

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM MAIN REGISTRY)
AT DAR ES SALAAM**

(CORAM: E.M. FELESHI, J.K, B.S. MASOUD, J. & E.B. LUVANDA, J.)

MISCELLANEOUS CIVIL CAUSE NO. 30 OF 2018

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

AND

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

AND

**IN THE MATTER OF A PETITION TO CHALLENGE THE
CONSTITUTIONALITY OF SECTIONS 9(1); 11; 30(1); 31(1), (2), (3) &
(4) 34(4); 35; 42(1) & (2); 44(2) & (3) AND 54 OF THE PREVENTION OF
TERRORISM ACT, 2002 [ACT NO. 21 OF 2002]**

RASHID AHMED KILINDO PETITIONER

VERSUS

THE HONOURABLE ATTORNEY GENERAL RESPONDENT

Date of Last Order: 30/10/2019

Date of Judgment: 31/08/2020

JUDGMENT

FELESHI, J.K

In this petition, the Court seeks to resolve the issue whether sections 9(1), 11, 30(1), 31(1), (2), (3) & (4), 34(4), 35, 42(1) & (2), 44(2) & (3) and 54 of the Prevention of Terrorism Act, Act No. 21 of 2002 (POTA) are in violation of some fundamental rights guaranteed by the Constitution of the United Republic of Tanzania of 1977, [Cap. 2] as amended (the Constitution).

The petitioner, advocate Rashid Ahmed Kilindo petitioned under articles 26(2) and 30(3) of the Constitution, sections 4 and 5 of the Basic Rights and Duties Enforcement Act, [Cap. 3 R.E. 2019] and Rule 4 of the Basic Rights and Duties Enforcement (Practice and Procedure) Rules, 2014, G.N. No. 304 of 2014 to impugn the constitutionality of the above-mentioned provision of POTA. He filed his petition by way of Originating Summons supported by his own affidavit.

His specific account on section 9(1) of POTA is to the effect that the provision is challenged for criminalizing mere possession or access of information obtained in usual or ordinary way which is protected by article 18(b), (c) & (d) of the Constitution. Besides, it criminalizes the right to access by workers, servants or employees to working tools or information in the course of performance or execution of their employment which is protected under articles 22(1) and 22(2) of the Constitution.

That, sections 11 and 31(4) of POTA have assumed supremacy against the Constitution due to their generality and deny an accused person all legal and Constitutional rights and freedoms under articles 13(1) and 13(6)(b) of the Constitution. That, POTA derogates article 26(1) of the Constitution by inviting, encouraging and allowing abuse of powers and authority.

As regards section 30(1) of the POTA, it is challenged for contravening articles 16(1) & (2) of the Constitution in violating right to privacy by interfering with private communications and does not safeguard and or prescribe the circumstances, manner and extent under which one's rights can be encroached without prejudicing his right to privacy.

He further asserted that, sections 31(1), (2) & (3), 34(4) and 35 of POTA contravene the Constitution by violating right to equality before the law, right to be heard and fair trial, right to challenge an order and decision and right to presumption of innocence under articles 13(1),(3) and 13(6)(a)&(b) of the Constitution respectively, when one faces trial in law.

Lastly, the petitioner added that, sections 42(1) & (2), 44(2) & (3) and 54 of POTA violate individual's rights to property and protection of one's property, the right to form associations or organizations and the attendant rights to be heard and to fair hearing/trial and presumption of innocence under articles 13(6)(a) 20, 24(1) & (2) of the Constitution respectively.

In his affirmed affidavit, Mr. Rashid Ahmed Kilindo averred that POTA contravenes the Constitution for violating some fundamental rights and freedoms of people and it suppresses both rule of law and due process of law hence encouraging abuse of power and authority. He added, mere allegations made recklessly or otherwise regarding commission of offences under POTA renders one susceptible to violation of the rights of freedoms and suffer from the contravention of the provisions of the Constitution.

Essentially, it is based on the aforesaid contention that the petitioner craves for four reliefs namely- declaratory order that the State (Executive, Judiciary and Parliament) has Constitutional duty and mandate to observe, protect and preserve the rights and freedoms as guaranteed, entrenched and protected by the aforesaid provisions of the Constitution; declaratory order that the above-mentioned provisions of POTA are unconstitutional, null and void and that the same should be expunged from the Statute books; costs; and any other reliefs as this Court may deem fit to grant.

In response, the respondent through Mr. Daniel Chacha Nyakiha, learned State Attorney from the Solicitor General's Office filed Counter Affidavit and reply to the petition. He deposed that, POTA does not contravene any of the provisions of the Constitution as alleged by the petitioner adding that, the aforementioned rights guaranteed under the Constitution are not absolute because they are subjected to certain limitations which are *in tandem* with the well-recognized coexisting individual and collective rights.

Hearing of the petition was conducted by written submissions whereas parties complied with the filing schedules, hence, this Judgment. The petitioner was represented by MISNAK LAW CHAMBERS AND NASSORO & CO. ADVOCATES that assigned Messrs. Juma Nassoro and Daimu Halfani to take conduct of the matter in Court while the respondent was represented by the Solicitor General's Office through Mr. Nyakiha, learned State Attorney.

Although we may not be able to repeat each and every substance contained in their respective resourceful and thoughtful submissions, we sincerely appreciate and commend them for their submissions which without doubt will substantially be basis of our analysis and findings.

Addressing the merits of the petition, the petitioner's counsel submitted that, challenging POTA finds basis in **Daudi Pete v. Attorney General** [1993] T.L.R. 22 where the Court of Appeal of Tanzania held:

"The law which seeks to limit or derogate from the basic right of the individual or grounds of public interest will have special requirements, first, such a law must be lawful in the sense that it is not arbitrary. It should make adequate safeguards against arbitrary decisions and provide effective controls against abuse by those in authority when using the law. Secondly, the limitation imposed by such law must not

be more than is reasonably necessary to achieve the legitimate object. This is what is also known as the principle of proportionality. The principle requires that such law must not be drafted too widely so as to net everyone including even the untargeted members of the society”.

They added that, a similar position was reached in the case of **Kukutia Ole Pumbun and another v. Attorney General and another** [1993] T.L.R 159. Regarding limitation to some rights, the learned counsel referred us to the decision of the Supreme Court of Canada in the case of **R v. Oakes** [1986] 1SCR 103 which had the following in deliberation:

“The onus of proving that a limitation on any Charter right is reasonable and demonstrably justified in a free and democratic society rests upon the party seeking to uphold the limitation. Limits on constitutionally guaranteed rights are clearly exceptions to the general guarantee. The presumption is that Charter rights are guaranteed unless the party invoking s. 1 can bring itself within the exceptional criteria justifying their being limited”.

