IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MAIN REGISTRY)

AT DAR ES SALAAM

(MASOUD, MAGOIGA AND MASABO, JJJ.)

MISC. CIVIL CAUSE NO 23 OF 2019.

IN THE MATTER OF THE CONSTITUTION OF THE UNITED REPUBLIC OF TANZANIA, 1977 AS AMENDED FROM TIME TO TIME [CAP 2 R.E. 2002]

AND

IN THE MATTER OF THE BASIS RIGHTS AND DUTIES ENFORCEMENT ACT, [CAP 3 R.E. 2002]

AND

IN THE MATTER OF PETITION TO CHALLENGE THE PROVISIONS OF SECTIONS 2 (2) (b) (ii), 4(a) (e), 6 (1) (b), 6 (2) (a) (b) (e) (f) (g) (h) (i) (j), 6 (3) (b) (d) (e) (f), 6 (4), 14(a), 15, 16(1), 18 and 19 OF THE ACCESS TO INFORMATION ACT, NO. 6 OF 2016 FOR BEING UNCOSTITUTIONAL

BETWEEN

WILLIAM BENJAMIN KAHALE ..... PETITIONER

AND

THE ATTORNEY GENERAL OF THE

UNITED REPUBLIC OF TANZANIA.....RESPONDENT

Date of last Order: 04/03/2020.

Date of Ruling: 16/06/2020

JUDGEMENT

MAGOIGA, J.

The petitioner, WILLIAM BENJAMIN KAHALE has by way of originating summons and accompanying affidavit instituted this instant petition under the provisions of Articles 26 (2) and 30 (4) of the Constitution of the United Republic of Tanzania of 1977 as amended (herein after to be referred as the **"the Constitution"),** sections 4 and 5 of the Basic Rights and Duties Enforcement Act, [Cap 3 R.E. 2002] (herein after to be referred as **"BRADEA")**and Rule 4 of the Basic Rights and Duties Enforcement (Practice and Procedure) Rules, G.N.304 of 2014 (herein after to be referred as **"the Rules"** against the above named respondent praying for declaratory orders, namely that:-

a. the provisions of section 2 (2) (b) (ii), 4 (a) (e), 6 (1) (b), 6 (2) (a) (b) (e) (f), 6 (3) (b) (d) (e) (f), 6 (4), 14 (a) , 15, 16 (1), 18 and 19 of the Access to Information Act, No.6 of 2016 are unconstitutional for offending the provisions of article 13(1) (2) (6) (a), 16, 18, and 29 (1) (2) of the Constitution of the United Republic of Tanzania of 1977 as amended.
b. That the respondent should not be given time to rectify unconstitutional provisions.
c. Each party to bear its own costs.

The accompanied affidavit of Mr. WILLIAM BENJAMIN KAHALE stated the reasons why the prayers contained in the originating summons should be granted.

Upon being served with the originating summons and affidavit of the petitioner, the respondent filed counter affidavit deposed by Mr. STANLEY MAHENGE, learned State Attorney from the office of the Solicitor General at Dar es Salaam disputing the grounds set forth and stating the reasons why the prayers contained in the originating summons should not be granted.

The facts of this petitioner are not complicated. On 7th September, 2016, the Access to Information Act, No.6 of 2016 (to be referred in this judgement as **"the Act"**) was passed by the parliament into law. The Act was assented by His Excellency, the President on 23rd September, 2016 and by way of a Government Notice dated 30th September, 2020, No.41 volume 97 of 2019, it came into force. The objectives of the Act are to provide for provisions for access to information; to define the scope of information which the public has the right to access; to promote transparency and accountability of information holders; and to provide for other related matters. The petitioner, using his right to protect the Constitution, petitioned to this court praying that this court be pleased to declare that the impugned provisions of Act No.6 of 2016 are unconstitutional for offending the provisions of articles 13(1) (2), 16, 18, and 29 (1) (2) of the Constitution, hence this judgment.

The petitioner, at all material time, has been enjoying the legal services of Mr. Jebra Kambole, learned advocate. On the other hand, the respondent, at all material time, has been enjoying the legal services of Ms. Alesia Mbuya, learned Principal State Attorney and Mr. Stanley Mahenge, learned State Attorney.

Mr. Kambole, in support of the petition, prayed that the affidavit in support of this petition be adopted to form part of the written submissions for the determination of this petition. The learned advocate pointed out that, notwithstanding the good intention of enacting the Act, the Act contains some impugned provisions which violate some basic fundamental rights enshrined in the Constitution. Mr. Kambole submitted that, the facts in paragraphs 3, 4, 5, 6, 7, 8, 9, 14 and 15 of the petitioner's affidavit are undisputed by the respondent in her reply to the originating summons and counter affidavit.

In the premise, Mr. Kambole suggested that, this court is enjoined to decide three issues, which are:

1. Whether the provisions of section 2(2) (b) (ii), 4 (a) (e), 6 (1) (b), 6 (2) (a) (b) (e) (f), 6 (3) (b) (d) (e) (f), 6 (4), 14 (a), 15, 16(1), 18 and 19 of the Access to Information Act, No.6 of 2016 are unconstitutional for offending the provisions of articles 13(1) (2),(6) (a), 16, 18, 19 (1) (2) of the Constitution.
2. Whether the above provisions have lawfully and legal justification for the limitation of enjoyment of the freedom of expression.
3. Whether the mentioned provisions after being declared unconstitutional, should be expunged from the statute book immediately and without giving time to the Government to amend as it will allow continuation of human right violation in Tanzania.

In view of the above issues, Mr. Kambole stated that this petition concern important democratic principle of the right to freedom of expression which

includes the right to be informed and the right to access to information, subject to limitation as allowed by the law as provided for under article 18 of the Constitution.

The said article 18 of the Constitution, according to the learned counsel for petitioner, holds the power to account and enables everyone to participate in free debate on issue of concern to avoid undesirable consequences of having wrong government being elected, the wrong policies being adopted, wrong people being appointed, and corruption, dishonesty and incompetence not being exposed.

Mr. Kambole went on to point out four reasons for importance of access to information namely; **one,** as of right, **two,** how the government serves the people or the oxygen democracy, **three,** democracy and good governance, and **four,** that it helps facilitate business practices.

Arguing on the first issue, Mr. Kambole started by citing the cases of R v. OAKS (1996) ISRC 103 adopted by High Court of Kenya in CORID v. THE REPUBLIC OF KENYA AND OTHERS, (HC) PETITION NO. 628 OF 2014, REFERENCE NO. 2 0F 2017, MEDIA COUNCIL OF TANZANIA, LEGAL AND HUMAN RIGHT CENTRE AND TANZANIA HUMAN RIGHTS DEFENDERS COALOTION v. ATTORMEY GENERAL, in which the principle of **'three part test'** was established. The principle must be tested based on the following:-

i. Is the limitation one that is prescribed by law? It must be part of statute, and must be clear, and accessible to citizen so that they are clear on what is prohibited;

ii. Is the object of the law pressing and substantial? It must be important to the society;

iii. Has the state, in seeking to achieve its objective, chosen a proportionate way to do so? This is the test of proportionality relative to the objectives or purpose it seeks to achieve.

