our view upon the law makers to consider the usefulness of this process and if found unnecessary, amend the law accordingly.

Since the constitutionality of section 225(4)&(5) of the CPA was considered and determined as shown above, the question for our determination is whether section 225(6) of the CPA is violative of the alleged provisions of the Constitution which relate to right to be heard and protection against discrimination and equality before the law as alleged in the petition. We will come back to this issue afterwards.

Legal position emanating from section 6(2) of the AJA was clarified by the Court of Appeal in the case of **Republic vs Mwesige Geofrey and Toto Bushahu**, Criminal Appeal No. 355 of 2014. Relying on **D.P.P. (Zanzibar) vs. Farid Hadi Ahmed & 9 Others**, CAT Criminal Appeal No. 96 of 2013 (unreported), the Court held thus in relation to section 6(2) of the AJA:

The legal position .....was made clear by this Court on an identical objection, in the case of the ***D.P.P. (Zanzibar) v. FARID HADI AHMED & 9 OTHERS****, Criminal Appeal No. 96 of 2013 (unreported). So we need here do no more than reiterate what we stated therein. The Court succinctly held as follows:-*

> *"It must be obvious to all now that in the entire section 6 which clothes this Court with jurisdiction to hear and determine criminal appeals from the High Court and subordinate courts with extended powers, there is no provision similar to, leave alone one identical with s. 5(2) (d) reproduced above. For this very obvious reason, we have found ourselves constrained to accept without any demur, Ms. Fatma's irresistible contention that the right of the D.P.P. to appeal against* ***"any***

***acquittal, sentence or order made or passed by the High Court or by a subordinate court exercising extended powers"**, was left unfettered by the total prohibition against appeals or revision applications to this Court in relation to any preliminary or interlocutory decision or order. This conclusion finds strong support from the observation of this Court in the case of **Yohana Nyakibiri** (supra), in respect of the reasons behind the passing of Act No. 25 of 2002.*

*In **Yohana Nyakibari's** decision dated 15/8/2007 the Court made this apt observation:*

> *"At this juncture it may be observed briefly that the intention of the legislature in enacting the law under the Act, was to ensure speedy expedition of trials particularly with regard to civil suits. Hence the amendments effected under the Act of section 5(2) (d) of the Appellate Jurisdiction Act, 1979, section 74 of the Civil Procedure Code 1966 and section 43 of the Magistrates' Courts Act, 1984."*

To this list, we may as well justifiably add sections 78 and 79 of the same Civil Procedure Code. This list of amended sections has led us to the conclusion that s. 6(2) of the Act was by design left untouched by Parliament.

In the face of these unambiguous provisions of s. 6 of the Act, we respectfully hold that the first point of preliminary objection premised on a statutory provision not related to appeals in criminal cases, as is the appeal under scrutiny, is totally misconceived. It is accordingly overruled. All other things being equal, the appeal ought to be held competent."

We subscribe wholly to the above holding.....We only wish to observe in passing that since there was no intention to bar appeals of this nature to this Court, then the words "criminal charge" appearing in s. 5 (2) (d) of Act should be deleted.

The relevant provisions of section 6 of the AJA, which were discussed in the above cases and which are relevant in this matter, read as follow:

> *S.6. Appeals in criminal cases*
>
> *(1) Any person convicted on a trial held by the High Court or by a subordinate court exercising extended powers may appeal to the Court of Appeal–*
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> *(a) where he has been sentenced to death, against conviction on any ground of appeal; and*
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> *(b) in any other case–*
>
> *(i) against his conviction on any ground of appeal; and*
>
> *(ii) against the sentence passed on conviction unless the sentence is one fixed by law.*
>
> *(2) Where the Director of Public Prosecutions is dissatisfied with any acquittal, sentence or order made or passed by the High Court or by a subordinate court exercising extended powers he may appeal to the Court of Appeal against the acquittal, sentence or order, as the case may be, on any ground of appeal.* [Emphasis is ours].