With regard to burden of proof, they cited a Ugandan case of **Charles Onyango Obbo and another vs. Attorney General**, (Constitutional Petition No. 15 of 1997) [2000] UGCC 4 where the Court underscored:

“It is important to determine who bears the burden to prove the constitutionality or unconstitutionality of an Act or law complained of. In other Commonwealth jurisdictions which have operated written Constitutions for much longer period than us, it has been determined that it is the duty of a person who complains that his rights and freedoms have been violated to prove that indeed the State or any other authority has taken an action under the authority of a law or that there is an act or omission by the State which has infringed on any of the rights or freedoms of the petitioner enshrined on any of the rights or freedoms of the petitioner enshrined in the Constitution. Once that is established, it is the duty of the State or that other authority which seeks to restrict a guaranteed right or freedom to prove that the restriction is necessary within the limits prescribed by the Constitution”.

Regarding the supremacy of our Constitution, the counsel argued that the same is provided for under article 64(5) of the Constitution and was so declared in the case of **Attorney General v. Lohay Akonaay and Another**, [1995] T.L.R 80 and complimented in **Rev. Christopher Mtikila v. Attorney General** [1995] T.L.R 31 where it was held that:

“(i) The Constitution is the basic or paramount law of the land and cannot be overridden by any other law. Where, as in the above provision, the enjoyment of a Constitutional right is ‘subject to the laws of the land’ the necessary implication is that those laws must be lawful laws. A law which seeks to make the exercise of those rights subject to the permission of another person cannot be considered with the express provision of the Constitution for it makes the exercise illusory”.

(ii) It is fundamental rights, but not their restrictions, that this Court is enjoined to guard jealously.

(iii) the scheme of our Constitution contemplates the full exercise of the fundamental rights enacted therein save as they may be limited in terms of the provisions of article 30(2) and article 31(1)”.

The petitioner’s counsel further argued that, this Court is vested with powers under article 30(5) of the Constitution to declare void and inconsistent all laws inconsistent with the Constitution. They argued, the general objectives in enacting POTA were to provide comprehensive measures against terrorism and cooperate with other States in suppression of terrorism and related matters with the impugned provisions which relate to detection, investigation, apprehension and detention extending to fair trials contending that they instead disrespect fundamental human statutory and constitutional rights through abuse of power and authority. Additionally, they contended that there is no board or authority set to oversee breaches.

So, despite the spirit behind enacting POTA, that is, parading suspects into trial, the learned counsel maintained that, to the contrary, the said

legislation disregards all procedural safeguards against arbitrary arrests and prolonged detention considering also that for under POTA, a person can be detained indefinitely at the will of the law enforcement and executive officers. They thus implored for the petition to be granted with costs.

In reply, Mr Nyakiha, learned State Attorney invited us to take note of a significant difference on how fundamental rights and fundamental duties are dealt with under Part III of the Constitution as opposed to other Constitutions including that of India which separately deal with the two distinct components under Part III and Part IVA of the Indian Constitution.

He said, by placing the basic rights under one Part, the Constitution has symbolic expression of constitutionally recognizing co-existence of the individual human being and society as well as co-existence of rights and duties of an individual and the society. Both rights and duties under Chapter III of the Constitution must be read in unison and not in isolation as they complete each other. However, he stressed that, in effect, co-existence of individuals and the society and of the rights and duties of individuals on one hand and the collective or communitarian rights and duties of the society on the other, means that the rights and duties of individuals are limited by the rights and duties of the society and *vice versa*, hence, the provisions of articles 29(5) and 30(1) of the Constitution which provide that:

"29(5) For the purposes of the better enjoyment by all persons of the rights and freedoms specified in this Constitution, every person shall so conduct himself and his affairs as not to prejudice the rights and freedom of others or the public interests".

"30(1) The rights and freedoms whose basic content have been set out in this Constitution shall not be exercised by any person in such a manner as to occasion the infringement or termination of the rights and freedoms of others or the public interest."

Mr Nyakiha argued, terrorism is posed to tumble-down human rights, democracy and rule of law against the established values embodied in the Charter of the United Nations and other International instruments. That, terrorism hampers human rights among other basic rights and acts in jeopardy to States and Governments stability, peace and security to the effect and extent of threatening social and economic development. Mr Nyakiha added, destructive impact of terrorism has gained full attention of the United Nations General Assembly, the UN Security Council and both the former Commission on Human Rights and the new Human Rights Council.

He argued that POTA has close connection with other statutes such as the Criminal Procedure Act, Cap.20 [R.E, 2002] (CPA), Extradition Act, Cap. 368 [R.E, 2002], the Proceeds of Crime Act, Cap. 256 [R.E, 2002], Anti Money Laundering Act, Cap. 423 [R.E 2002], the National Security Act, Cap. 47 [R.E, 2002], Immigration Act, Cap. 54 [R.E, 2002] and the Evidence Act, Cap. 6 [R.E, 2002] with POTA on the other hand taking an overriding effect regarding terrorism matters. It was his stance that, section 11 of POTA does not offend any article of the Constitution adding that, the alleged infringement to article 16(1) & (2) of the Constitution on interference to private communications cannot be said to exist if it does not prejudice right to privacy. Mr. Nyakiha thus strongly submitted that the impugned sections are in conformity to article 30(2)(a) of the Constitution that reads:

“It is hereby declared that the provisions contained in this part of this Constitution which set out the principles of rights, freedom and duties does not render unlawful any existing law or prohibit enactment of any law or the doing of any lawful act in accordance with such law or for the purposes of-(a) ensuring that the rights and freedoms of other people or of the interests of the public are not prejudiced by the wrongful exercise of the freedoms and rights of individuals”.

Regarding the provisions of sections 31(1), (2) & (3) of POTA, Mr Nyakiha submitted that, they are only applicable by the Police with prior written consent of the Attorney General to search for and obtain evidence of commission of an offence under POTA and the Court can only grant the Police *ex-parte* application for an interception of communication or admissibility of intercepted communications if it is satisfied that the written consent of the Attorney General has been obtained as required by the law and that there are reasonable grounds to believe that material information relating to the commission of an offence under POTA or the whereabouts of the person suspected by the Police Officer to have committed the offence is contained in that communication or communications of that description.

In view of the foregoing, he submitted that sections 31(1)-(4) cannot thus be read in isolation of section 34(4) of POTA on the ground that both the provisions provide statutory procedures to be met by the Police, the Attorney General and the Court before specified offender's communication is intercepted and retained by the Police through the communication service provider and or exclusion of any person other than the parties and their legal representatives from the instituted proceedings under POTA. Through such legal processes, Mr. Nyakiha stressed that section 34(4) of POTA is in conformity with the right to fair trial under article 13(1) and (6) when is read together with article 30(2) (a) of the Constitution quoted above.