In regards to section 2(2) (b) (ii) of the Act, it was the submissions of the learned counsel for petitioner that it violates articles 13 (1) (2) (6) (a), 16, 18 and 28 (1) (2) of the Constitution. The learned counsel pointed out that article 13 (1) (2) (6) of the Constitution guarantees equality before the law and right of fair hearing. Article 16 guarantees right to privacy and personal security. Article 18 guarantees freedom of expression which includes the right to seek, receive and or disseminate information regardless of national boundaries. To buttress his point, the learned counsel cited the **Cambridge Law Journal, Vol.66, No. 1 (March 2007), pp.67-85** in which an article on Rule of Law by Bingham had it **"that, all persons and authorities within the state, whether public or private, should be bound by and entitled to benefit of laws publically made, taking effect (generally) in the future and publically administered in the courts."**

The learned counsel went on to explain that there are eight principles that are packed in the above quotation which are to the following effect:- that the law must be accessible and so far as possible intelligible, clear and predictable, questions of legal rights and liability should ordinarily be resolved by application of the law and the exercise of discretion, the law should apply equally to all subject to limitation allowed by law, powers to public officers be exercised in good faith without exceeding the limit, the law

must afford adequate protection of human rights, way of resolving dispute in fairly manner, adjudicative procedure be fair and observe rule of law.

Further submission of the learned counsel was that, article 13 (2) of the Constitution, condemns all kinds of discrimination. He then argues that, section 2 of the Act has unlimited scope of application; it is not clear on the parameters of its application; and it is not clear as to who has the duty to determine information which is of significance public interest. On that note, he concluded that section 2 of the Act contravenes the Constitution and do not meet the criteria in the three part test, and specifically on clarity and proportionality test.

As regards section 4 (a) (e) of the Act, it was the submission of Mr. Kambole that, it offends the provisions of articles 13 (1) (2), (6) (a), 16 18 and 29 (1) (2) of the Constitution. He argues that, in so far as it explains the objectives of the law, the provision is wide, vague, arbitrary and subjective. It was the strong submission of Mr. Kambole that the said provision does not say who are persons protected between those who release information of public interest in good faith and those who release information not on public interest in good faith and how to draw the line between the two. Therefore, he concluded that the said provisions do not pass the proportionality test. To buttress his point, the learned counsel cited the case of KUKUTIA OLE PUMBUNI v. ATTORMEY GENERAL AND ANOTHER [1993] TLR 159 AND JULIUS ISHENGOMA NDYANABO v. ATTORNEY GENERAL [2004] TLR 14 in which the Court of Appeal had this to say:

"a law which seeks to limit or derogate from basic rights of individual on the ground of public interest, will be saved by article 30(2) of the Constitution if it satisfied two requirements; firstly, such law must be lawful in the sense that it is not arbitrary. It should make adequate safeguards against arbitrary decisions and provides effective controls against abuse of those in authority when using the law. Secondly, the limitation must not be more than necessary to achieve the legitimate object."

Same words were echoed in the case of JULIUS NDYANABO by the Court of Appeal where it stated that:

"fundamental rights are not illimited. To treat them as being absolute is to invite arnachy in society. Those rights can be limited, but the limitation must not be arbitrary, unreasonable and disproportionate to any claim of state interest."

On that note, the learned counsel submitted, in conclusion, that the said limit, if any, does not meet the criteria in the three part test, and specifically the aspects of clarity and proportionality.

Next is section 6 (1) (b), 6 (2) (a) (b) (e) and (f), 6 (3) (b) (d) (e) (f) and 6 (4) of the Act. The section basically provides for exempted information. It was argued that the provision reflects pure limitation to the freedom of expression, particularly access to information. The learned counsel referred to paragraph 2 (i) (d) of the petition in which the petitioner's claim was that, the Act contains some words which are unclear, ambiguous, and

unreasonable, and, thus, violates the right to information as per article 18 of the Constitution.

It was further submitted that, in determining whether the Act violates the Constitution, the three part test must be applied locally, and internationally. Accordingly, where the provision fails to meet any of those three criteria, it is to be declared that it violates the right to freedom of expression and press freedom. Quoting section 6 (1) (b) of the Act, the learned counsel emphasized that, it limits access to information in a manner which is vague and broader and, hence, capable of being abused such as 'disclosure is not justified in the public interest and, concluded that, this provision do not pass the three part test.

Another complaint was on section 6 (2) of the Act, which, according to the learned counsel for petitioner, also contains some words which are unclear, vague and ambiguous. It was argued that words such as 'lawful commercial interest', 'unwarranted invasion', 'undermine the defence', 'national security', 'international relations of the United Republic of Tanzania', impede due process of law and endanger safety of life of any person. In the view of the learned counsel, such phrases are too wide and too vague to clearly provide for what activities are forbidden by the law. The learned counsel relied on American case of NEW YORK TIMES CO. v. UNITED STATED (PENTAGON PAPERS CASE) 403 US 713 (1971) in which the famous United State 'First Amendment' was considered and the court held that the word 'security' is broad, vague, and general. Accordingly, its contours should not be invoked to abrogate the fundamental law embodied in the 'First Amendment' on freedom of expression to the Constitution of America . In this respect, the

learned counsel for the petitioner argued that the provisions of section 6 (2) is unconstitutional for failure to meet the three part test.

Section 6 (3) of the Act was also attacked for the same reasons of being unclear, vague, ambiguous and capable of multiple interpretations. For such reasoning, the provision was alleged to be unconstitution. On the same account section 6 (4) (f) (g) which employ words 'serious public safety or environment risks' was, in the learned counsel's view, unclear and cannot pass the three part test because what is public serious safety to one person cannot be serious public safety to another. To buttress this point, the learned counsel cited the Indian case of THAPPER v. STATE OF MADRAS S.C.R (1950) 594 where the Court of Appeal of India pointed out that:-

> **"where a law purports to authorize the imposition of restrictions on a fundamental right in a language wide enough to cover restrictions both within and without, the limit of Constitutionality permissible legislative action affecting such a right, it is not possible to uphold it even so far as it may be applied within the Constitutional limits, as it is not severable. So long as possibility of its being applied purposes not sanctioned by the Constitution cannot be ruled out, must be held to be wholly unconstitutional and void."**

The learned counsel for petitioner, guided by the above case law, concluded that the said provision is unconstitutional.

As to section 14 (a) of the Act, it was also criticized as giving wide discretion to the holder of information for failure to set out time frame or limit within

which, the holder of the information should notify the person who has requested for information, the refusal of providing the requested information. It was therefore the submission of the learned counsel for petitioner that, in the absence of the time frame for communication of the refusal to the person who requested the information, the provision is vague, widely open to abuse by the holder the information and it is not necessary and justifiable in democratic society. To buttress the submissions, the learned counsel cited the case of JULIUS ISHENGOMA NDYANABO v. ATTORNEY GENERAL [2004] TLR 14 at page 29, where the Court of Appeal held that:

> **"the legislative competence of the Parliament is limited to the making of laws that are consistence with the Constitution .... Fundamental rights are not absolute, but any limitation imposed on them must not ne arbitrary, unreasonable, or disproportionate to any claim of state interest."**

The learned counsel for the petitioner pointed out that, the section contains the phrase **'public interest'.** The phrase is, however, is not defined both in the Act and the Regulations. The failure to set a time frame for the information holder within which to communicate the refusal to the person who has requested information makes it unconstitutional. To underscore the point, the learned counsel for petitioner cited the case of JULIUS NDYANABO (supra) in which it was held that:

> **"in discharging the task of Constitutional interpretation courts should avoid crippling the basic law by construing it**

technically or in a narrow spirit; fundamental rights provisions should be interpreted broadly and liberally, jealously protecting and developing the dimensions of those rights."

With the above position of the law, the learned counsel for petitioner invited the court to declare that section 14 (a) of the Act is unconstitutional as it violates articles 13(1), (2) 6 (a), 16, 18 and 29 (1) and (2) of the Constitution by curtailing the right to equality before the law and freedom of expression, which includes the right to be informed.