Given the above legal position, we are not in doubt that the right of the D.P.P to appeal against "*any.....order made or passed by the High Court or by a subordinate court exercising extended powers*", was under section 6(2) of the Appellate Jurisdiction Act (supra) "*left unfettered by the total prohibition against appeals or revision in relation to any preliminary or interlocutory order.*"

The position emerging from section 6(2) of the AJA is inconsistent with section 6(1)(a)&(b) of the AJA (supra) which gives any person convicted on a trial the right to appeal against his conviction or sentence, and not the right to appeal against any

preliminary or interlocutory order of the specified court in a criminal case before his conviction and sentence.

This means that the D.P.P may in the course of criminal proceedings appeal against any order she is aggrieved by. She does not have to wait for the case to be finally determined for her to appeal against such an order. The implication is that the original criminal proceedings will have to be stayed pending determination of the appeal against the order.

Thus, while the D.P.P as a party in a criminal trial may as a matter of a statutory right appeal against any preliminary or interlocutory decision or order of the court, an accused person also a party in the trial is not given such right under section 6(1) or section 6(2) of the AJA (supra). An accused person's only right is in respect of appealing against sentence or conviction. The right accrues after the conviction and sentence and not before.

Unlike section 225(4)&(5) of the CPA whose constitutionality appears to have been tested before, we are not aware of any decision of the court on the constitutionality of any subsections of section 6 of the AJA. The question whether section 6(2) of the AJA and section 225(6) of the CPA are violative of the right against inequality before the law and right to be heard as alleged will nevertheless be a subject of examination hereinafter.

Our framework for determining the issue of the constitutionality of the impugned provisions is based on guiding principles from the decisions of the High Court and those

of the Court of Appeal which have interpreted the provisions of the Constitution. One such principles is the principle of presumption of constitutionality of a statute or a statutory provision as clearly restated in **Julius Francis Ishengoma Ndyanabo vs A.G [2004] TLR 14.**

Emerging from this principle is the settled position of the law that until the contrary is proved, a piece of legislation or provision in a statute shall be deemed constitutional. Thus, once the petitioner alleges and proves, either by evidence or arguments, the burden then shifts to the respondents to show that the impugned legislation or statutory provision is saved by article 30(2) of the Constitution.

The other principle is that of proportionality which comes into play to establish whether it has been shown that a relevant provision meets the proportionality test after being proved to be unconstitutional by the petitioner, to wit, whether the impugned provisions are not unreasonable, not arbitrary, and necessary for societal good. In other words, a restriction on fundamental right imposed by a provision must serve a legitimate purpose and has to be proportionate. This was articulated in **Kukutia Ole Pumbun and Another vs Attorney General and Another** [1993] TLR 159; **Julius Francis Ishengoma Ndyanabo** (supra); and **Director of Public Prosecution vs Daudi Pete** [1993] TLR 159.

Our framework is also informed by principles guiding the court in discharging its duty of resolving constitutional issues. One such principle was stated in **U.S vs Butler**, 297 U.S. 1 [1936] and adopted by the Court of Appeal in **Attorney General vs Jeremia**

Mtobesya Civil Appeal No. 65 of 2016 (unreported). The principle, in a nutshell, requires the court to:

> *"to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question."*

In line with the foregoing, we recalled the principle requiring the court to only look at the impugned law itself not how it works as articulated in **Christopher Mtikila vs Attorney General** [1995] TLR 31.

Other principles relate to constitutional interpretation which emphasises on, among other things, the duty of the court, not to endeavour to cripple the Constitution by construing it in a manner that is uncalled for, to interpret the Constitution in a broad and liberal manner, and to strictly construe restrictions on fundamental rights; see **Julius Francis Ishengoma Ndyanabo** (supra) and **Jeremia Mtobesya** (supra).