Regarding sections 35, 42(1) & (2) and 54 of POTA, the respondents' counsel argued that, they do not offend one's Constitutional rights in relation to fair trial, presumption of innocence, property and forming associations or

organizations because POTA provides for legal and Institutional framework to protect those rights. It is for that reason, Mr. Nyakiha argued that, there are provisions of among other things on: availability of legal assistance including legal aid, prosecution service, independent Judiciary accessible by any person charged under POTA with the Court charged with responsibility of making decisions to be adhered to by other State organs.

For example, referring to section 42(1) & (2) of POTA, he submitted that, the provisions are self-explanatory that where the Court is satisfied on an *ex parte* application that there are reasonable grounds to believe that there is in any building, place or vessel, any property in respect of which an order of forfeiture may be made under section 43, it may issue a search warrant to the Police or restraint order to any person or at the request of the Attorney General appoint a person to take control of and manage or otherwise deal with the whole or a part of the property in accordance with the directions of the Court or require any person having possession of the property to give possession thereof to the person appointed.

So, it was Mr Nyakiha's contention that the impugned POTA's provisions ensure prevalence of public safety whereas both individual and collective rights are considered in general, as a whole, not in isolation as was held by the Court of Appeal in the case of **Director of Public Prosecutions v. Daudi Pete** (supra). He added that, it was held by the Court of Appeal in the case of **Julius Inshengoma Francis Ndyanabo v. Attorney General** [2004] T.L.R. 38 that fundamental rights are subjected to sets of limitations. In that case, the Court held:

“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.”

He also reminded the Court that the Court of Appeal held in the case of **Julius Inshengoma Francis Ndyabo v. Attorney General (supra)** and **AG v. Jeremia Mtobesya**, CA Civil Appeal NO.65/2016 (Unreported) that, until the contrary is proved, a legislation is presumed to be Constitutional adding that, the Constitutional construction and interpretation of a Statute should receive such construction as it will make it operative and not inoperative. And that, that the presumption as to the constitutionality of a Statute can be reversed only where the contrary is proved as held in **Rev. Christopher Mtikila v. Attorney General (supra)** that such proof must be beyond reasonable doubt which is not the case in the present petition.

Mr Nyakiha also referred the Court to the observation made by Dr. Durga Das Basu in his book titled: Shorter Constitution of India, 12th Ed who stated at page 104 that-

“there cannot be any such thing as absolute or uncontrolled liberty wholly free from restraint for that would lead to anarchy and disorder. The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed to the governing authority of the country to be essential to the safety, health, peace, general order and moral of the community.”

Mr Nyakiha submitted that, the position held by Dr. Durga Das Basu above and in the case of **Kukutia Ole Pumbun and another v. Attorney General and another (supra)** render the complaints against the impugned sections of POTA unfounded and the Court should find the petitioner to have failed to prove how the impugned provisions of POTA have affected him or

even how the impugned provisions are arbitrary. He thus implored this Court to dismiss the petition with costs notwithstanding the provision of Rule 18(1) which provides that the award of costs shall be in the discretion of the Court because the petitioner has not by any iota of evidence demonstrated that he ought to be exempted from costs in pursuit of the present petition.

In rejoinder, the petitioner's counsel submitted that, the impugned provisions do not meet the imposed conditions, hence, unjustifiable in purview of what the Court of Appeal held in the cited case of **Rev. Christopher Mtikila v. Attorney General** (supra) that, it is the fundamental rights which are fundamental and not the restrictions.

Counsel further referred us to the decision in **A & Others v. Secretary of State for the Home Department** [2004] UKHL 56 where Lord Hoffman underscored at page 97 that the real threat to life of the nation in the sense of people living in accordance with its traditional laws and political values comes not from terrorism but from laws. They further rejoined at page 4 and argued that, POTA makes the Muslim community "feel targeted" for it targets Muslims, devout Muslims, Muslim-clerics, sheikhs and Muslim leaders. They added at page 9 that, the Courts have not been helpful to suspects charged under POTA. To that effect, they cited the decision of the Court of Appeal in the case of **Republic vs Farid Hadi Ahmed and 21 others**, Criminal Appeal No. 59 of 2015, CAT, unreported.

The petitioner's counsel maintained that the impugned provisions suppress fundamental rights safeguarded under the Constitution by targeting unintended actions, acts, conducts and people to the detriment of

the people. They thus reiterated their prayers in the Originating Summons which were also advanced in their submission in-chief. That marked closure of the hearing of the petition under examination.

Having gone through the submissions by the respective learned friends and after generally and specifically carefully addressed our mind to the ably arguments of both counsel and also considered the wealth of authorities cited for guidance to the Court, we find it necessary to make quick general observation. That general observation is that, the POTA and its associated legislation in Tanzania and those in other jurisdictions, the International instruments inclusive, have become one of the most challenging areas for constitutional Courts called on to determine issues pertaining to fundamental individual basic rights *vis-à-vis* fundamental public basic rights.

So, confining ourselves to the scope of the petition before us, we are specifically sited to resolve the issue whether sections 9(1), 11, 30(1), 31(1), (2), (3) & (4), 34(4), 35, 42(1) & (2), 44(2) & (3) and 54 of POTA are in violation of some fundamental rights guaranteed by the Constitution.

It will be recalled that, several salient principles have been discussed by the learned advocates for the parties above. With a limited addition, we respectfully find them vital for determining the constitutionality of the impugned provisions hence disposing the issue at hand.

Whereas in the case of **Christopher Mtikila v Attorney General**, (supra) for example, it was held *inter alia* that, it is the fundamental rights which the Court is enjoined to guard jealously and not the restrictions. It was further underlined in the case of **Jackson Ole Nemeteni and 19**

others v. the Attorney General, Miscellaneous Civil Cause No. 117 of 2004 while determining the constitutionality of the impugned provision of the then section 148(5)(e) of the CPA and section 148(5)(a)(i) of that Act, in relation to armed robbery that, Courts are bound to look at and determine on the constitutionality of the impugned provisions and not how they are applied because, failure to comply with impugned provision/s is a question of administration and not of deficiency of the provision itself.

In **Ndyanabo's** case (supra), **Mtobesya's** case (supra), **National Bank of Commerce v Commissioner General Tanzania Revenue Authority** Civil Appeal No. 52/018, (Unreported), (Dodoma Registry), **EADB vs. Blueline Enterprises Limited**, Civil Appeal No. 110 of 2009, (Unreported) and **Chiriko Haruna David v Kangi Alphaxard Lugora & 2 Others**, Civil Appeal No. 36 of 2012 to mention a few, the Court of Appeal was settled that, until the contrary is proved, a legislation is presumed to be constitutional and also that, when the issue of interpretation arises, the constitutional construction and interpretation of a Statute should receive such construction as it will make it operative and not inoperative.