Section 15 of the Act was also attacked. The petitioner contended that, the provision is unconstitutional for offending the provisions of articles 13(1) (2), (6) (a), 16, 18, and 29 (1) (2) of the Constitution. Mr. Kambole argued that, section 15 is unconstitutional because it provides for the requirement of furnishing particulars of the person requesting information to the satisfaction of the information holder without having in place safeguards against abuse. In this premise, the provision is violative of article 16 and 19 (1) (2) of the Constitution.

While quoting article 16 of the Constitution, Mr. Kambole contended that the requirement of furnishing particulars of person requesting information to the information holder, is violative of the Constitution because it erodes the right to privacy and personal protection. He further contended that, the provision is against article 17 of the International Convention on Civil and Political Rights which provides that "no one should be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence nor to unlawful attacks on his own honour and reputation". In bolting his point,

the learned counsel cited the case of GOVIND v. STATE OF M.P. (1975) in which the SC confirmed that:

> **"the right to privacy is a fundamental right. The right was said to include and protect personal intimacies of the home, marriage, family etc, but it also observed that, it was subject to compelling state subject."**

Further, the learned counsel cited article 29(1) (2) of the Constitution to show that every person has right to enjoy fundamental human rights and to enjoy the benefits accruing from the fulfillment by every person of this duty to society, as stipulated under articles 12 to 28 of the Constitution.

Another provision which was under attack is section 16 (1) of the Act. The main complaint by the petitioner was that it contravenes articles 13(1) (2), 16, 18, and 29 (1) (2) of the Constitution because of failure of the Act or the Regulations to the Act to define the phrase **'public interest'.** As a result the provision is too wide, vague, unclear and capable of being abused.

The learned counsel cited article 19 of the UN Declaration on Human Rights and Convention Civil and Political Rights to buttress his point on freedom to seek and receive information regardless of frontiers and in whatever medium. According to Mr. Kambole, the impugned provision curtails the right to freedom of expression for deferring the access to information until the happening of a particular event, including the taking of some action required by law or some administrative action or until the expiration of a specified time.

It was the strong submission of Mr. Kambole, therefore, that the above provision is capable of being abused as the holder of information can hold the information until the happening of firstly an event, without categorizing the kind of such events, that may justify holding such information and secondly, some action required by law, without specifying which law or Acts or any written law. Further submission was to the effect that, as long as the said provision does not provide for safeguards against those incidences, it is open to abuse by the information holder.

It was, therefore, the strong submissions of Mr. Kambole that the provision does not pass the test of three part test as explained in CORD case which was relied on in the case of MEDIA COUNCIL OF TANZANIA (supra) and, that, this provision do not pass the proportionality as held in the case of JULIUS ISHENGOMA NDYANABO v. ATTORNEY GENERAL [2004] TLR 14 that:

"what the Constitution... attempt to do; in declaring the rights of the people is to strike balance between individual liberty and social control."

In view of the foregoing, the learned counsel concluded that section 16(1) of the Act is unconstitutional and prayed that it be declared so.

The other attack was directed to section 18 of the Act. The main complaint was that the impugned section is vague and unclear and it creates loopholes for responsible state bodies to abuse it. In addition, the provision was attacked for being silent as to what amounts to **'distort'**. The learned counsel cited a Kenyan case of CORD v. REPUBLIC OF KENYA AND

OTHERS (HC) PETITION No. 628 of 2014, in which it was stated that the law must be part of statute and must be clear and accessible to citizen so that they are clear on what is prohibited. Mr. Kambole was of the considered view that the word 'distort' is so general that it can be misused to deny access to information contrary to article 18(b) of the Constitution which allows person to seek, receive and disseminate information.

Furthermore, the learned counsel for petitioner contended that, section 18(2) of the Act imposes a very huge sanction which, unlike an offence, does not envision an element of requiring mens rea. In this respect, the sanction is capable of being abused. Mr. Kambole implored this court to hold that section 18 of the Act is unconstitutional.

The last section under attack was section 19 of the Act, which the petitioner alleged that it is unconstitutional for contravening the provisions of article 13(1),(2),(6) (a),16,18 and 29(1) (2) of the Constitution. According to Mr. Kambole, section 19(3) of the Act provides for remedy of an appeal to the Minister from the decision of the head of institution made under subsection 2 within 30 days from the date of receiving the decision. However, the decision of the Minister is final and, as such, contravenes article 107A (1) of the Constitution which provides that the judiciary shall be the authority with final decision in dispensation of justice. It was argued that the section sets double standard and discrimination as, while some information seekers have right to knock court doors for judicial review, others are denied such rights.

Mr. Kambole has it that the finality clause imposed by section 19(3) is unconstitutional for being violative of section 13(1) of the Constitution. To buttress his point the learned counsel cited the case of JULIUS ISHENGOMA NDYANABO v. ATTORNEY GENERAL (supra) in which, among others, the court had this to say:

> **"access to court is, undoubtedly, a cardinal safeguard against violation of one's right, whether those rights are fundamental or not. Without that right, there can be no rule of law, and therefore, no democracy. A court of law is the last resort of the oppressed and the bewildered."**

In addition to the foregoing, the learned counsel cited the case of JEBRA KAMBOLE v. ATTORNEY GENERAL, MISCELLANEOUS CIVIL CAUSE NO. 32 OF 2015 (HC) DSM (Unreported) in which the court held that the provisions of section 50 of the Cyber Crimes Act is unconstitutional for it restricts the right of hearing and right of appeal.

It was the submission of Mr. Kambole that at paragraph 12 of the counter affidavit the respondent concurred by noting the contents of paragraph 14 of the affidavit and stated that an aggrieved party can pursue his grievances through other mechanisms, without disclosing what those other mechanisms are. According to Mr. Kambole, section 19 of the Act, contains finality clause which bars the court from determining the same case on which the Minister has finally determined. In this context, it was argued, the provision violates article 13(6) of the Constitution.

In totality, it was the submission of Mr. Kambole that, **first,** the court must be satisfied that the limitation is 'provided by law'. In other words, the limitation must be part of the statute, and must be clear and accessible to citizen so that they can regulate their conduct. **Second,** the court must determine that the objective or purpose of the law was pressing and substantial. In other words, the law must be promulgated to meet an objective or aim that is important to society. **Three**, the court must find that the law is proportionate relative to the objective or aim that it seeks to achieve. In this context, the law is required to be rationally connected to its objective or aim. This means that the effects of the law must be proportionate to its objective or aim, and the right to freedom of expression must be limited as little as possible.

On the other hand, the respondent strongly objected to the prayers of the petitioner and stated in strong terms that the Access to Information Act, No.6 of 2016, was enacted with a view of making provisions for defining the scope of information which public has the right to access, to promote transparency and accountability of information holders and for matters related therewith. According to Mr. Mahenge, the same was to protect the Government, private sector, individuals and the whole community in relation to information which the public has right to access, hence reasonably necessary.

Mr. Mahenge pointed out that in this petition, the only issue for determination is whether the provisions of sections 2(2) (b) (ii), 4(a), (e), 6(1),(b),6(2)(a)(b)(e)(f)(h)(i)(j), 6(3)(b)(d)(e)(f), 6(4),14(a),15,16(1),18

and 19 of the ACCESS TO INFORMATION ACT, NO.6 OF 2016 violate articles 13(1),(2)(6), 16,18 and 29(1) (2) of the Constitution.