Alongside the principles on constitutional interpretation, we were minded to consider whether the constitutionality of the impugned provisions had already been resolved by the court in an earlier matter so that the petitioner is barred from re-agitating afresh on the constitutionality of the provisions; see **Machibya Seleman and Others vs Attorney General**, Misc Civil Cause No. 24 of 2018; **Jebra Kambole vs Attorney General**, Misc Civil Cause No. 22 of 2018; and **Fikiri Liganga and Another vs Attorney General and Another** Misc Civil Cause No.5 of 2017.

We applied the above framework to the provisions of the Constitution alleged to be violated by the impugned provisions of section 225(6) of the CPA and section 6(2) of the AJA which we reproduced herein above. We did so against the backdrop of the impugned provisions and the submissions for and against the constitutionality of the impugned provisions which we revisited herein above in a nutshell.

We were very sure that the alleged infringement is in respect of the right to equality before the law guaranteed under article 13(1) of the Constitution, right to fair hearing, appeal and access to justice guaranteed under article 13(6)(a) of the Constitution. The impugned provisions were said to be discriminatory in their effect to the citizens and they militate against the citizens' protection and equality before the law and citizens' right to fair hearing guaranteed under articles 13(1) & (2) and 13(6)(a) of the Constitution.

With regard to the issue on the constitutionality of section 225(6) of the CPA, we were told that an accused person charged with an economic offence triable in the High Court is excluded by such provision from the protection and safeguard of his liberty provided by section 225(1),(2),(3),(4),of (5) of the CPA. This was alleged to be discriminatory as an accused person charged with other offences triable by subordinate court enjoys the benefit of having his liberty protected and safeguarded under section 225 of the CPA.

However, the petitioner did not show how the regime obtaining under the Economic and Organised Crime and Control Act (supra) offers less protection and safeguard of personal liberty than those obtaining under section 225 of the CPA. In the

circumstances, we are not convinced that the petitioner proved by evidence or argument that the impugned provision of section 225 of the CPA is discriminatory and therefore unconstitutional. To the extent that section 225(6) of the CPA excludes an accused person from the protection and safeguard of liberty provided under subsections 225(1),(2),(3),(4),&(5) of the CPA, we think it was successfully shown by the respondents that the impugned provision is necessary, reasonable and not discriminatory.

We were told that unlike the other offences, the offences envisaged under the provision are organised, transnational and complexity in nature which characteristics justify the exclusion of such accused persons charged with such offences from the procedural requirements of section 225 of the CPA.

Consistent with the distinct nature of the offences, the accused persons are first subjected to committal proceedings, which as stated in **Joseph Steven Gwaza** (supra), is just a process towards a hearing at a later stage before the High Court as a court of competent jurisdiction. Subsequently, the trial in the High Court is conducted subject to strict timelines provided for under the Economic and Organised Crime Control (the Corruption and Economic Crimes Division) (Procedure) Rules, 2016 (GN No. 267 of 2016).

Given the nature of such economic offences, they require distinct procedural requirements in certain contexts that reflect difficulties of conducting investigations on such offences, collecting cogent evidence needed for fair trial, and the dictates of the

prevailing criminal investigation system in the country. We are in this respect aware of the special regime obtaining from the Economic and Organised Crimes Control Act (supra) and the Economic and Organised Crime Control (the Corruption and Economic Crimes Division) (Procedure) Rules, 2016 which applies in respect of such offences in addition to other laws such as the CPA.

The foregoing in our view shows that the provision of section 225(6) of the CPA which excludes those who are charged with economic offences triable by the High Court from enjoying the protection and safeguard of their liberty under section 225 of the CPA is saved under article 30(2) of the Constitution. We are therefore not prepared to hold that the provision is unconstitutional and therefore void.

