IN THE HIGH COURT OF TANZANIA
(MAIN REGISTRY)

AT DAR ES SALAAM

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

MISCELLANEOUS CIVIL CAUSE NO. 29 OF 2019

DICKSON PAULO SANGA..... PETITIONER

VERSUS

THE ATTORNEY GENERAL.....1st RESPONDENT

JUDGMENT

19/02/2020 & 18/05/2020

Masoud, J.

The petitioner is a Tanzanian citizen. He is an Advocate of this court and courts subordinate thereto practicing in criminal justice among other areas. He petitioned under article 26(2) of the Constitution of the United Republic of Tanzania as amended (the Constitution) for his own interest and that of the people of the United Republic of Tanzania, complaining about the constitutionality of section 148(5) of the Criminal Procedure Act, cap. 20 (CPA). The complaint was that the impugned provision denies bail to a person accused of an offence falling within listed offences and situations under section 148(5) of the CPA, commonly referred to as "*non-bailable*". The thrust of the complaint was that the impugned provision violates articles 13(3) & (6)(b) and 15(1) & (2) of the Constitution and it is, for such reason, unconstitutional.

The petition was accompanied by the petitioner's affidavit, which supported the factual basis for the following reliefs sought by the petitioner. Firstly, declaratory orders that

the provision of section 148(5) of the CPA is unconstitutional and violates articles 13(3), & (6)(b) and 15(1) &(2) of the Constitution. Secondly, declaratory orders that the trial courts with jurisdiction to deal with any offences should be left to deal with the question of bail upon being properly moved by parties to the criminal dispute. Thirdly, befitting directives to meet the ends of justice and protect the constitutional rights of the people. And lastly, an order that since this petition is in the public interest, parties should bear own costs.

It was alleged by the petitioner that bail was, from 1920 to 1984, a fundamental instrument of the courts of law in administering criminal justice in the Mainland Tanzania. The administration of bail took into account the principle of presumption of innocence and the right to personal liberty of an accused person. The jurisdiction of the courts in administration of right to bail was taken away from the courts of law when the impugned provision was enacted in 1985. The impugned provision specified non-bailable offences and prohibited bail to a person accused of any of such offences. The said provision was in such context claimed to violate the above mentioned provisions of the Constitution.

It was further alleged that in spite of having the bills of rights in the Constitution since 1984, and ratifying various international instruments prescribing for civil rights, such as personal liberty and presumption of innocence; section 148(5) of the CPA with its inherent non-bailable offences have survived and the specified offences kept escalating. It has as a result accommodated new offences and statutes like the Prevention of Terrorism Act, 2002, and the Anti-Money Laundering Act, 2006. In so far as the

impugned provision ousts the jurisdiction of the courts of law in considering granting of bail to such an accused person, the provision was alleged to have usurped the constitutional powers of the courts of administering the right to bail which is an inherent aspect of the right to personal liberty and the presumption of innocence without having in place a known time frame for investigation and prosecution.

On the basis of the above allegations, the petitioner advanced the following grounds to support his prayers. Firstly, since section 148(5) of the CPA (supra) denies bail to a person accused of a non-bailable offence, it contravenes the right to personal liberty and the presumption of innocence guaranteed under articles 13(6)(b) and 15(1)&(2) of the Constitution. Secondly, the impugned provision takes away the constitutional mandate of the courts of law envisaged under article 13(3) of the Constitution. Thirdly, despite the impugned provision denying bail to a person accused of a non-bailable offence, the time limit for investigation and prosecution is unknown and left to the devices and discretion of the investigating body without adequate controls and safeguards against abuse. Fourthly, the impugned provision denies the courts of law their fundamental instrument of administering criminal justice during criminal proceedings. And lastly, the impugned provision contravenes the relevant provisions of international instruments verified by the country which provide for the right to personal liberty and the presumption of innocence.

The aforementioned complaint, allegations, and the grounds upon which the petition rests were vigorously disputed and resisted by the respondent as was apparent in the reply to the petition and the accompanying counter affidavit sworn by Ms Jenifer Kaaya,

learned State Attorney, for the respondent. The first point of the respondent's reply as a whole is to the effect that the impugned provision is not violative of the invoked basic rights, as it is consistent with circumstances and procedures provided by the law pursuant to article 15(2)(a) of the Constitution.

The second point of the reply was that the provision does not take away the constitutional jurisdiction of the courts of law as the same must be exercised in accordance with the law. The right to bail is not absolute as it is a matter of privilege to be administered in accordance with the law and where bail is applicable, and it is only granted upon fulfillment of conditions stipulated by the law. The only exception on the right to bail, according to the respondent, was on specific capital offences. The third point in the respondent's reply was that the list of non-bailable offences was not constantly escalating as alleged except in accordance with the law. The fourth point was with regard to the issues of time limit of investigation and for prosecution, and international instruments which were resisted because they were considered not to be relevant to the present petition.