In answering the above issue, the learned State Attorney premised his submissions on an Article by Toby Mendel titled **"Freedom of Information: A Comperative Legal Survey"** which was also cited by the petitioner at page 20 of his written submissions. The relevant part of the article reads:

> **"Request to access information must be in writing and specify the name and address of the applicant, as well as a description of the information desired."**

The learned State Attorney also relied on article IV(1) of the **"Declaration of Principles on Freedom of Expressions in Africa of 2002"** in which has it that, in every right there must be procedures provided by the law to regulate the exercise of the right in question. The said article provides as follows:

> **"public bodies hold information not on themselves but as custodian of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law."**

According to Mr. Mahenge, the above position is relevant to the instant petition as any person who wishes to access the information is required to make a request to the information holder by following the laid down principles.

Mr. Mahenge invoked article 30(1) of the Constitution arguing that every fundamental right is subject to limitation. He relied on the case of JULIUS NDYANABO v. ATTORNEY GENERAL [2004] TLR 14 at page 38 where the Court of Appeal stated:

> **"Fundamental rights are subject to limitation. To treat them as being absolute is to invite anarchy in society. Those rights can be limited, but the limitations must not be arbitrary, unreasonable and disproportionate to any claim of State interest."**

The learned State Attorney also brought to our attention article 9(1) of the **African Charter on Human and Peoples' Rights, 1981** which provides for information; while article 27 of the same Charter provides that the rights and freedom of each individual shall be exercised with due regard to the rights of others, collective security, morality and common interest. The learned State Attorney further fortified his position by article 19(2) and (3) of the International Covenant on Civil and Political Rights, 1966 which recognizes the restrictions subject to the law in question.

To bolt up his point the learned counsel quoted the holding in the case of JULIUS NDYANABO v. AG (supra) at page 38 where it was held:

> **"A society in which men recognize no check upon their freedom soon becomes a society where freedom is the possession of only a savage few..."**

On that premise and foundation, the learned counsel tested the alleged provisions against the articles of the Constitution to be violated. Starting with section 2(2) (b) of the Act that is said to offend article 13(1) (2), 6(a),

16, 18, and 29(1) (2) of the Constitution, the learned State Attorney submitted that the petitioner has completely failed to show how the said provisions are discriminatory. The learned State Attorney pointed out that under article 13(5) of the Constitution, discrimination is defined to include treating categories of people differently. On top of that the learned State Attorney cited the case of LEGAL AND HUMAN RIGHTS CENTRE (LHRC) AND TWO OTHERS v. THE ATTORNEY GENERAL, MISCELLANEOUS CIVIL CAUSE NO.77 OF 2005 at page 25 in which the court, when determining whether the law was discriminatory, observed as follows at its judgement:-

> **"with great respect to the learned State Attorney, we disagree with him that 'takrima' provisions are not discriminatory. They are discriminatory as between high-income earner candidate and low-income earner candidate. The two cannot stand at the same position. The economic status of the high-income earner will place the candidate at an advantageous position to win the elections at the detriment of the low-income candidate who has very little or nothing at all to offer. This we have no doubt in our minds at all."**

It was the submission of the learned State Attorney that, under Act No.6 of 2016, any citizen of the Mainland Tanzania can request for information from an information holder whereby an information holder includes a public authority or private body registered under the law which utilizes public funds or are in possession of information which is of public interest. On that note, therefore, the learned counsel was of the view that, every citizen of Mainland Tanzania has access to information from public authorities and

private bodies in a prescribed manner. In this regard, the provisions are not discriminatory as alleged by the petitioner.

On the argument that the law is not clear on what information is of public interest and who has the duty to determine the information of public interest, it was the reply of the learned State Attorney that, it is a settled principal of statutory interpretation that, words of any given statutory provision, must be given their plain meaning. Accordingly, the phrase information of public significance would vary in context and each case has to be addressed specifically and on its own merits. It is thus illogical to define such a phrase in view of lack of commonality of use. Even when a citizen applies for information and upon the application being refused for whatever reason, the citizen still can apply for judicial review to the High Court under section 19(4) of the Act, pointed out Mr. Mahende. To buttress his point the learned State Attorney cited the case of JEBRA KAMBOLE v. ATTORNEY GENERAL, MISCELLANEOUS CIVIL CAUSE NO. 32 OF 2015.

On the submissions that section 2 does not meet the criteria of clarity and proportionality test as provided in the case of MEDIA COUNCIL (supra), the learned State Attorney argued that, the petitioner failed to show how the said section failed the above test. The principal of proportionality, according to Mr. Mahenge, was well explained in the cases of KUKUTIA OLE PUMBUN v. ATTORNEY GENERAL AND ANOTHER (supra) AND JULIUS ISHENGOMA NDYANABO v. ATTORNEY GENERAL (supra) where the Court of Appeal held that:

"A law which seeks to limit or derogate from the basic right of individual on the ground of public interest, will be saved by article 30 (2) of the Constitution of it satisfied two requirements. Firstly, such law must be lawful in the sense that it is not arbitrary. It should make adequate safeguards against arbitrary decisions and provide effective controls against abuse of those in authority when using the law. Secondly, the limitation imposed must not be more than necessary to achieve the legitimate object. This is known as the principle of proportionality."

And in Ndyanabo case(supra) it was held:

"Fundamental rights are illimitable. To treat them as being absolute is to invite anarchy in society. Those rights can be limited, but the limitation must not be arbitrary, unreasonable and disproportionate to any claim of state interest."

In essence, according to the learned State Attorney, what is prohibited by section 2 of the Act is **'intentional and unlawful'** access to private personal information which is aimed at making mandatory the scope of application of the Act limited only to information of public interest.

More so, the learned State Attorney argued that, section 2 of the Act, aims at safeguarding the protected information that the public has not been permitted to access, including personal information. The learned State Attorney concluded that section 2(2) (b) (ii) of the Act, do not violate the right to seek, receive and disseminate information as articulated in article 13, 16,18 and 29 of the Constitution but same is line with those provisions.

On whether provisions of section 4 (a) (e) of the Act offends the provisions of article 13(1) (2), 6 (a), 16,18 and 29 of the Constitution, the learned State Attorney submitted that as per the decisions in JEBRA KAMBOLE v. ATTORNEY GENERAL (supra) words must be given their plain meaning. The alleged provisions have plain meaning and have no any ambiguity. The words in the provisions carry obvious ordinary meaning that need not to be defined. Mr. Mahenge, therefore, submitted that, he does not see how the section limits freedom of expression and access to information. Rather, it safeguards access to information and protects those who release information of public interest in good faith and, by protecting the information holder, it will encourage the release of information upon request.

On the issue as to whether section 6(1) (b), 6(2) (a) (b) (e)(f), 6 (3)(b) (d) (e) (f) and 6(4) of the Act offends the provisions of articles 13(1) (2), (6) (a), 16,18 and 29 (1) (2) of the Constitution, it was the strong submissions of the learned State Attorney that, the section does not restrict access rather it allows the information holder to withhold information or part of information where he is satisfied that the requested information is exempted or the disclosure is not justified for different reasons as listed, including national security and public interest. On the test of proportionality it was submitted that several factors have to be taken into account. They include seriousness of the information, nature and severity of the information, the risk that the invasion to privacy of another person poses, national security, and the risk that the information will destroy or tamper with court proceedings.