On a different note, we are minded that the constitutionality of the provisions of section 225(4) and 225(5) of the CPA was determined in **Jackson Ole Nemeteni and 19 Others** (supra) and **Joseph Steven Gwaza** (supra). We think the provisions of section 225 of the CPA are inter-connected and should not be dealt with in isolation of one another.

We say so because while the provisions of subsections 225(1),(2),(3),(4) and (5) of the CPA protect and safeguard the liberty of an accused person in so far as the timeline for adjournments, remanding custody of the accused and investigation completion is concerned, subsection 225(6) of the CPA excludes application of the provisions to an accused person charged with an economic offence triable by the High Court.

We are therefore of a considered opinion that the issue of constitutionality of subsection 225(6) of the CPA is substantially connected to the issues of constitutionality of sections 225(4) and 225(5) of the CPA which were raised in **Jackson Ole Nemeteni and 19 Others** (supra) and **Joseph Stephen Gwaza vs Attorney General and Another** (supra) respectively. The issue should have been raised in such earlier cases which were understandably in the nature of public interest litigation as is the present petition.

Having not been explicitly raised would in this subsequent petition by the same petitioner or any member of the public be barred by the principle of res judicata which bars endless litigation on the same subject matter by the same parties or any person in the public litigation context. In our view, this rule is, on one hand informed by, and on the other hand reinforces, the principle of presumption of the constitutionality of a piece of legislation or a provision of a statute. We cannot, therefore, once again, consider the constitutionality of this section or any of its subsections. For this reason alone, we would equally decline to find merit on the prayer on the unconstitutionality of section 225(6) of the CPA.

With regard to the constitutionality of section 6(2) of the AJA, we were clear that the issue has never before been a subject of judicial scrutiny. Applying the principle of presumption of constitutionality of a statutory provision, we were satisfied that the petitioner showed how the impugned provision gives the right to appeal to the D.P.P

against any interlocutory order in a criminal case whilst the same right is not equally and on the same footing given to an accused person.

In our scrutiny of the provision of section 6(2) of AJA, we were content that in addition to the right of the D.P.P to appeal against a sentence or acquittal after the conclusion of a criminal case pursuant to the impugned provision, which right corresponds to the right of a convict to appeal against a sentence or conviction pursuant to section 6(1)(a)(b) of the CPA, the D.P.P has additional right of appealing against any order before a criminal case is concluded. Such additional right of the D.P.P to appeal against any order in a criminal case, in the course of its proceedings, are not available to an accused person.

The implication of the provision demonstrates the discriminatory effect complained of by the petitioner. Clearly, whilst an accused person aggrieved by an order of the court must wait for the conclusion of the case before he can appeal against the order, the D.P.P can just appeal against an order she is aggrieved by as she does not have to wait for the conclusion of the case. The impugned provision thus discriminates between the D.P.P and accused persons by limiting the accused persons' right to appeal against any interlocutory order in a criminal case.

In view of the above finding, we are satisfied that the petitioner sufficiently demonstrated and argued that the provision of section 6(2) of the Appellate Jurisdiction Act (supra) infringes the provisions of the Constitution relating to, protection against discrimination (article 13(1)), prohibition of enactment of a law that directly or by

implication discriminates citizens of Tanzania (article 13(2)); and right to fear hearing and appeal (13(6)(a)).

The issue is whether the provision is saved by article 30(2) of the Constitution. As we pondered on the issue at stake, we recalled the reasoning that informed the submissions of the learned Senior State Attorney. In a nutshell, the reasoning centred on the D.P.P's constitutional responsibility in criminal prosecutions and the need to construe the impugned provision in accordance with its own befitting situation depending on nature and circumstance of a case.

With due respect, the above justifications do not in our view squarely show how and why the provision should be saved by article 30(2) of the Constitution. We were of a considered view that the justifications given do not reveal compelling needs for giving the D.P.P such right of appeal against any order of the court in a criminal case, whilst such right is not equally and on equal footing given to an accused person. It was in particular not shown why conferring to the D.P.P such right of appealing against any order in a criminal case, not on an equal footing with accused persons, was exceptionally necessary in discharging her criminal prosecutions responsibility in the country.