The hearing of the petition was by filing written submissions pursuant to rule 13 of the Basic Rights and Duties Enforcement (Practice and Procedure) Rules, 2014 (GN No. 304 of 2014). The submissions were filed by the parties through their learned counsel, Mr Mbuga Jonathan, Advocate for the petitioner, and Ms Jenifer Kaaya, State Attorney for the respondent. The rival submissions that emerged are on the record. They expounded on the standpoint of each party on the central issues of the constitutionality of the impugned provision and incidental matters thereto.

There were mainly two principal issues relating to the constitutionality of section 148(5) of the CPA which were addressed. The **first principal issue** for our determination was whether section 148(5) of the CPA contravenes articles 13(3) & (6)(b) and 15(1) & (2) of the Constitution. Arguments which emerged in relation to this issue sought to answer three supplementary questions as follows; whether the impugned provision contains requisite prescribed procedure for denying bail to an accused person in terms of article 15(2) (a) of the Constitution; whether by denying bail a person accused of a non-bailable offence is treated as a criminal person contrary to article 13(6)(b) of the Constitution; and whether the impugned provision ousts the constitutional mandate of the courts of law in protecting and determining the right to bail of a person accused of a non-bailable offence as enshrined under articles 13(3) of the Constitution. **And the second principal issue** for our determination was if the first principal issue was in the affirmative, whether the impugned provision is saved by article 30(2) of the Constitution.

In his submissions in relation to the first issue, the learned counsel for the petitioner argued that the impugned provision prohibits the granting of bail to a person accused of any of the listed non-bailable offences. However, the impugned provision does not in any way stipulate circumstances and a prescribed procedure envisaged under article 15(2) of the Constitution in relation to which bail may be refused by the courts of law. Instead, it was argued, the impugned provision just contains an extended list of non-bailable offences which has since 1985 persisted and kept escalating through a raft of amendments contrary to the provisions of article 11(1) of the UDHR, article 14(2) of the

ICCPR and article 7B of the ACHPR relating to the right of an accused person to be presumed innocent unless proved guilty.

The counsel for the petitioner argued further that the enlargement of the list of non-bailable offences through amendments has, as a result, increasingly prohibited bail to a wide range of offences categorised as non-bailable offences. In the absence of the prescribed circumstances and procedures under which bail may be refused, the enlargement of the list of non-bailable offences dramatically undermines the right to personal liberty and the principle of presumption of innocence enshrined under article 13(6)(b) and 15(1)&(2) of the Constitution. This is by the outright prohibition of bail to a person accused of a non-bailable offence without having in place a meaningful prescribed procedures envisaged under article 15(2)(a) of the Constitution.

It was also argued that the prohibition of bail to a person accused of a specified offence contained in the enlarged list of non-bailable offences is contrary to the position that prevailed in the country before the enactment of the CPA in 1985. Restriction to the right to bail was then only applied to capital offences. A good number of authorities were cited and explained to drive home the argument as to how bail was then administered as a matter of right and in conformity to the right to liberty and the presumption of innocence applicable to an accused person. The authorities are on the record and we need not to mention them here.

It was shown that the prevailing position in Mainland Tanzania does not correspond with the position relating to granting or refusing of bail to accused persons in other common law jurisdictions. Examples were drawn from some common law jurisdictions

such as Zanzibar, Ghana, Kenya, Uganda and South Africa. It was shown that repressive laws denying bail to non-bailable offences have in such jurisdictions either never existed as all offences were and still are bailable upon fulfilment of certain procedure and conditions, or have been abandoned in favour of granting bail to all offences upon application and fulfilment of certain conditions.

A glimpse from the position in Zanzibar and Ghana should suffice to demonstrate what was meant by the counsel for the petitioner. In so far as Zanzibar is concerned, it was argued that the enactment of the Criminal Procedure Act, No. 7 of 2004 favourably retained the position under the Criminal Procedure Decree, cap. 14 of Laws of Zanzibar enacted in 1934 which does not deny an accused person his personal liberty through prohibition of bail. It was explained that the position of the law is such that it empowers only the High Court of Zanzibar to admit a person accused of a nonbailable offence to bail upon an application, which if opposed, the prosecution must adduce good reasons for refusal of bail.