The allegations that the provisions are unclear and vague and that ambiguous words are subject to interpretation of the information holder are misplaced. It was so argued because, where an information holder has withheld the disclosure of such exemption, a person has a room to challenge the withholding of such exempted information in the proper forum and through the laid down procedures under section 19(4) of the Act. The laid down procedure provides for a mechanism to be followed by a person who has requested for information and is aggrieved with the decision of the information holder. Another room is to appeal to the Minister whose decision is final. And the last remedy is for the aggrieved party to apply for judicial review. To bolt up his point the learned State Attorney cited the case of SANAI MURUMBE AND ANOTHER v. MUHERE CHACHA [1990] TLR 54 where it was held that:

> **"an order for certiorari is one issued by the High Court to quash the proceedings of and decisions of subordinate courts or tribunal or public authority where, among others, there is no right of appeal."**

Mr. Mahende further pointed out that even the decisions cited by the learned counsel for petitioner supports their position that right to access information is not absolute and the limitation is provided for under the Act. To bolt up the point further, the learned State Attorney cited the case of JULIUS NDYANABO v. ATTORNEY GENERAL (supra) in which the Court of Appeal held inter alia that:

"The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed to the governing authority of the country to be essential to the safety, health, peace and general order and moral of the community ... what the Constitution, therefore, attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control."

It was, therefore, a strong submission and conclusion of the learned State Attorney that, the whole of section 6 of the Act is in compliance with the Constitution since it has legitimate aims of safeguarding the public interest and protecting the society rights and freedoms as provided under articles 29(5) and 30 (1) of the Constitution.

As to section 14 (a) of the Act which is alleged to offend the provisions of articles 13(1) (2) (6) (a), 16, 18, and 29 (1) (2) of the Constitution, it was the submission of the learned State Attorney that the provision has to be read together with section 11 of the Act, which require the information holder to give notice as soon as possible but not exceeding thirty days after a request is received. The notice must indicate whether the information exists and if it does, whether access shall be given. As such, it was submitted that, it is not true as alleged and argued by the learned counsel for petitioner that the law does not provide for a time frame when one refuses to give access to information. Mr. Mahenge, therefore, submitted that they find no merits to the allegation by the petitioner on this section.

The next section attacked by the petitioner is section 15 of the Act of which it was alleged it offends the provisions of articles 13 (1) (2) (6) (a), 16, 18, and 29 (1) (2 of the Constitution. However, Mr. Mahenge submitted that, this section was enacted to save the public interest by ensuring that exempted information is not requested by a person from a third party unless all dangers are eliminated including the safety of life of any person.

As to the case of GOVIND v. STATE OF M.P. (1975) cited by the learned counsel for petitioner, it was the submission of Mr. Mahenge that this case is distinguishable from the circumstances of this petition. In this petition, Mr. Mahenge pointed out, however, that, the case of GOVIND supports the position of the section that the right to information is not absolute but subject to restriction on the basis of defending public interest. On that note, the learned State Attorney invited this court to find that the said section is Constitutional.

Mr. Mahenege also addressed us on section 16 of the Act on allegations that it offends the provisions of article 13(1) (2) (6) (a), 16, 18 and 29(1) (2) of the Constitution. It was the brief submissions of the learned State Attorney that, the words used in the provision vary in context and each case has to be addressed on its own specific circumstances since it is illogical to define such phrase in view of the commonality of use. Further submissions were that even the remedies are available under section 19(4) of the Act.

As to whether section 18 of the Act offends the provisions of articles 13(1) (2) (6) (a), 16, 18, 29(1) (2) of the Constitution, it was the submission of the learned State Attorney that in the originating summons, and affidavit of

the petitioner, nothing is said on the facts, law and grounds on how section 18 violates the specific provisions of the Constitution. According to the learned State Attorney, the arguments are statement of facts by the petitioner from the bar which cannot be raised in the course of submissions in this court. In support of his stance, the learned State Attorney cited the case of ATTORNEY GENERAL v. MKONGO BUILDING AND CIVIL WORKS CONTRACTORS LIMITED AND ANOTHER, CIVIL CASE NO.81/16 OF 2019 (Unreported) at pages 5 and 6. As to the complained word 'distort', it was the strong submission of the learned State Attorney that the word must be given ordinary and plain meaning and within the context used in the statute.

In addition, the learned State Attorney submitted that the word 'distort' is only applicable where a person has already accessed the information and is prevented from distorting the same. The learned counsel, therefore, wondered how this section denies access to information as alleged by the petitioner. Even when someone distorts the information and is sanctioned under that section the same has to be read with other laws such as Criminal Procedure Act, [Cap 20 R.E. 2002].

On that note the learned State Attorney in sum submitted that the section is Constitutional in all intents.

As regards the issue as to whether section 19 of the Act, offend provisions of article 13(1) (2),(6) (a), 16,18 and 29 (1) (2) of the Constitution, it was the strong submission of the learned State Attorney that, section 19 does not violate the right to be heard. In his submissions, section 19 of the Act affords right to be heard, through extra judicial mechanism whereby the

decision of the Minister is final, but can be challenged at the High Court by way of judicial review.

He argued further that section 19 is reasonable since article 13(6) of the Constitution not only provides for the right to appeal but also provides for other legal remedy. Judicial review is another legal remedy that has been incorporated in the section.. To bolt up his point the learned State Attorney cited the case of SANAI MURUMBE AND ANOTHER v. MUHURE CHACHA [1990] TLR 54 in which the court held that:

> **"An order of certiorari is one issued by the High Court to quash the proceedings of and decision of a subordinate court or tribunal or public authority where, among others, there is no right to appeal."**

On the totality of the above, it was the submission of the learned State Attorney that the whole of the Access to Information Act is in compliance with the Constitution since it has legitimate aims of safeguarding the public interest and protecting the society rights and freedom under article 29(5) and 30(1) of the Constitution. Not only that but also was the strong submission of the learned State Attorney that the whole Act is saved by article 30(2) of the Constitution and is not arbitrary but reasonable and proportional.

Lastly, the learned counsel submitted that the petitioner utterly failed to prove his allegations of how the said sections violated the alleged provisions of Constitution as alleged. To buttress his point, the learned State Attorney

cited the case of REV CHRISTOPHER MTIKILA v.ATTORNEY GENERAL [1995] TLR 31 in which the court held that:

> **"Breach of the Constitution is such a grave and serious matter that cannot be established by mere inference but by proof beyond reasonable doubt."**

To crown it all and for the reasons advanced, the learned State Attorney prayed for dismissal of the petition in its entirety with costs.

This marked the end of the submissions by the legal minds for the parties in this Constitutional petition. We were obliged and found it imperative to summarize the details of each argument raised because of the nature and seriousness of the Constitutional petitions.

Equally important we find it imperative for the sake of clarity to reproduce the affidavit of the petitioner which will guide us in the determination of this constitution petition for it's the basis upon which proof of the impugned provisions are alleged to have been violative of the Constitution lies.