In **EADB vs. Blueline Enterprises Limited** (supra) the Court underscored:

"It has been established and we believe there is ample authority for saying so, that 'our first assumption in reading the words of any text is that the author is using them in their ordinary meaning' The Courts, therefore, under the ordinary meaning rule of statutory construction are obliged to determine the ordinary meaning of the words to be interpreted and to adopt this meaning in the absence of a reason to be rejected in favour of some other interpretation".

In **National Bank of Commerce v. Commissioner General Tanzania Revenue Authority** (supra), the Court of Appeal held at page

16 of its Judgment to the effect that, Courts in Tanzania are bound to apply plain language of a Statute to give effect to the intention of the Legislature. That position maintained its Full Bench decision in **Chiriko Haruna David v Kangi Alphaxard Lugora & 2 Others** (supra) where it held that:

"... We wish to observe here by way of emphasis even if it is at the expense of repeating ourselves that one of the cardinal rules of construction is that courts should give legislation its plain meaning... "The traditional wisdom is that the search for legislative intent is central to statutory interpretation. And the legislature's intent is normally ascertained from the words it has used. The word used may be found in the title/preamble/ chapter headings/ marginal notes/ punctuations/definitions/ etc. of the statute"."
[emphasis supplied]

Likewise, we wish to draw few best Court practices regarding statutory interpretation which we find important in the case at hand from Canada where the British Columbia Court and the Supreme Court of Canada had an opportunity to determine the constitutional validity of section 83.28 of the Criminal Code, where one of the new provisions was added to the *Code* as a result of the enactment of the Anti-terrorism Act in 2001.

In the Matter of an Application under section 83.28 of the Criminal Code (RE) [2004] 2 S.C.R. 248, 2004 SCC 42, a purposive interpretation was applied in *ex-parte* an application filed by the Crown for an order to compel the "Named Person" to attend and answer questions with regard to infringement of some fundamental rights".

The brief facts of that *ex-parte* application has it that, shortly after the beginning of the trial, the Crown lodged it in the British Columbia Court seeking an order that a "Named Person", a potential Crown witness, in a case that involved two persons jointly charged with several offences in

relation to the explosion of Air India Flight 182 and the intended explosion of Air India Flight 301 attend a judicial investigative hearing for examination pursuant to the aforementioned provision.

The application was granted and a number of terms and conditions were set to govern the conduct of the Judicial investigative hearing, among others, the hearing was to be conducted *in camera* with the notice of hearing given to the accused in the Air India trial, to the press or to the public. As the counsel for the Named Person applied to challenge the constitutional validity of s. 83.28, the constitutional challenge and the application to set aside the order were heard *in camera* where the judge presiding at the hearing concluded that the order was validly issued and section 83.28 was constitutionally sound. However, given the unusual circumstances of this case, she varied the order to permit the counsel for the accused to attend at the investigative hearing and examine the "Named Person" under the proviso that they leave the hearing if information unrelated to the trial was elicited. They were also prohibited from disclosing any information or evidence obtained at the hearing to the public or to the accused. Aggrieved, the "Named Person" successfully sought leave of appeal.

On appeal, the Supreme Court of Canada held *inter alia* that, the purpose of the Anti-terrorism Act is to prosecute and prevent terrorism offences and that although terrorism necessarily changes the context in which the rule of law must operate, it does not call for the abdication of law. Besides, the Court added that, the challenge regarding balancing of an effective response to fundamental democratic values respecting the importance of human life, liberty in the battle against terrorism is well met

by the statute **through a broad and purposive interpretation of section 83.28 (12) which suggest for a more fulsome participation by counsel during interview.** It was also expounded that: -

"...the purposive approach is supported by the wide ambit given to the judiciary under ss. 83.28(5)(e) and 83.28(7) to set or vary the terms and conditions of an order the power enabling the judge to respond flexibly to the specific circumstances of each application and ensures that constitutional and common law rights and values are respected... a broad and purposive interpretation of section 83.28 is consistent with the judiciary's role of protecting the integrity of the investigation and the interests of the named person that accords with the presumption of constitutionality and resolves ambiguities".

In another case of **Bank Mellat v HM Treasury (No 2)** [2013] UKSC 39; [2014] AC 700, 770–771, the Supreme Court (Lord Jonathan Sumption, as he then was) formulated four questions for determining the constitutionality of section 83.28 of the Canadian Criminal Statute in purview of proportionality principle. The questions were: (i) is the objective sufficiently important to justify limitation upon a fundamental right? (ii) is the measure rationally connected to the objective? (iii) could a less intrusive measure have been adopted? and (iv) has a fair balance been struck between individual rights and the interests of the community?

As the subject matter concerned border control, the Court resolved in respect of the first question that, the intervention imposed at the border **was not for border control *per se* but, rather the prevention and detection of terrorism** adding that, **the power of questioning and ordering for search was rationally connected to the main statutory objective that merited the safeguard.** Concerning questions (iii) and (iv) the Court noted that, **there was a plain rational reason for connecting**

questioning and search aiming at prevention and detection of terrorism with border controls.

Nonetheless, the Court stressed the value of the questioning and search power at the port of entry/exit **being valuable intelligence gathering tool that would be lost with a system based on suspicion on reasonable grounds.** The Court found the port questioning and search powers under the section 83.28 of the Canadian Criminal Statute in respect of information and investigative hearing predicated by a number of procedural requirements with regard to a variety of offences of terrorism were in line with section 7 of Canadian Charter of Rights and Freedoms. Section 7 of the Charter provides: -

"Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice in as far as it represents a fair balance between the rights of the individual and the interests of the community,"[emphasis supplied]

The Court further **found the principle of legality was well met through the adequate safeguards protecting individual rights from the risk of arbitrary misuse of power.**

With regard to Constitutional law specifically on the aspect of investigation of terrorism offences, the Court considered the issue whether the Criminal Code provision on gathering of information and investigative hearing infringed principles of judicial independence and impartiality **where in its majority decision it found such procedures did not infringe the principles of judicial independence and impartiality enshrined in the Charter. That is because, the guaranteed rights and freedoms**

are subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Similarly, the Supreme Court of Canada in the case of **R v. Khawaja**, 2012 SCC 69, [2012] 3 S.C.R. 555 dealt with Constitutional law aspects specifically on the Charter of Rights on the issue whether the provisions, in purpose or effect, violate a right to free expression under the Canadian Charter of Rights and Freedoms and section 2 (b) of the Criminal Code, R.S.C. 1985 amongst others where it held that **the purpose of the law does not infringe freedom of expression.**

In view of the general observation, law and case law recapped above, we find it is important for a Constitutional Court assigned to determine constitutionality of any Statute to pay regard to one or more of the basic guidelines/principles discussed above. The principles include: proportionality; constitutionality presumption of legislations; judicial independence and impartiality; legality; fundamental rights are subject to limitations; Court's duty to jealously guard fundamental rights but not their restrictions; and, applying Constitutional Construction and interpretation of a Statute method making it operative and not inoperative.