In line with the position prevailing in Zanzibar, the counsel for the petitioner cited the case of **Hassan Kornely Kijogoo vs Attorney General of the Revolutionary Government of Zanzibar & Another**, Constitution Petition No. 01 of 2019 in which the High Court of Zanzibar dealt with the right of an accused person to bail in Zanzibar in its historical context. The court clarified the position of the law to the effect that the High Court of Zanzibar was and still is empowered to grant bail in any case even those relating non-bailable offences.

It was likewise submitted in relation to Ghana that the provision of section 97(2) of the Criminal and Other Offences (Procedure) Act, 1960 (Act 30) as amended which, was a replica of the impugned provision, was struck out from the Ghanaian statute book by the Supreme Court of Ghana in **Martin Kpebu vs the Attorney General,** Writ No.J1/13/2015 on ground of constitutional violation. As is the impugned provision, it was argued, the provision denied bail to a person accused of any non-bailable offence specified under the law. The specified offences included, treason, subversion, murder, robbery, hijacking, piracy, rape, defilement, escape from lawful custody, and acts of terrorism. The Supreme Court of Ghana declared the provision unconstitutional, null and void and struck it out. The court reasoned, among other things that the provision violated the Constitution of Ghana by denying an accused person the right to be considered for admission to bail without court determination and due process.

The other submissions of the counsel for the petitioner which were also related to the first issue were anchored on the following: While it is a constitutional jurisdiction of the court to determine the rights to personal liberty of an accused person as enshrined under article 13(3) & (6)(b) of the Constitution, the impugned provision completely prohibits the courts of law from entertaining an application for bail in respect of a person accused of a non-bailable offence. In taking this argument further, it was contended that the impugned provision of section 148(5) of the CPA requires the court to refuse bail notwithstanding circumstances of a case at hand. Besides prohibiting the court, the impugned provision also prohibits police officer in charge to grant bail to a suspect of a non-bailable offence.

A Ugandan case of **Col. Rtd Dr Kizza Basigye vs Uganda**, Misc. Criminal Application No. 228 of 2005 was cited to reinforce the argument that bail as a judicial instrument is meant to ensure the liberty of an accused person which the court must jealously and courageously guard for defending the right of all people. The case of **Martin Kpebu** (supra) was similarly relied upon to the effect that the issue of considering whether to grant or refuse bail *"....is not a magisterial or executive act .....but a judicial one to be performed under the Constitution."* Other cases cited to fortify this stance include the case of **Attorney General vs Jeremia Mtobesya**, Civil Appeal No. 65 of 2016 (unreported) in relation to the requirements of strict interpretation of any law that seeks to limit fundamental rights of an individual in order to ensure that it does not render the constitutionally guaranteed rights meaningless.

The counsel for the petitioner sought to further strengthen the above submissions by another argument. The same was to the effect that by requiring the court to refuse bail to a person accused of a non-bailable offence, the accused person is not only denied his right to be heard in relation to his right to personal liberty but also treated as a guilty person contrary to the principle of presumption of innocence enshrined under of article 13(6)(b) of the Constitution. It was pointed out in this connection, while citing **Seidu vs Republic** (1978) 1 GLR, that since the issue as to whether a case is one falling in the list of non-bailable offences allegedly committed by a particular accused person is a matter which has to be determined by the court based on the evidence on the record, denying an accused person the right to bail is tantamount to treating such accused person as a guilty person.

On the second issue, the counsel for the petitioner appeared to argue that since his submissions in respect of the first issue establish that the impugned provision is violative of the provisions of articles 13(3) & (6)(b) and 15(2)(b) of the Constitution, the court must consider whether the provision is saved by article 30(2) of the Constitution. The submissions advanced on this issue were to the effect that the impugned provision could not be saved by article 30(2) of the Constitution as it does not fall within the purview of the said article. In a bid to show how the provision could not be saved by article 30(2) of the Constitution, the counsel for the petitioner invoked the principle of lawfulness and proportionality test of a statutory provision restated in the case of **Kukutia Ole Pumbuuni and Another vs Attorney General and Another** [1993] TLR 159,166.

We revisited the principle enunciated in the above case cited by the counsel for the respondent which, in a nutshell, states 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 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 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.

With the above principles in mind, the counsel for the petitioner argued with details and shown; that the impugned provision is so wide that it includes even unintended persons; how the impugned provision lacks effective safeguards and controls against

arbitrary decisions and abuse; and that, to the extent that it does not guarantee the safety of any person in the country and does not have any procedure prescribed by law as is required by article 15(2)(a) of the Constitution, it vests excessive powers to the prosecution to decide the fate of an accused or suspected person's personal liberty and directs the court and police to refuse bail.