The affidavit in support of the originating summons with 19 paragraphs provides:-

1. ***That I am the petitioner in this application thus conversant with the facts am about to depose hereunder.***
2. ***That I am the patriotic and conscious Tanzania citizen with the human rights concern.***
3. ***That the respondent is the Attorney General of the United Republic of Tanzania who is responsible for the Government legal matters.***
4. ***That Access to Information Act No.6 of 2016 was passed into law by the Tanzania Parliament on September 7, 2016.***

5. *That the law was assented and signed by the President of the United Republic of Tanzania on 23rd September, 2016.*
6. *That the law was published on Government Gazette No.41 Volume 97 dated 30th September, 2016.*
7. *That the objective of the Act was to provide for Access to Information; to define scope of the information which the public has the right to access, to promote transparency and accountability of information holders and to provide for other related matters.*
8. *That the provisions of the Access to Information Act provides that the Act shall apply to Mainland Tanzania specifically to public authorities and private bodies who are in possession of information which is of significance public interest.*
9. *That the provision of the Access to Information Act provides for the right to access information to the Tanzania natural persons only.*
10. *That the Access to Information Act No.6 of 2016 restricts access to information as it provides for categories of information in which a huge number of information is said to be exempted from disclosure.*
11. *That the provisions of the Access to Information Act No.6 of 2016 does not provide time frame under which information holder can notify the refusal of the request.*
12. *That the provision of the Access to Information Act No. 6 of 2016 provides for requirement to give notice to the third party including particulars of the person requesting information to the satisfaction of the information holder.*
13. *That section 16 of the Access to Information Act No.6 of 2016 provides discretionary powers to the information holder to defer access to information.*
14. *That the provisions of the Access to Information Act No.6 of 2016 provide for the right to review decision of information to the head of*

the institution then to the Minister whose decision is final, save for few incidences which can be referred to the High Court.

15. That the Constitution of the United Republic of Tanzania of 1977 as amended from time to time provides for the right to equality, to appeal, right to information, right to equal protection under the law, right to non-discrimination, right to fair trial, right to privacy and right to enjoy fundamental human rights.

16. That the petitioner is challenging the Constitutionality of some provisions of the Access to Information Act No.6 of 2016.

17. That the petitioner does not have an alternative remedy as regards to the Constitutionality of the Access to Information Act No.6 of 2016.

18. That it is the High Court which has jurisdiction to declare that the provisions of particular law as unconstitutional.

19. That the petitioner as person has never file a constitutional case challenging constitutionality of some provisions of Access to Information Act.

From the foregoing submissions of the parties' learned counsel, the task we have now is to determine the merits or otherwise of this petition. The first issue this court is enjoined to determine is whether the provisions of section of section 2 (2), (b), (ii),4(a) (e), 6(1) (b),6(2) (a) (b) (e) (f) (g) (h) (i) (j), 6(3) (b) (d) (e) (f), 6(4), 14(a), 15, 16(1), 18 and 19 of the Act are unconstitutional. If the first issue is answered in the positive, then, the second issue will be whether they are saved by article 30(2) of the Constitution. And the last issue will be what relief parties are entitled to.

However, before we delve into the details of each section alleged to be unconstitutional, we find it imperative to point out that, in our jurisdiction now, there are certain trite principles that have been developed from the judicial pronouncements in regard to petitions on unconstitutionality of the Acts of parliament which will be of a useful guidance in the determination of the instant petition. These are:

One, a piece of legislation or provision in a statute shall be presumed to be Constitutional until the contrary is proved. This principle, in other words, is known as Constitutionality of the Act of the parliament. See the case of JULIUS ISHENGOMA NDYANABO v. ATTORNEY GENERAL [2004] TLR 14. **Two,** litigants should first exhaust other lawful available remedies under statutory or case law, before they can seek remedies under the Basic Rights and Duties Enforcement Act. See sections 4 and 8(2) of the Basic Rights and Duties Enforcement Act, [Cap 3 R.E.2002]. See the case of TANZANIA CIGARATTE COMPANY LIMITED v. THE FAIR COMPETITION COMMISSION AND ATTORNEY GENERAL, MISCELLANEOUS CIVIL CAUSE NO 31 OF 2010 (HC) DSM (Unreported). **Three**, any legislation that falls within the parameters of the article 30 is constitutionally valid, notwithstanding that it may violate basic rights of the individual. But the legislation must fit squarely with the provisions of that article in that it could be construed as being wholly for ensuring the interests of defence, public safety, public order. See DIRECTOR OF PUBLIC PROSECUTION v. DAUD PETE [1993] TLR 22. **Four,** a breach of the Constitution, however, is such a grave and serious affair that it cannot be arrived at by mere inferences, however attractive as such require proof beyond reasonable doubt. See the cases of REV.

CHRISTOPHER MTIKILA v. ATTORNEY GENERAL [1995]TLR 31 and CENTRE FOR STRATEGIC LITIGATION LIMITED AND CHANGE FOR TANZANIA LIMITED, MISC. CIVIL CAUSE NO 21 OF 2019 (HC) DSM (Unreported). These principles though just but few to mention, will assist this court in the determination of the instant Constitutional petition.

Also, it should be noted that the Access to Information Act, No.6 of 2016 was enacted in order to provide for access to information; to define the scope of the information which the public has the right to access; to promote transparency and accountability of information holders; and to provide for other related matters.

We turn now to consider whether the enactments complained of, are indeed unconstitutional, and if yes, whether they are saved by article 30(2) of the Constitution. We will determine each section in the chronological order the learned counsel for the parties discussed them in their respective submissions. The first section under attack and which this court is invited to declare unconstitutional in this petition is section 2(2)(b)(ii). This section is alleged to contravene articles 13 (1) (2) (6) (a), 16, 18, and 29 (1) (2) of the Constitution. Article 13 provides for equality before the law; article 16 provides for right to privacy and personal security; article 18 guarantees for freedom of expression; and article 29 which guarantee right to enjoy the basic rights. However, we hasten to point out that, nothing was submitted in respect of article 29 of the Constitution in the affidavit and in the written argument to substantiate the unconstitutionality allegations against this article. We will not, however, for avoidance of repetition, reproduce again

the arguments of the learned counsel but we will consider them along each section as industriously argued.

Having carefully considered affidavit and counter affidavit and rival submissions on section 2(2) (b)(ii) of the Act and having scanned through the entire provision which applies to private bodies registered under the law, and which are in possession of information which is of significant public interest, we find no merits on allegations in respect of this section raised by the petitioner. The petitioner's affidavit in support of the petition, fall short of showing the alleged unconstitutionality of section 2. Unfortunately to the petitioner, none of the 19 paragraphs of the affidavit quoted above had a single paragraph attempting to show how the alleged section is unconstitutional.

It is only in the petitioner's written submissions, it was stated that section has limited scope of application. The bodies or individuals who are segregated or discriminated in the Act were not disclosed. Another point argued was in relation to who determine that certain information is of significance public interest. With due respect to the learned counsel for petitioner, determination of the significance of public interest in the Act is left to the applicant under section 10 (2) of the Act. Therefore, the argument by the learned counsel for the petitioner that no one has duty to determine whether certain information is of significance public interest, is not true and was made in ignorance of the provisions of section 10(2) of the Act. To be sure, under section 10(2) of the Act, the applicant is supposed to provide sufficient details to enable the information holder to identify the kind of information requested. Section 19 (1)- (4) in its totality provides for right to

be heard, to challenge refusal to access to information, to appeal to the Minister and apply for review to the High Court.

We, accordingly, find and hold that section 2 (2) (b) (ii) of the Act is Constitutional and do not in any how discriminate any person or any group of person as alleged. In other words, the petitioner has utterly failed to prove to the standard required in Constitutional petitions; namely beyond reasonable doubt, that the said section is unconstitutional either by affidavit or arguments. On that note, we find and hold that section 2 (2) (ii) was legitimately enacted.