We are minded that the right of the D.P.P of appealing against any order in a criminal case was retained amidst the reforms that resulted in the total prohibition of appeals or revisions in relation to any preliminary or interlocutory decision or order in civil cases. The reforms aimed at ensuring speedy expedition of trials in civil suits. We are aware

that the Government and its officials are, in relation to the total prohibition of appeal against such orders, placed on an equal footing with other parties in civil matters.

Inviting us to reject the inequality brought abought by allowing only the D.P.P to appeal against any order of the court in a criminal case whilst other parties in criminal cases are denied such right, the petitioner referred this court to the reasoning of the Court of Appeal in **Kukutia Ole Pumbun** (supra). The reasoning of their Lordship in that case was in relation to the equality before the law between the Government on one hand and an ordinary person on the other hand. The reasoning of their Lordships was, on one hand, informed by article 13(1)&(2) of the Constitution which provides for the equality before the law and, on the other hand, the case of **Peter Ng'omango vs Gerson M. K. Mwangwa and Attorney General** [1993]TLR 77 in which the court took restriction based on which court in the United Republic, one goes to seek remedy against the Government of the same United Republic as violative of article 13(1) and (2) of the Constitution.

The Court of Appeal in this case (i.e **Kukutia Ole Pumbun's case**) reasoned as follow:

> *...we reject ...submission that because the Government is responsible for the wider interests of the society, then it should not be placed on equal footing with an ordinary person. We can find no justification for the distinction. We think that the equality before the law envisaged in article 13(1) above embraces not only ordinary persons but also the Government and its officials; all these should be subjected to the same legal rules.*

The above reasoning was recently echoed in **Jemremia Mtobesya** (supra) when the Court of Appeal made a clear reference to the D.P.P and an accused person as equal

parties in a criminal proceeding. The reasoning was mindful of the massive powers of the D.P.P under the law, how such powers should not be used to justify inequalities amongst such parties in any given criminal proceeding, and how such inequalities are against the dictates of equality of treatment, the protection before the law, and the notion of fair hearing.

The most relevant part of the reasoning and holding of the Court of Appeal in **Jeremia Mtobesya** (supra), which we adopt for purpose of our determination in this petition, is at page 61 and 62 of the Court of Appeal's judgment. It reads thus:

> *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 he is able to deprive the other party of his liberty merely by 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, are rendered powerless. The right to a fair hearing, by its very nature, requires there be equality between the contestants in the proceeding. There can be no true equality if the legislature, as we have said, allows one party to deprive the other of his personal liberty merely by her say - so. All said, we just as well find that the impugned provisions infringe Article 13 (6) (a) of the Constitution.* [Emphasis is ours]

We are settled that this petition is one of such cases in which the reasoning and holding in the above cases would apply in determining the issue before us. In the absence of the compelling need as afore shown, the reasoning would serve to defeat the special treatment of the D.P.P on the right to appeal against any order in a criminal case. We

say so because the provision is, to the extent that gives the D.P.P the right to appeal against any order in a criminal case whilst an accused person as a party to the case is denied such a right, is discriminatory and militates against the equality before the law and fair hearing envisaged by the Constitution.

We applied the proportionality test on the impugned provision of section 6(2) of the Appellate Jurisdiction Act (supra). We were, as a result, of a clear view that the impugned provision is not saved by article 30(2) of the Constitution which permits derogation from basic rights in certain circumstances. We are arrived at such conclusion because of the following findings relating to the impugned provision.

In so far as the impugned provision relates to right to appeal against an order of the court, it is so wide and general that it applies to any order of the court which the D.P.P is aggrieved by without any restriction whatsoever. The provision does not specify orders which the D.P.P may appeal from before a criminal case is finally determined. It thus applies even to orders which were not envisaged under the law.