Our attention was equally drawn to insightful arguments on the absence of time frame for investigation, prosecution and holding of an accused person in remand custody. He drew inspirations from the law on the right to bail to persons accused of specified non-bailable offences in Zanzibar. The learned counsel also relied on **D.P.P vs Daudi Pete** [1993] TLR 22, 43-44, and **Jackson Ole Nemeteni and Others vs A.G** Misc. Civil Cause No. 117 of 2014 where a similar provision of the then section 148(5)(e) of the CPA and section 148(5)(a)(i) of the CPA in relation to armed robbery were respectively found to be unconstitutional and not saved by article 30(2) of the Constitution.

Replying to the submissions on the above issues, the learned State Attorney for the respondent argued that there was nothing like violation of the said articles of the Constitution by the impugned provision. She argued that the rights articulated under the cited articles of the Constitution are not absolute for they are enjoyed in accordance with the law in force in the country. The impugned provision conforms to the provision of article 15(2) of the Constitution which requires denial of bail to be effected in accordance with procedure prescribed by law. Thus, the CPA which contains the impugned provision was enacted to provide for such procedure. Reasoning from the case of **Mbushuu @Dominic Manyaronje and Another vs Republic** [1995] TLR 97

in which death penalty was held not to be arbitrary as it was imposed in accordance with the law, the learned State Attorney argued that the provision of section 148(5) of the CPA is not arbitrary because it is consistent with the requirements and elements of fair hearing under article 13(6)(a) and (b) of the Constitution.

The learned State Attorney drew the attention of the court to the co-existence of co-existence of rights and duties of an individual and collective or communitarian rights and duties of the society which characterize the Constitution and which must inform constitutional interpretation on the exercise of the right to bail. In the submissions of the State Attorney, the co-existence means that the rights and duties of an individual to bail for instance are limited by the rights and duties of society and vice versa. It was her further submissions that since articles 13(3), 15(2) and 30(2) of the Constitution permit derogations with the prescribed procedures found under section 148(5) of the CPA, the impugned provision is thus in accordance with the Constitution.

The submissions by the petitioner's counsel that the denial of bail under section 148(5) of the CPA treats an accused person as a convict was said by the learned State Attorney to be misplaced. The learned State Attorney drew our attention to the case of **DPP vs Daudi Pete** (supra) where the Court of Appeal in its deliberations found that the denial of bail as contained in the provision of section 148(5(e) of the CPA as it stood by then was not tantamount to treating an accused person as a convicted person. Thus, the provision did not violate article 13(6)(b) of the Constitution. As such, denying bail to an accused person under the impugned provision does not necessarily amount to treating such a person as a convicted criminal.

Consistent with the case of **DPP vs Daudi Pete** (supra), it was submitted that an accused person is pursuant to section 148(5) of the CPA denied bail on the basis of his criminal conducts which are considered threats to the public. It was in this regard argued that the impugned provision corresponds with articles 13(3),(6)(b), and 15 of the Constitution because it was, among other things, enacted to ensure that the rights and freedoms of other people are not prejudiced by wrongful exercise of freedoms and rights of individuals and thus serving public interests. We were respectively referred to the decision of this court in **Gideon Wasonga & Others vs The Attorney General and Others**, Misc. Civil Cause No. 14 of 2016.

To fortify the above view relating to wrongful exercise of the rights and freedoms, the court was invited to consider the seriousness of the listed non-bailable offences such as terrorism, armed robbery, drug trafficking and money laundering. In the light of the forgoing, therefore, the court was called on to find that the impugned provision of section 148(5) of the CPA reasonably interfere with individual rights and freedom for public interests and hence it is in line with article 30(1) &(2) of the Constitution. The court was thus invited to dismiss the petition with costs.

We closely considered the submissions of both counsel in relation to the pleadings and respective affidavit and counter affidavit of the parties. We were settled that from the record and the forgoing rival submissions , it was obvious that the constitutionality of the entire provision of section 148(5)(a)(i),(ii),(iii),(iv),(v),(vi) of the CPA is at issue. We were of a considered opinion that the entire details of the impugned provision of section 148(5) of the CPA, and the provisions of articles 13(3),(6)b and 15(1)&(2) of the

Constitution alleged to be infringed, needed to be appreciated before making any further progress. We were of such view as we are aware that the provisions were a subject of judicial interpretation in various cases and series of amendments. Mindful of amendments so far effected on the CPA, we were undoubtedly clear that the impugned provision of section 148(5) of the CPA presently reads as follow:

> *S. 148(5) A police officer in charge of a police station or a court before whom an accused person is brought or appears, shall not admit that person to bail if–*
> *(a) that person is charged with–*
> *(i) murder, treason, armed robbery, or defilement;*
> *(ii) illicit trafficking in drugs against the Drugs and Prevention of Illicit Traffic in Drugs Act, but does not include a person charged for an offence of being in possession of drugs which taking into account all circumstances in which the offence was committed, was not meant for conveyance or commercial purpose;*
> *(iii) an offence involving heroin, cocaine, prepared opium, opium poppy (papaver setigerum), poppy straw, coca plant, coca leaves, cannabis sativa or cannabis resin (Indian hemp), methaqualone (mandrax), catha edulis (khat) or any other narcotic drug or psychotropic substance specified in the Schedule to this Act which has an established value certified by the Commissioner for National Co-ordination of Drugs Control Commission, as exceeding ten million shillings;*
> *(iv) terrorism against the Prevention of Terrorism Act, 2002;*
> *(iv) money laundering contrary to the Anti-Money Laundering Act, 2006*
> *(vi) trafficking in persons under the Anti-Trafficking in Persons Act*
> *(b) it appears that the accused person has previously been sentenced to imprisonment for a term exceeding three years;*
> *(c) it appears that the accused person has previously been granted bail by a court and failed to comply with the conditions of the bail or absconded;*
> *(d) it appears to the court that it is necessary that the accused person be kept in custody for his own protection or safety;*
> *(e) the offence with which the person is charged involves actual money or property whose value exceeds ten million shillings unless that person deposits cash or other property equivalent to half the amount or value of actual money or property involved and the rest is secured by execution of a bond:*
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> *Provided that where the property to be deposited is immovable, it shall be sufficient to deposit the title deed, or if the title deed is not available such other evidence as is satisfactory to the court in proof of existence of the property; save that this provision shall not apply in the case of police bail.*

We discern that the above quoted provision deals with a range of offences and situations in relation to which, firstly, an accused person is refused bail, and secondly, the discretion of the court and a police officer to admit an accused person, to bail is taken away. We took a clear note that the impugned provision is couched in mandatory terms in so far as it relates to the court and a police officer not to admit a person accused of a non-bailable offence to bail.

We further discern that there is no room under the provision for the court or a police officer to consider the suitability of granting bail to a person accused of a non-bailable offence. Perhaps the only limited room is for such court or police officer to satisfy itself or herself that a person is accused of a non-bailable offence. If the answer to the question is in the affirmative, the respective court or police officer must refuse bail, notwithstanding the circumstances of the case and the accused person. A person accused of a non-bailable offence is seemingly left with no option apart from waiting for his trial in remand custody. In the premise, the provision places the determination of right to bail of an accused person under disposition and absolute discretion of the prosecution which decides on a charge to be preferred against a person.

We were in respect of the above mindful of the principle that a constitutionality of a statutory provision is not in what could happen in its operation but in what it actually provides for; the mere possibility of a statutory provision being abused in actual operation will not, as a matter of general rule make it invalid. On this principle, we recalled for instance **Rev. Christopher Mtikila vs AG** [1995] TLR 31 amongst others. We were similarly aware of the principle affirmed in **Attorney General vs Jeramia**

Mtobesya (supra) by the Court of Appeal when it drew inspiration from the decision of Supreme Court of Canada in **R vs Big M Drug Mart Ltd** [1985] 1 S.C.R. 295 to the effect that both purpose and effect of a statutory provision are relevant in determining its constitutionality for, either unconstitutional purpose or unconstitutional effect can invalidate the provision.

In light of the overview that we set out above, we should re-emphasise that the offences covered in the extended list of non-bailable offences are murder, treason, armed robbery, and defilements as specified under section 148(5)(a)(i) of the CPA. The other offences are illicit trafficking of drugs as specified under section 148(5)(a)(ii) of the CPA; offences involving various types of drugs whose value exceed ten million shillings as specified under section 148(5)(a)(iii) of the CPA; terrorism against the Prevention of Terrorism Act, 2002 as specified under section 148(5)(iv) of the CPA; money laundering contrary to the Anti-Money Laundering Act specified under section 148(5)(a)(v) (inadvertently in our view referred as section 148(5)(iv) in the amending Act cited herein below); and trafficking in persons under the Anti-Trafficking in Persons Act as specified under section 148(5)(a)(vi). We underscored that the wide range of the specified offences translates into a wide discretion on the part of the prosecution in deciding a charge of non-bailable offence to be laid against a person.

The situations in relation to which an accused person is also denied bail are those specified under 148(5)(b),(c), (d),& (e) of the CPA. The situations are entirely different from one another although they are all meant to deny bail to an accused person appearing to fit into those situations and also add to the width and breadth of the

discretion in charging for non-bailable offences. The situations relate to, previous sentence of imprisonment term exceeding three years (s.148 (5)(b)), record of absconding or failing to comply with bail conditions (s.148(5)(c)), protection and safety of an accused person (s.148(5)(d)), and value of money or property involved in the offence (s.148(5)(e)).