The second section this court was invited to declare unconstitutional was section 4 (a) and (e) of the Act. This section spells out the objectives which the Act was enacted to achieve. Having seriously considered the rival arguments as presented above by the learned counsel for parties on this section above, we are of the considered opinion that sub paragraphs (a) and (e) of section 4 give effect for citizen to have access to information as provided by the Constitution, and protecting people who give information for public interest. Accordingly, the learned counsel for petitioner has utterly failed to convince this court to see how the sub paragraphs are violative of articles of 13 (1) (2). Allowing citizens to have access to information is the very object that the impugned law seeks to achieve under sub paragraph (a) as amply submitted by the learned counsel for petitioner in his introduction to his arguments. In our considered opinion, section 5 (a) of the Act, provides as general rule that all citizens have the right to access to information. The limit imposed under sub paragraph (e), therefore, was aimed at protecting the information holder who release information on public

interest, otherwise the public interest may be at jeopardy at the detriment of the individual as amply provided under article 30 (1) of the Constitution. So, even the principle emerging from the case of JULIUS NDYANABO (supra) allows such limitation and achieve the privacy articulated under article 16 of the Constitution, hence within the ambit of article 30 (2) of the Constitution.

As we have noted earlier, the affidavit of the petitioner did not show any statement or evidence how the section 4 (a) (e) of the Act is unconstitutional. In his written submissions the learned counsel did not also demonstrate how the provision violates the Constitution. As to articles 18 and 29 (1) (2) of the Constitution, there was equally nothing in the affidavit and in the written submissions on how such provisions are violated. On that note, we were satisfied and hold that that section 4 of the Act was validly enacted.

This court was also called on to declare unconstitutional section 6 (1) (b), 6 (2) (a)(b) (e),(f), 6(3) (b) (d) (e) (f) and 6(4) of the Act. The impugned section is all about information which is exempted under the Act. The learned counsel for the petitioner, correctly in our view, argued that the section is purely limitation section under the Act. It is alleged that the section contravenes articles 13(1) (2), (6) (a), 16, 18 and 29(1) (2) of the Constitution. But upon carefully going through his submissions, we were clear the only argument was that, section contravene article 18 alone. There was nothing submitted in respect of articles 13, 16 and 29 of the Constitution. We are, therefore, without much ado, find and hold that the abstinence or avoidance of the learned counsel for petitioner to say a word in respect of articles 13, 16 and 29 of the Constitution as earlier alleged in

respect of section 6 of the Act, means to our considered opinion, that, the alleged section was validly legislated and is Constitutionally proper with articles 13, 16 and 29 of the Constitution.

To put the record proper, article 18 of the Constitution has four sub paragraphs, and each paragraph confers some rights to the citizens of this country. The said article provides as follows:

18. Kila mtu-

(a) anao uhuru wa kuwa na maoni na kuelezea fikra zake

(b) anayo haki ya kutafuta, kupokea na kutoa habari bila kujali mipaka ya nchi.

(c) anao uhuru wa kufanya mawasiliano na haki ya kutoingiliwa katika mawasilaino yake.

(d) anayo haki ya kupewa taarifa wakati wowote kuhusu matukio mbalimbali muhimu kwa maisha na shughuli za wananchi na pia kuhusu masuala muhimu ya kijamii.

This is all about the famous article on right to have free opinion, seek information and disseminate information. We have been referred to by the learned counsel for petitioner and urged to test this section under the **"three part test"** ie, first, if limitation is within the law, clear and accessible to allow the citizen to regulate their affairs; the objective or purpose of the law was pressing and substantial to the society; and the law is proportionate relative to the objective or aim it seek to achieve; second, to the United State famous first amendment to their Constitution as interpreted in the case

of NEW YORK TIMES v. UNITED STSTE (Supra) and the case of THAPPER (supra) from India to see that where the language used is wide to cover restrictions that are not allowed by the law, it must be upheld as being unconstitutional.

Having considered both the lengthy rival submissions of the learned legal minds of the parties, we have observed the following: **one,** there is no free enjoyment of rights without limits even when it comes to article 18 of the Constitution. The case of JULIUS NDYANABO (supra) speaks loud and voluminous. It was held that:

> **"the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed to the governing authority of the country to be essential to the safety, health, peace, and general order and moral of the community ... what the Constitution therefore attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control."**

two, very serious and important is the aim of the petitioner to bring and challenge the provisions of section 6 (2) (a) (b) (e) and (f) of the Act. We have seriously doubted the petitioner's aim of challenging the protection of national security, safety of the life of any person, invasion of person privacy and commercial interest because, to him these are matters that do not matter and they can be exposed without restrictions. Besides, the word that was found broad, vague and general in the case of NEW YORK TIMES (supra) was **'security'** as opposed to our case where the phrase used are

'national security or public interest' which we are sure that even the United States, cannot venture to leave them at the disposal of anybody. Therefore, the petitioner's learned advocate, reliance in that case, with due respect to him, is distinguishable and do not apply to our situation we have here.

Three, the kind of information restricted is, in our considered opinion, provided by the law under article 29(5) of the Constitution and is intended to achieve what is provided for in article 16(2) of the Constitution. Therefore, in the final analysis and for the reasons given above we are constrained to find and hold that the restrictions are proportionate to the objective of the Constitution itself and the law in question. **Forth,** the restrictions given under section 6(1) (b) of the Act are not absolute. As correctly argued by the learned State Attorney, there are mechanism of challenging the restrictions under the provisions of section 19 of the Act. Therefore the sanctity of the court to be final in dispensation of justice under article 107A (1) of the Constitution is still preserved under section 19(4) of the Act.

In the totality of the above reasons, we are satisfied that the provisions of section 6 of the Act, were legitimately enacted and the restrictions attached thereto are that are consistent with article 30(2) of the Constitution. So, the arguments of the learned counsel for petitioner are short of convincing this court to find otherwise.

This takes us to section 14 (a) of the Act which is alleged offensive of articles 13 (1) (2), (6)(a), 16, 18,and 29(1) (2) of the Constitution. With due respect to the petitioner and his learned counsel there was no single

paragraph in the affidavit and in the written submissions attempted to put facts on how section 14(a) of the Act is offensive of the alleged articles 13 (1) (2), (6) (a), 16 and 29 (1) (2) of the Constitution. We increasingly, therefore, continue to find and hold that the silence of the petitioner to point out how the said section is unconstitutional against the above alleged articles is a clear indication that the said section is at home and dry with the Constitution.

The only article the learned counsel pointed out and argued strongly is article 18 of the Constitution. Having careful considered the other rival arguments on time limit or time frame within which the information holder is to give the reply to the information requested, we are of the considered opinion that, as, correctly argued by the learned State Attorney, section 14 has to be ready with section 11 which set time limit of 30 days after the request is received. So, the arguments by the learned counsel for petitioner on time line or time frame lacks legs to stand. That said and done, we find that section 14 (a) is Constitutional in all intents.

We considered the issue on the phrase **'public interest'.** Our reasoning was inspired by the phrase like **'sufficient reason'** when an applicant apply for extension of time. We were clear that, it is dangerous to attempt to define such phrases. On the same parity, the courts leave such common phrases to be dealt on merit of each individual case. In our wisdom, it is prudent that each case be decided based on material facts in place which pertains to public interest and nature of information. In any events, there are remedies for challenging such a determination. We find it imperative not to take the risk of defining the phrase 'public interest' or to declare such

section unconstitutional just because the phrase 'public interest' is not defined.

We are, consequently, constrained to find and hold that section 14 (a) of the Act is Constitutional and the petitioner has utterly failed to prove otherwise.

We were also asked to declare unconstitutional section 15 of the Act. It was the argument of the petitioner's counsel that the the provisions of articles 13(1) (2) (6) (a), 16, 18 and 29(1) (2) of the Constitution are infringed by section 15 of the Act. We carefully perused the submissions of the learned counsel for parties, and, in particular, that of the petitioner on this section. We had no difficulty in finding that the petitioner had nothing on his affidavit to demonstrate that section 15 of the Act contravenes articles 13 (1) (2) (6) (a), 18 of the Constitution. The failure on the part of the petitioner is nothing other than that section 15 of the Act is at home and dry with articles 13 and 18 of the Constitution.