The D.P.P's decision to appeal against any order in a criminal case is unfettered. There is no provision for any safeguard against abuse of the provision conferring such right to the D.P.P. There is no filtering procedure before such appeal is filed although the appeal may occasion failure of justice to an accused person and result in unwarranted delays in finalisation of criminal proceedings levelled against the accused person. There is, therefore, no checks or control whatsoever in the exercise of such right by the D.P.P, which right an accused person does not have under the law.

In the light of the above, it is not surprising that the Court of Appeal in **D.P.P. (Zanzibar) v. FARID HADI AHMED & 9 OTHERS**, Criminal Appeal No. 96 of 2013 (unreported) was settled that the impugned provision in so far as it relates to the right of the D.P.P to appeal against any order of the court in a criminal proceeding, '*was left unfettered by the total prohibition against appeals or revision applications.... in relation to any preliminary or interlocutory decision or order.*' We are content that the right to appeal against any order which is reflected under the impugned provision is surely capable of being abused or used wrongly to the detriment of an accused person.

If the object was to enable the D.P.P to effectively control criminal prosecutions as argued by the learned Senior State Attorney, it was not at all shown how such object could be achieved after completion of investigation and committal proceedings without affecting the rights of an accused person in a criminal proceeding.

It was not shown, for example, how the whole object could as such be achieved without, firstly, resulting into inequality of parties in a criminal case; and secondly, without limiting the rights of accused persons as parties in equal footing with the D.P.P in criminal cases. We are of a strong view that at whatever strength of imagination, the D.P.P cannot enjoy such unfettered power whilst she is in law an equal party on an equal footing with an accused person in a criminal proceeding.

All said and done, we find that the petitioner sufficiently argued and proved that the provision of section 6(2) of the Appellate Jurisdiction Act (supra) infringes citizens' right to protection against discrimination and citizens' right to fair hearing provided under articles 13(1) & (2) and 13(6)(a) of the Constitution respectively. We are also satisfied

that the respondents failed to show that the impugned provision of section 6(2) of the AJA, to the extent that it allows the D.P.P to appeal against any order of the court in a criminal proceeding, is saved by the provisions of article 30(2) of the Constitution. We are, on the other hand, satisfied as demonstrated earlier that we are not inclined for reasons already stated to find merit in relation to the allegations of unconstitutionality of section 225(6) of the CPA.

In the end, we find that the provision of section 6(2) of the AJA is, to the extent that allows the D.P.P to appeal against any order of the court in a criminal case, unconstitutional for offending articles 13(1) & (2), and 13(6)(a) of the Constitution for reasons we have amply demonstrated above. In the circumstances, we have no option but to hold in terms of article 64(5) of the Constitution of the United Republic of Tanzania that section 6(2) of the Appellate Jurisdiction Act (supra) is, to the extent it provides for the right of the D.P.P to appeal against any order of the court in a criminal case, void; and is, accordingly, struck out to such an extent without in any way affecting the right of the D.P.P to appeal against any acquittal or sentence. We decline on the other hand to grant the prayer in relation to section 225(6) of the Criminal Procedure Act (supra) for lack of merit as already shown above. In the circumstances of the public interest nature of the petition, we will not make any order as to costs.

Dated at Dar es Salaam this 22nd day of October 2019.

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B. S. MASOUD
JUDGE

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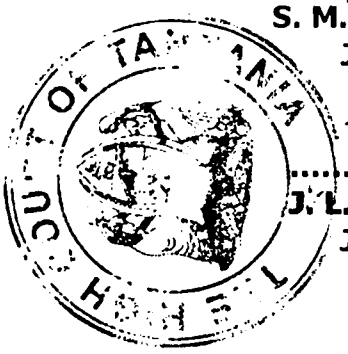
S. M. MAGOIGA
JUDGE



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J. L. MASABO
JUDGE