Before we appreciate the scope of the provisions of the Constitution alleged to be infringed as we did with the impugned provision of section 148(5) of the CPA above, it is important to briefly reflect on the amendments on the non-bailable offences in relation to the issue that emerged on the rival submissions. The issue was as to whether the list of non-bailable offences under section 148(5) of the CPA has kept escalating. It is, as already shown above, instructive that the offences of terrorism, money laundering, and trafficking in persons were specified as non-bailable under the impugned provision by amendments effected by section 49 of the Terrorism Act, No. 21 of 2002, section 19 of the Written Laws (Miscellaneous Amendments) Act No 15 of 2007, and section 39 of the Trafficking in Persons Act, No 6 of 2008 respectively.

With such amendments in mind, and having compared the current provision of section 148(5) of the CPA with the previous provisions, particularly, the provision whose paragraph (e) was constitutionally considered and determined in **Attorney General vs Daudi Pete** (supra), we were clear that the list of non-bailable offences was undoubtedly enlarged by adding three more offences in respect of which an accused person is denied bail and the discretion of the court and a police officer to admit an accused person to bail is taken away. It would appear that the momentum of extending

the list of non-bailable offences from the original list containing offences attracting possible or mandatory capital penalty only started sometimes back and has been consistently maintained.

It is, for example, not surprising that immediately after the decision of **Daudi Pete** (supra) in 1991, the Written Laws (Miscellaneous Amendments) Act, No. 12 of 1998 was enacted. As a result of such enactments, paragraph (a) of sub-section (5) of section 148 of the CPA was deleted and replaced by a paragraph which introduced armed robbery and defilement as observed in the decision of this court in **Jackson Ole Nemeteni** (supra). The decision was referred to us by the learned counsel for the petitioner. Our conclusion that the list of non-bailable offences under the impugned provision has indeed kept escalating is consistent with what was recently observed by the Court of Appeal of Tanzania in **Attorney General vs Jeremia Mtobesya** (supra):

> *....[I]t should be recalled that.....the law, as it then stood, only prohibited the grant of bail where the offence involved was either murder or treason. But, in the wake of numerous amendments, as one may discern from the body of the provisions of the section, the list of unbailable offences was extended well beyond the offences carrying a possible or mandatory capital penalty to include armed robbery; defilement; illicit trafficking in or conveyance of drugs for commercial purposes as well as offences involving certain narcotic drugs; terrorism; and money laundering.*
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> .....
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> .....

Quite apart from the CPA, the list of unbailable offences is prudently embodied in such other legislation as the Economic and Organised Crimes Control Act, Chapter 200...., as well as the Drugs Control Act, No. 5 of 2015.

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With the foregoing legislative developments, the legal straight jacket " which the [the Judicial Service] Commission conscientiously sought to avoid, has been overtaken and is, presently, fully fledged with a sizeable number of unbailable offences.

The provisions of the Constitution against which the entire provision of section 148(5) of the CPA are challenged are found under articles 13(3), (6)(b) and 15(1),(2) of the Constitution. They read thus:

13(3) The civic rights, duties and interests of every person and community shall be protected and determined by the courts of law or other state agencies established by or under the law.

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

(a).....N/A.....

(b) no person charged with a criminal offence shall be treated as guilty of the offence until proved guilty of that offence;

.....

.....

.....

15.-(1) Every person has the right to freedom and to live as a free person.

(2) For the purposes of preserving individual freedom and the right to live as a free person, no person shall be arrested, imprisoned, confined, detained, deported or otherwise be deprived of his freedom save only-

(a) under circumstances and in accordance with procedures prescribed by law; or

(b) in the execution of a judgment, order or a sentence given or passed by the court following a decision in a legal proceeding or a conviction for a criminal offence.

To the best of our understanding the above provisions of the Constitution relate to, firstly, the constitutional powers conferred upon the court or other state agencies established by or under the law to protect and determine rights, duties, and interests of every person and community (article 13(3)); secondly, the prohibition of treating an accused person as a convicted criminal (article 13(6)(b)); thirdly, right of every person to freedom and to live as a free person(article 15(1)); and fourthly, right of every person not to be deprived of his freedom except under circumstances, and in accordance with procedures, prescribed by law, or in execution of a judgment, order, or a sentence (article 15(2)(a)).