The remaining rival arguments are on whether the information requested, but relating to third parties, should be dealt with by the information holder without infringing one's right to privacy. We carefully considered the rival arguments on the issue whilst mindful of the impugned provisions. We are of the considered opinion that the provisions aims at protecting information holder from giving information which relates to third parties without their consent. The provision of personal particulars is meant to promote transparency and accountability and to prevent distortion. Without this section, then the information holder will find themselves in trouble. The provision hold responsible any person who was availed the information but

distort it. We further considered particulars which the procedure for access to information must contain. We are of the view that, the procedure must contain very basic particulars as provided under section 10(2) of the Act. They are name and address of the person requesting the information. It is on that note we satisfied that the arguments of the petitioner were based on fears of what would happen but not the reality. In the case of REV. MTIKILA (supra) it was held that the Constitutionality of a provision or statute is not found in what could happen in its operation but in what it actually provides for. Where a provision is reasonable and valid the mere possibility of it being abused in actual operation will not make it invalid.

Guided by the above holding, we are of the considered opinion that information which relates to third parties, is reasonable and valid. Whoever wants that information; the information holder must seek and obtain his consent in accordance with the procedure provided under the law. In our view the holding in the case of GOVIN v. STATE OF M.P (supra) is in accordance with what is provided for under section 15 of the Act. We are of such view because, holding envisages balancing interests of access to information and protection of those whose information are likely to affect them. We are thus constrained to find and hold that, section 15 of the Act, was legitimately enacted. The enjoyment of the right under this provision is equally limited under sub article (2) of article 29. In all section 15 is on our part intended to strike a balance within the two competing rights of public and private. It is thus justified by the function it wants to achieve.

The other section which this court was called called upon to declare unconstitutional is section 16(1) of the Act. We dutiful considered the rival

submissions on this section. It is our observation that deferment of the access to information is one of the matters that can effectively be handled under section 19 of the Act by way of review of the decisions by the information holders. In that way, the information holder decisions once reviewed the deferment dies a natural death like any other denial. On the public interest, we echoed what we held hereinabove for it is imperative that the phrase should be dealt with on individual cases basis. We find no harm, therefore, to the enactment of this provision.

We venture to consider section 18 of the Act, which we were likewise asked to declare unconstitutional. The main complain of the petitioner was on two issues; the first one was on definition of the word 'distort', and the second one was the punishment provided under subsection 2 which was arguably is very huge and do not fit the crime. On the other hand, the learned State Attorney submitted in reply that there was nothing in the originating summons and affidavit on section 18 of the Act. The arguments on section 18 of the Act only featured in the submission of the learned counsel. To bolt up his point, the learned State Attorney cited the case of ATTORNEY GENERAL v. MKONGO BUILDING AND CIVIL WORKS CONTRACTORS LTD AND ANOTHER (supra) quoting the case of TRANSAFRICA ASSURANCE CO. LTD v. CIMBRIA (EA) LTD [2002] 2EA in which it held that "as is well known a statement of fact by counsel from the bar is not evidence and therefore, court cannot act on." On the word 'distort' it was brief submission of the learned State Attorney that the word distort has an ordinary meaning which need not be defined.

Having carefully considered the above rival arguments, we are of the opinion that the word distort is a plain English word that even without being defined still cannot by itself make a provision of the law invalid or unconstitutional. Equally important the issue of punishment is not a factor which would render the provision unconstitutional. In our respective opinion, distortion of information is very serious matter that can cause severe damage and can endanger one's life. On that note, we find and hold that section 18 is Constitutional in all intents.

The complaint of the petitioner on section 19 of the Act is that it contravenes article 107A (1) of the Constitution which provides that the judiciary shall be the authority with final decision in dispensation of justice. It was also complained that sub section (3) of section 19 is discriminatory in that it denies rights to others, it grants to some to review to High Court. The provision which resists right of hearing and right of appeal is unconstitutional, insisted learned counsel for the petitioner. Therefore, putting the Minister as a final decision making authority is unconstitutional and violated article 13 of the Constitution, he argued.

On the other hand, it was argued that section 19 provides for right to be heard, provides for appeal, and above all where appeal is barred it provides for judicial review-which is other legal remedy that cures any complain that it abrogates article 13(6) (a) of the Constitution.

Having considered the rival arguments of the parties on this point and perused the affidavit and submissions in support of this point, we have noted that the allegation about abrogation of articles 107A (1) of the

Constitution emerge right from the written arguments. It was neither pleaded in the originating summons nor in the affidavit and nor leave of the court was sought before the allegation was introduced. Even without citing any authority, it is a trite law in our jurisdiction that parties are bound by their pleadings. Therefore, the arguments in respect of that article were misplaced and could not be considered at all. In the originating summons and affidavit the only allegations was that section 19 of the Act is violative of articles 13 (6) (a) and 29 (2) of the Constitution. However, our perusal of the affidavit and written submissions showed that there was nothing shown as to how section 19 abrogates article 29(2) of the Constitution. As already held herein above the silence or abstinence from indicating how such provision is violative of the Constitution is a clear indication that the same is at home and dry with article 29(2) of the Constitution. It is contrary to what the petitioner wanted this court to make finding that the provision contravenes the said provision of the constitution.

Section 19 of the Act, nevertheless, was attacked for being discriminatory for allowing other information seekers to appeal and other information seekers not to appeal from the decision of the Minister which described it as final. Our understanding is that, when the decision of the Minister is final, it does not outs jurisdiction of the court as final authority in dispensation of justice. We say so because the decision can still be subjected in judicial review. This is in line with the decision of this court in the case of TANZANIA AIR SERVICES LIMITED v. MINISTER FOR LABOUR, ATTORNEY GENERAL AND COMMISSIONER OFR LABOUR, [1996] TLR 217 in which considering similar

provision which stated that the decision of the Minister was final and conclusive, the court had this to say:-

"the decision that the minister's decision is final and conclusive does not mean that the decision cannot be reviewed by the High Court. In deed no appeal against such decision but aggrieved party may come to the High Court and ask for prerogative orders."

Legally speaking here the wording says the decision of the Minister is final but has no conclusive effect of ousting the court's intervention in proper judicial review case. What we, therefore, gather from the submissions of the learned counsel for the petitioner, are fears of what would happen but in real sense it cannot be said that the section bars anyone from approaching the court for redress.

In the final analysis, we are of the firm opinion that the instant petition is devoid of any useful merits and we answer the first issue in the negative i.e the alleged provisions are not violative of the Constitution. Our efforts to trace the unconstitutionality of the above provisions shown herein abovehave found the other way round. With the above findings, therefore, the second issue becomes redundant. In the end the instant petition fails in its entirety and the same is hereby dismissed with no order as to costs.

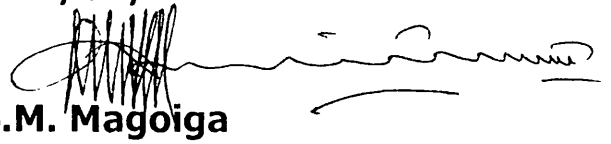
It is so ordered.

Dated at Dar es Salaam this 16th day of June, 2020.

B. S. Masoud

Judge

16/06/2020.



S.M. Magoiga

Judge

16/06/2020

J. L. Masabo

Judge

16/06/2020.