This Court too, is guided accordingly. For purposes of facilitating easy references and analysis regarding the impugned provisions, we find it ideal to reproduce them *in extenso* as hereunder: -

Section 9(1) "A person shall commit an offence under this section who is in possession of any code, password, sketch, plan, model, note or other document, article or information which relates to or is used in a protected place or anything in that place, in contravention of this Act or the Protected Places and Areas Act,

1969, or which has been entrusted to that person in confidence by any person holding office, or he had access to office from or which he has obtained or to which that person had access owing to the position or office held by him or as a person who is or was party to a contract with the Government."

Section 11. "The Provisions of this Act shall have effect notwithstanding anything inconsistent with this Act contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act."

Section 30(1) The Minister may, for the purposes of the prevention or detection of offences of terrorism or for the purposes of prosecution of offenders under this Act, give such directions as may appear to him to be necessary to:

- (a) Communication service providers generally;
- (b) Communication service providers of a specified description;
- (c) Any particular communication service provider".

Section 31(1) Subject to subsection (2), a police officer may, for the purpose of obtaining evidence of the commission of an offence under this Act, apply, *ex parte*, to the Court, for an interception of communications order.

(2) A police officer may make an application under subsection (1) only with the prior written consent of the Attorney General.

(3) A Court to whom an application is made under subsection (1), may make an order – requiring a communications service provider to intercept and retain a specified communication or communications of a specified description received or transmitted, or about to be received or transmitted by that communication service provider; authorizing the police officer to enter any premises and to install on such premises, any device for the interception and retention of a specified communications of a specified description and to remove and retain such device,

if the Court is satisfied that the written consent of the Attorney General has been obtained as required by subsection (2) and that there are reasonable grounds to believe that material information relating to –

- (i) The commission of an offence under this Act, or
- (ii) the whereabouts of the person suspected by the police officer to have committed the offence, is contained in that communication or communications of that description".

(4) Any information contained in a communication –

(a) intercepted and retained pursuant to an order under subsection (3);

(b) intercepted and retained in a foreign state in accordance with the law of that foreign state and certified by a Court of that foreign state to have been so intercepted and retained,

shall be admissible in proceedings for an offence under this Act, as evidence of the truth of its contents notwithstanding the fact that it contains hearsay."

Section 34(4) "A Court may, on motion by or on behalf of the Director of Public Prosecutions, in the interest of public safety or public order, exclude from proceedings instituted for any offence under this Act, any person other than the parties and their legal representatives".

Section 35. "Where in any proceedings for an offence under this Act, a question arises as to whether anything or a substance is a weapon, a hazardous, radioactive or a harmful substance, a toxic chemical or microbial or other biological agent or toxin, a certificate purporting to be signed by an appropriate authority to the effect that the thing or substance described in the certificate is a weapon, hazardous, radioactive or harmful substance, a toxic chemical or microbial or other biological agent or toxin, shall be admissible in evidence without proof of the signature or authority of the person appearing to have signed it and shall, in the absence of evidence to the contrary, be proof of the facts stated therein."

Section 42-(1) "Where the Court is satisfied, on an *ex parte* application, that there are reasonable grounds to believe that there is in any building, place or vessel, any property in respect of which an order of forfeiture may be made under section 43, it will issue-

(a) a warrant authorising a Police officer to search the building, place or vessel for that property and to seize that, property if found, and any other property in respect of which that police officer believes, on reasonable grounds, that an order of forfeiture may be made under section 35;

(b) a restraint order prohibiting any person from disposing of, or otherwise dealing with any interest in that property, other than as may be specified in the order.

(2) On an application made under subsection (1), the Court may, at the request of the Attorney General and, if the Court is of the opinion that the circumstances so require-

(a) appoint a person to take control of, and manage or otherwise deal with, the whole or a Part of the property, in accordance with the directions of the Court;

(b) require any person having possession of the property to give possession thereof to the person appointed under paragraph (a)."

Section "44(2) Upon the signing of a certificate under subsection (1), by the Minister or a person authorized by him, shall cause the applicant or the registered trustees to be served, personally or by registered letter sent to its last known address, with a copy of the certificate and a notice informing it that, the certificate will be referred to the Court not earlier than seven days after the service of the notice, and that, if the certificate is determined to be reasonable, the applicant will not be eligible to be registered as registered trustees or the registration of the registered trustees of the trust will be revoked, as the case may be.

(3) The certificate or any matter arising out of it shall not be subject to review or be restrained, prohibited, removed, set aside or otherwise dealt with except in accordance with this section."

Section "54. The Evidence Act, 1967 is amended, in section 89-

(i) by redesignating that section as subsection (1);

(ii) by inserting the following:

"(2) Notwithstanding subsection (1) and any other written law, where in criminal proceedings involving offence of terrorism or international terrorism, a question arises as to whether anything or a substance is in a state described or purported to be described in a document, that document shall be admissible in evidence without proof of the signature or authority of the person appearing to have signed it and shall, in the absence of evidence to the contrary, be proof of the facts stated therein."

Before getting into specific examination of the petition, it is significant to take note of the general allegations mounted by the petitioner's counsel against the impugned provisions of POTA which are phrased as- "overzealous law enforcement officers and executives officials may easily abuse the Act without checking them in order to protect the innocent ones and the integrity of the criminal justice system and constitutional order"; "section 11 in effect

suspends all human rights”; “the Act removes all procedural safeguards against arbitrary arrest and prolonged detention”; “there are no mechanisms for addressing concerns about the abuse or the prevalence of abuse of the law”; and “the Muslims community feels targeted as most of the people arrested and who face prolonged detention under the Prevention of Terrorism Act 2002 are devout Muslims, Muslim clerics and Sheikhs and Muslim leaders,” to mention but a few in the provided list.

In addition, in his rejoinder submission, the petitioner’s counsel submitted the following at page 9-10:

“The case of Republic vs Farid Hadi Ahmed and 21 others, Criminal Appeal No. 59 of 2015 was an attempt to curb abuse of the prosecution under the Prevention of Terrorism Act 2002 through Preliminary Inquiries. ... However, we should not be taken as intending to challenge the decision of Farid Had Ahmed (supra) through this Constitutional case but we want to show how the charges preferred under the unconstitutional Terrorism Act filed in the subordinate courts abuses the constitutional right of suspects. ... the Prevention of Terrorism Act 2002 has given the prosecution, investigative machineries more powers than courts.....The prosecution may adjourn the proceedings indefinitely and they may abuse the process of the court with impunity. The decision in Republic vs Farid Hadi Ahmed and 21 others (supra) has rendered the committal courts mere advisory courts.”