To appreciate the scope of the provisions alleged to be infringed, we saw it fit to consider two leading authorities, namely, **Attorney General vs Daudi Pete** (supra) and **Attorney General vs Jeremiaa Mtobesya** (supra) which were drawn to our

attention by the learned counsel in their respective written submissions. The two authorities relate to matters of constitutionality of provisions denying or depriving bail to an accused person and the Court of Appeal had the opportunity to ponder on some of the above provisions of the Constitution in relation to the provisions of the then sections 148(5)(e) and 148(4) of the CPA respectively. While the former was about a non-bailable offence under the then section 148(5)(e) of the CPA as is the present petition which is under the present section 148(5) of the CPA, the latter was about bailable offences in relation to which bail was refused upon the issuance of a valid DPP certificate "ordering" the court to just refuse bail.

It is common ground that both authorities were on denial of bail which amount to curtailment of accused person's right to personal liberty, and in particular, the right to bail. The denial of bail in both instances was effected without having in place any meaningful procedure prescribed by the law. A procedure providing for a judicial process that could lead to a different outcome apart from the only outcome stipulated under the impugned provision.

In the case of **Daudi Pete** (supra), the scope of the provisions of articles 13(6)(b) and 15(1)&(2)(a) of the Constitution were considered by the Court of Appeal in relation to the then provision of section 148(5)(e) of the CPA as we already indicated above. With regard to article 13(6)(b), the Court of Appeal was categorically satisfied that such provision prohibits treating an accused person like a convicted criminal and maintained the position that denying bail to an accused person does not necessarily amount to treating such an accused person like a criminal. The Court of Appeal in **Jeremia**

Mtobesya (supra) did not consider article 13(6)(b) of the Constitution. But it considered article 13(6)(a) of the Constitution, in which case it found that the provision is violated by the provision authorising denial of bail by the D.P.P certificate.

However, none of the two leading authorities had opportunity to consider article 13(3) of the Constitution in the light of powers of the courts or a police officer to meaningfully consider whether or not to admit an accused or suspected person falling under the impugned provision to bail. Powers of the court were in **Daudi Pete** (supra) only considered in the light of article 4 of the Constitution relating to separation of powers. The Court of Appeal was of the view that legislation which prohibited the grant of bail to a person charged with specified non-bailable offences did not amount to infringement of separation of power by a takeover of judicial function by the legislature.

Despite the absence of an authority that had opportunity to consider the scope of article 13(3) of the Constitution, we were settled that the provision falls under basic rights and duties and envisages the constitutional mandate of the court to safeguards basic rights including the right to personal liberty, duties and interest of an individual and community of which such individual is a part. We were not in doubt that, as far as the courts of law are concerned, the provision underlines a judicial process and a due process in protecting and determining such rights, duties and interests.

On the above understanding, we were convinced that as observed by the Court of Appeal in **Daudi Pete** (supra) in relation to article 15(2) of the Constitution, article 13(3) of the Constitution is also protective of the basic rights of an individual (including a person accused of a non-bailable offence). Accordingly, the mandate of protecting

and determining such rights, duties and interests, envisaged under the provision of article 13(3) of the Constitution, cannot be anything but a process of safeguards by which an accused person may be denied bail. We quoted elsewhere in this judgment the relevant part of the Court of Appeal's reasoning which informed our understanding of article 13(3) of the Constitution.

With regard to article 15 of the Constitution, it was held by the Court of Appeal in **Daudi Pete's case** (supra) that a person may be deprived or denied of personal liberty under the said article only under the conditions stipulated under paras 15(2)(a) and 15(2)(b) of the Constitution. With particular reference to para 15(2)(a) of the Constitution, which is relevant to the petition at hand, the Court of Appeal held that the paragraph sanctions the deprivation or denial of liberty under the "certain circumstances" and subject to a "procedure prescribed by law", which must both be prescribed by law. The Court of Appeal was further of the view that, and we hereby quote from page 38 of the reported judgment as thus:

> *From a close examination of sub-article (2) of article 15, it is apparent that its wording is so emphatically protective of the right to personal liberty that the procedure envisaged under para (a) cannot be anything but a procedure of safeguards by which one may be deprived or denied of personal liberty.*

Quite recently, the Court of Appeal in the case of **Jeremia Mtobesya** (supra) reinforced the above principle on the import of article 15(2)(a) of the Constitution. The Court of Appeal observed in the light of the denial of bail by the issuance of an ex-parte

statement of fact of the D.P.P that the "procedure prescribed by law" envisaged under article 15(2)(a) of the Constitution is one that does not completely oust the judicial process, or by any standards, a due process, in matters of personal liberty. Furthermore, the envisaged "procedure prescribed by law" must be one that may affect the outcome on whether or not an accused person should be granted or refused bail.