At page 11, he finally concluded with the following submission:

“Your Lordship, the Prevention of Terrorism Act has authorized for or given leeway or paves way to unchecked interference of the people’s right to privacy. No intervention of the Honourable courts has been provided for. The Act does not even provide conditions for the intervention and no remedy for the unwarranted interference is provided for.

In a democratic society like ours where the people’s right (fundamental Human rights) are respected and cherished, it is not expected the Prevention of Terrorism Act to be enacted and proceed to survive amidst the abuses, for such a long time from 2002 to the present, i.e. 2019. So, the executive and the law enforcement officials may simply intercept people’s private communications like political opponents and

expose them to the public with impunity while relying on the Prevention of Terrorism Act. The impugned provisions of the Prevention of Terrorism Act infringe and contravenes the constitution, and they target or net unintended actions, acts, conducts, people and at the detriment of the society which it purports to serve and protect."

In view of the above rejoinder submission, we found appropriate to go through the Court of Appeal decision in the case of **Republic v. Farid Hadi Ahmed and 21 others** (supra) for purposes of drawing the necessary lesson/s, if any, pertinent to the instant petition.

What we found in **Farid Hadi Ahmed's** case (supra) is that, the Court of Appeal after hearing the parties, decided to quash the decision of the High Court (Dar es Salaam Registry) dated 19.12.2014 in Misc. Criminal Application No. 101 of 2014 that had directed the Resident Magistrates Court of Kisutu (RM's court) to decide on matters which were raised by the respondents on 03.09.2014 in connection with three counts-conspiracy to commit an offence contrary to section 27 (c) of POTA; recruitment of persons to participate in terrorist acts contrary to section 21 (b) of that Act; and harbouring persons committing terrorist acts contrary to section 19 (a) of the same Act. The matters raised which the subordinate Court held on 01.10.2014 were that the Court had no jurisdiction to determine them as they emanated from a case triable by the High Court, including those which touched on the jurisdiction of the committing Court, lack of the mandatory consent Certificate from the Director of Public Prosecutions (the DPP) in certain instances, defects in the charge sheet for failure to disclose clear names of persons allegedly recruited and failure to disclose factual particulars in certain instances, among others.

After hearing the parties, the Court of Appeal underscored the following at page 10,11,14,16,18 and 19: -

"...the issue becomes whether or not the Subordinate Court had jurisdiction to decide those matters during committal proceeding. ...It is common ground that jurisdiction is Court's power to hear and decide a case, and it is a creature of the law. It should be underscored that the jurisdiction of any Court must be expressly given; it cannot be implied and/or assumed. Also note-worthy is the point that invariably such jurisdiction is limited. Where a decision of any court may be found to have been reached without jurisdiction, such a decision risks the danger of being declared invalid by a higher Court. (p.10)

In our jurisdiction, the Penal Code Cap 16 of the Revised Edition, 2002 is the major statute prescribing the various offences which the law prohibits and whose breach attracts prosecution. On the other hand, the CPA not only governs the procedure in trials of criminal offences, but also sets out the offences triable by subordinate courts, and those which are exclusively subject to trial by the High Court. In all those offences for which the High Court has original jurisdiction, there is a legal requirement for such offences to be instituted in the subordinate courts (the RM's Court and District courts), which are charged with duty to hold committal proceedings, and subsequently to commit such accused persons to the High Court for trial." (pp.10-11)

..."Even after the repeal of Criminal Procedure Code of 1945, and enactment of the new Criminal Procedure Act, 1985, whose main object was to provide for procedure to be followed in investigation of crimes and conduct of committal trial and for other related purposes, the former position remained the same, thus the active role of the magistrate in committal proceedings was done away with." (p.14)

... "In that vein, we hold the view that those matters which were raised before the RM's court on 3.9.2014 were legal matters to which the RM's court had no jurisdiction to decide. Those matters ought to have been reserved with a view of raising them in the High Court upon being committed to that court for trial". ... (P.16)

... "Thus, we are convinced that it was improper for the High Court Judge to interpret those powers as extending to committal proceedings, because as already stated, matters of committal are covered elsewhere. Consequently, we agree with Mr. Ndjike that the

High Court Judge erred in holding that the RM's court had jurisdiction to deliberate and decided on those matters" ... (p.18)

For reasons we have assigned, we find and hold that the subordinate court magistrate had no jurisdiction to deliberate and decide the matters which were raised before it by the respondents' advocates. Therefore, the appeal has merit and we allow it. Consequently, we quash the decision of the High Court, and direct the RM's court to proceed with the case from where it ended before the institution of the application for revision in the High Court." (P.19)

From the foregoing decision, it is certain to us that both the principle of legality, on one hand and plain meaning statutory interpretation principle, on the other, were amongst others, applied in arriving at the Court decision.

For the sake of clarity, it is not offensive for us to amplify that-the principle of legality operates on the parable that since crimes are created by law, it is a legal prerequisite that their creation must be founded on a system of law prescribing the substantive criminal law (prohibited or required actions) and the law of criminal procedure (prescribed steps for law enforcement) written down in black and white for compliance to avoid abuse of powers. Under this principle, Judges and Magistrates have no power to penalize conduct merely because it is in their view immoral, anti-social or in some way undesirable but rather should be guided by law and not by the decisions of individual men. Now as to what extent, if any, the decision in **Farid Hadi Ahmed's** case (supra) with the petitioner counsel's quoting general allegations in advancing the petitioner's case before this Court are matters that will be resolved in the due course.

Beginning with the complaint mounted against section 9(1) of POTA that it offends articles 18(b), (c) & (d) and 22 (1) &(2) of the Constitution for criminalizing a mere possession or access of information obtained in

usual or ordinary way and right to access by workers, servants or employees to working tools or information whilst at work, with due respect to the petitioner's counsel, we find that his generalized submissions did not clarify on how the provision has impaired those rights.

Nevertheless, we found it strange that the learned counsel until the time of hearing of this petition seemed to have been unaware that the restricted areas under the impugned provisions fall under the Protected Places and Areas Act, of 1969 with overarching objectives to protect public rights. Actually, that objective is akin to the one provided for under section 4(1) of the National Security Act (supra) which was enacted in 1970, that is, 32 years before the enactment of POTA in 2002. That section reads: -

"4. (1) any person who has in his possession or under his control any code, password, sketch, plan, model, note or other document, article or information, which relates to or is used in a protected place or anything in such a place, or which has been made or obtained in contravention of this Act, or which has been entrusted in confidence to him by any person holding a public office, or which he has obtained or to which he has had access owing to his position as a person who holds or has held such office or as a person who is or was a party to a contract with the Government.....:-

(a) N/A...; or (b) N/A...; or (c) N/A....; or

(d) retains the sketch, plan, model, note, document or article in his possession or under his control when he has no right or when it is contrary to his duty so to do, or fails to comply with any lawful directions with regard to the return or disposal thereof,

shall be guilty of an offence and liable on conviction to imprisonment for a term not exceeding twenty years."

[Emphasis added]

In view of the above, having considered the wordings of section 9(1) of POTA and general allegations mounted against it in the light of the guiding

principles referred above, we are satisfied that the impugned provision is more on protection of public rights against individual or private rights hence well clothed and salvaged by Article 30(2) of the Constitution. Therefore, the petitioner's complaint against it is devoid of merit.

In the same vein, we have examined the petitioner's complaint against section 11 of POTA quoted above that per articles 13(1), (6) & 26 of the Constitution, the same proclaim supremacy over the Constitution hence rendering other laws redundant adding that the same is too general and denying a person charged under POTA all legal and Constitutional rights and freedoms thus encouraging abuse of powers and authority and for not observing basic Constitutional rights. It is very unfortunate that the counsel for the petitioner did not substantiate their general and hypothetical allegations we recapped above. Besides, our further review to the part of the rejoinder submission quoted above, in the light of the laws and case law discussed above, it has come to our firm view that POTA was as such enacted to improve the country's legal framework.

It is evident that, even before the enactment of POTA in 2002, the Constitution and Statutes like the Penal Code (supra), the National Security Act (supra), the CPA, the Evidence Act (supra) and the Economic and Organized Crime Control Act, [Cap. 200 R.E, 2002] to mention a few, for some decades had catered for and promoted both private and public basic rights. For example, whereas some aspects of the present section 9(1) of POTA regarding possession of unauthorized articles, information and espionage were already covered by section 4(1) of the National Security Act

(supra), issues of bail and admission of evidence have ever since also continued to be the domain of the CPA (supra) and Evidence Act (supra).

Now that the petitioner and his counsel did not substantiate their general and hypothetical allegations against the impugned provisions or address on the deficiency, if any, of several safeguards as provided for by POTA catering for fundamental basic rights against public rights. Thus, we find the allegations against section 11 of POTA devoid of merit.

We have further examined the allegations raised against sections 30(1) and 31(1), (2), (3) & (4) of POTA which is argued to contravene constitutional rights to-privacy, equality before the law and fair hearing as provided for under articles 16(1)&(2),13(1),(6)(a) of the Constitution. It was further argued that, section 30(1) of POTA sets ground for the interference of private communications and it does not safeguard or prescribe specific circumstances, manner and extent under which one's rights can be encroached without prejudicing his right to privacy.

Concerning section 31(1), (2), (3) & (4) of POTA regarding right to fair hearing under article 13(6)(a) of the Constitution, the petitioner's counsel argued in his rejoinder submission that the POTA discriminates the Muslim community. However, Mr Nyakiha refuted the allegations above for lack of proof and stressed that, the powers of the Court to enforce the safeguards provided under POTA renders the petitioner's allegations unfounded.

On our part, we are inclined to agree with Mr Nyakiha that the petitioner's counsel did not account on how the enforcement of section 30(1) of POTA derogates one's individual rights particularly on the alleged

freedoms and right to privacy. He did not present how the national security can be maintained without having mechanisms capable of detecting, preventing and or controlling incidents leading to destructive incidents against the State which cannot happen without affecting individual citizens.

Besides, it is imperative that for the Minister to give general directions or direction with specified description to communication service providers or any particular communication service provider under section 30(1) of POTA it is stipulated that the directions should be those aiming at: **one**, preventing or detecting offences under terrorism; and **two**, facilitating prosecution of offences of terrorism under POTA. In view of the above and employing the plain and purposive interpretation methods to section 30(1) of POTA, we find the Minister's powers to issue directions are statutorily confined to the scope provided by the provision. It is for that reason we find implementation of those directions not supposed to subject the recipient communication service provider/s to offend the law/s governing her registration and business license. Therefore, it is not expected that the Minister can just wake up in the morning and issue unfounded direction/s as doing so will subject his arbitral directions/orders to judicial review proceedings. It is with this understanding we find the petitioner's allegations devoid of merit.

Regarding sections 31(1)-(4) and 34(4) of POTA quoted above, we equally have no doubt whatsoever that there are adequate safeguards against arbitral abuse of power by the Police. We are inclined to pay regard to the best practice **In the Matter of an Application under section 83.28 of the Criminal Code (RE)** (supra) and **Bank Mellat v. HM Treasury (No 2)** (supra) earlier discussed above.

In the impugned provisions, the safeguards can be inferred from the ordinary catch words to wit, "a police officer **may, for the purpose of obtaining evidence** of the commission of an offence under this Act, **apply, ex parte, to the Court**"; "A police officer may make an application under subsection (1) only **with the prior written consent of the Attorney General**"; "A Court to whom an application is made under subsection (1), **may make an order...**"; "if the Court is satisfied that the written consent of the Attorney General has been obtained as required by subsection (2) and that **there are reasonable grounds to believe that material information** relating..."; and "... **and certified by a Court...**".

It is thus certain to us that, in determining the *ex-parte* applications, the impugned provisions cater for unfettered judicial independence and impartiality. Therefore, in the absence of any evidence from the petitioner on how the judicial independence and impartiality is compromised by sections 31(1)-(4) and 34(4) of POTA, we are satisfied thus holding that the impugned provisions do not contravene article 13(3)&(6)(a) of the Constitution, rather; are a manifestation of how the principles of illegality, judicial independence and impartiality and other guidelines referred to earlier are observed. We are respectfully inclined to Mr Nyakiha's submission and his prayer that to sections 31(1)-(4) and 34(4) should be read in unison.

Turning to section 42(1) & (2) of POTA which is alleged to violate the rights to-property, protection of one's property and fair hearing under articles 24(1) & (2) and 13(6)(a) of the Constitution, we regrettably noted that, during hearing the alleged violations were generalized without proof.

The impugned provision which is also quoted above, specifically caters for statutory safeguards against arbitrary abuse of powers by other law actors by empowering Courts tasked to determine Police *ex parte* application/s in: **one**, issuing search warrants to seize any property; **two**, issuing restraint orders prohibiting any person from disposing of, or otherwise dealing with any interest in that property, other than as may be specified in the order; **three**, appointing a person to take control of, and manage or otherwise deal with, the whole or a part of the property, in accordance with its directions; and **four**, issuing an order requiring any person having possession of the property to give possession thereof to the person it has appointed. We have no doubt whatsoever that, the catch words in section 42(1)&(2) of POTA to wit, **"Where the Court is satisfied, on an *ex parte* application, that there are reasonable grounds to believe that"** ;**as may be specified in the order"**.; **the Court may**, at the request of the Attorney General and, **if the Court is of the opinion that the circumstances so require**; and **"in accordance with the directions of the Court**; which relate to determination of *ex-parte* applications filed in Court by the Police, are absolutely legal safeguards against arbitrary abuse of powers by the investigation and or the prosecution.

We hold so because, no *ex-parte* application can be filed in Court by the Police for its determination unless the same is sanctioned by the Attorney General whom we all know is not an investigative officer. Nevertheless, the Court can only grant *ex-parte* application if fully satisfied that there are reasonable grounds to believe on existence of material information stated in that *ex-parte* application concerning: **one**, commission of a terrorism

offence; **two**, the whereabouts of the person suspected by the Police Officer to have committed a terrorism offence; **three**, existence of a property connected to the commission of a terrorism offence; and **four**, there is certification by the foreign state (if involved) regarding suspect's intercepted and retained communication or attached, forfeited /restrained property.

In view of the foregoing discussions and after paying due regard to the guiding principles outlined above, we are inclined to agree with Mr Nyakiha that, the impugned provisions are in conformity with articles 13(6)(a) and 24(1) & (2) of the Constitution in relation to one's right to property and protection of property as well as the right to fair hearing.

Regarding sections 35 and 54 of POTA, which are alleged to contravene the rights to-equality before the law, presumption of innocence and fair trial entrenched and protected by article 13(1) &(6)(a) &(b) of the Constitution, we did not as well find substance from the petitioner on how the aforesaid constitutional rights are restrained/limited by the impugned provisions. To our dismay, the petitioner's counsel just generally argued that, what is in the Statute does not conform the practice adding that, POTA has no checking safeguards when its enforcement is abused. He did not address the facilitation the provisions cater to the admissibility of evidence in criminal proceedings involving offence/s of terrorism or International terrorism and the attendant safeguards attached therein.

On our part, we paid keen attention to the catch words- "..... a certificate purporting to be signed by an appropriate authority shall be admissible in evidence **and shall, in the absence of evidence to the**

contrary, be proof of the facts stated therein” for section 35 and “ that document shall be admissible in evidence without proof of the signature or authority of the person appearing to have signed it **and shall, in the absence of evidence to the contrary,** be proof of the facts stated therein.” for section 54(2). With due respect to the petitioner’s counsel, we are not persuaded to disregard the vivid powers conferred upon the Court by the impugned provisions for purposes of regulating and controlling the admission of Certificates and documents referred therein.

We thus respectfully disagree with the petitioner’s counsel *omnibus* complaints. After all, we wish to remind that, it is trite law, as alluded to earlier, that, the misconduct practice and, or any malpractice that may be perpetrated by law actors in judicial processes or during administration of any law are matters that cannot be challenged through a Constitutional petition. This is because, those acts/misconducts cannot constitute grounds that can be relied on to examine the efficiency or deficiency of any law and for that matter, have nothing to do with the Constitutionality of any law.

In view of the foregoing discussion, it is evident to us that tendering of “a document” or “certificate” for admission under sections 35 and 54 of POTA is a question of practice and, or administration of law which, as we have held, is controlled and regulated by the Court. That is why we have just observed in bold above that the Court can only admit in evidence the document under section 35 or Certificate under section 54(2) **if there is no any evidence to the contrary.** Under the circumstance above clarified, we do not see how the two provisions violate article 13(1), (6)(a) &(b) of the Constitution regarding the rights to- equality before the law, presumption

of innocence and fair trial. In a nutshell, we find the petitioner's allegations against sections 35 and 54 of POTA to be devoid of merit in law.

Finally, regarding section 44(2) & (3) of POTA, the petitioner alleged that they contravene rights to fair hearing and to form associations or organizations under articles 13(6)(a) and 20(1) of the Constitution. However, we have found nowhere the petitioner or his counsel has substantiated how the impugned provisions contravene the aforementioned rights.

Under section 44(2) & (3) of POTA, it is patent clear that, the Minister or a person authorized by him **based on information or criminal intelligence reports, may cause** the refusal of registration of an applicant for registration as a registered trustees or revocation of registered trustees on ground of being linked with suspected resource support from a terrorist group. However, that refusal or revocation, as the case may be, can be done upon that applicant or the registered trustees being served with copy of the Certificate and notice **if the Certificate is determined to be reasonable.**

In the present petition the petitioner and his counsel did not substantiate the allegations. We do not thus understand how the petitioner will be prejudiced by the decision taken by the Minister or a person authorized by him to act on a tangible information or intelligence report received which is certified and found reasonable to be acted upon for national security. Therefore, we respectfully disagree with the petitioner that section 44(2) & (3) of POTA violates articles 13(6)(a) and 20(1) of the Constitution regarding right to fair hearing and to form associations or organizations. We thus find section 44(2) & (3) to be well clothed and salvaged by article 30(2) of the Constitution.

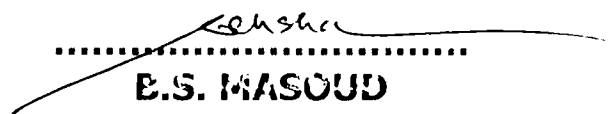
In final analysis, from the discussion held above, we find and hold that; the preferred petition is hypothetical and devoid of merits and the issue whether sections 9(1), 11, 30(1), 31(1), (2), (3) & (4), 34(4), 35, 42(1) & (2), 44(2) & (3) and 54 of the Prevention of Terrorism Act, Act No. 21 of 2002 (POTA) are in violation of some fundamental rights guaranteed by the Constitution is settled in the negative. Consequently, the petition is hereby dismissed. However, considering the circumstances and nature of the petition, we disagree with Mr. Nyakiha on the aspect of costs and for that matter we accordingly order the parties to shoulder for their own costs.

It is so ordered.

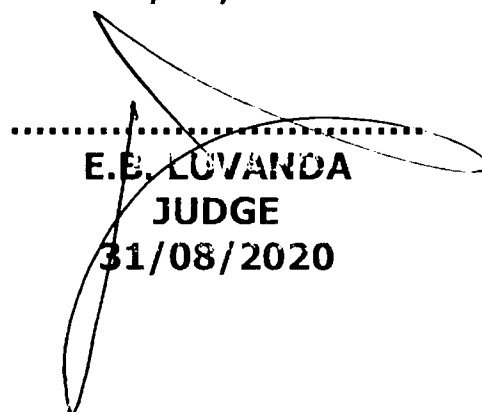
DATED at DAR ES SALAAM this 31st day of August, 2020.



.....
E.M. FELESHI
JAJI KIONGOZI (JK)
31/08/2020



.....
E.S. MASOUD
JUDGE
31/08/2020



.....
E.E. LOVANDA
JUDGE
31/08/2020

COURT:

Judgment delivered this 31st day of August, 2020 in presence of Ms. Loveness Denis, advocate for the Petitioner and Mr. Yohana Marco, learned State Attorney, for the Respondent. Right of Appeal is fully explained.



A handwritten signature in black ink, consisting of a series of loops and a long horizontal stroke, positioned above the printed name.

.....
S.S. SARWATT
HIGH COURT REGISTRAR
31/08/2020