We have already considered herein above the scheme of the impugned provision and the scope of the provisions of article 13(3), 6(b), 15(1),&(2)(a) of the Constitution allegedly infringed. The obvious crucial issue which we had to answer was whether the impugned provision of section 148(5) of the CPA infringes the alleged provisions of the Constitution. In answering this question, we were settled that we must first answer the three supplementary questions, namely, whether the impugned provision contains circumstances and a requisite prescribed procedure for denying bail to a person accused of a non-bailable offence as envisaged under article 15(2)(a) of the Constitution; whether by denying bail an accused or suspected person of a non-bailable offence is treated as a criminal person contrary to article 13(6)(b) of the Constitution; and whether the impugned provision ousts the constitutional mandate of the courts in protecting and determining the right to bail of a person accused of a non-bailable offence as enshrined under articles 13(3) of the Constitution.

In the light of the above issue, we closely examined the rival submissions on the relationship between the impugned provision and the allegedly infringed provisions of the Constitution. The counsel for the petitioner in brief argued that the provision infringes the provisions of the Constitution as it is not hinged on under circumstances

and any procedure prescribed by law as is required by article 15(2)(a) of the Constitution and as it also outs the constitutional mandate of the court in considering whether or not to grant bail. On the other hand, the argument of the respondent's State Attorney, in summary, insisted that the denial of bail is in accordance with law and procedure set out in the CPA and therefore the argument of infringement of the Constitution does not arise. Relying on **Daudi Pete** (supra), it was also argued in reply that the submission that the denial of bail under section 148(5) of the CPA treats an accused person as a convict is misplaced.

In resolving the above issues, we were mindful of the established principle guiding this court in discharging its duty and the principles governing constitutional interpretation and determination, as laid down in **Julius Francis Ishengoma Dyanabo v. The Attorney General** [2004] TLR 14, and reaffirmed in **Attorney General vs Jeremia Mtobesya** (supra). The principle guiding discharge of the duty of this court requires this court to place the article(s) of the Constitution which is/are invoked alongside the impugned statutory provision which is challenged and make determination as to whether the constitutional provision invoked squares with the former.

In making such determination as to whether an impugned provision squares the allegedly infringed provision, this court was guided by principles governing constitutional interpretation which are to the effect that, (i) the constitution is the living instrument having a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of State Policy; (ii) the provisions touching fundamental rights have to be interpreted in a broad and liberal manner; (iii)

until the contrary is proved a legislation is presumed to be constitutional; (iv) a person who challenges the constitutionality of a legislation has the onus to prove that such legislation is unconstitutional; and (v) where those supporting a restriction on fundamental rights rely on claw back clauses or exclusion clause in doing so, the onus is on them to justify the restriction.

As we were applying the above principles, we once again recalled the leading authorities in matters of constitutionality of provisions denying bail to an accused person. As is in the present petition, the Court of Appeal was in **Daudi Pete** (supra) faced with the issue whether the provision of the then section 148(5)(e) of the CPA, which denied bail to an accused person infringed among others the provisions of article 13(6)(a),(b), and 15(2)(a). The relevant provision of the CPA which was eventually declared unconstitutional and struck out from the statute book was to the effect that:

> *148(5) A police officer in charge of a police station, or a court before whom an accused person us brought or appears, shall not admit that person to bail if-*
>
> *(a).....*
>
> *(b).....*
>
> *(c).....*
>
> *(d).....*
>
> *(e) the act or any of the acts constituting the offence with which a person is charged consists of a serious assault causing grievous harm on or threat of violence to other person, or of having or possessing a firearm or an explosive."*

Having laid the above provision besides the provision of article 15(2)(a) of the Constitution under which a person may be denied or deprived of personal liberty under "certain circumstances" and subject to a "procedure prescribed by law", the Court of Appeal in **Daudi Pete** (supra) was quick to find and hold that the above quoted provision of the then section 148(5)(e) of the CPA did not contain the requisite prescribed procedure for denying bail to an accused person and therefore infringed article 15(2)(a) of the Constitution. The holding was, as already shown above, premised on the finding that the wording of the provision of article 15(2)(a), was "emphatically protective of the right to personal liberty" which meant that the envisaged procedure is one of safeguards by which an accused person may be deprived of personal liberty.

On the other hand, the Court of Appeal was of the settled view that section 148(5) (e) of the CPA did not violate articles 13(6)(b) of the Constitution as denying bail to an accused person does not necessarily amount to treating such a person like a convicted criminal. It was also held with respect to separation of power that the provision which prohibited granting of bail to an accused person did not amount to a takeover of judicial function by the legislation and did not therefore violate doctrine of separation of power. Unlike in the present matter, article 13(3) of the Constitution which provides for powers to the court and state agency established under or by the law to protect and determine rights of an accused person was not invoked in **Daudi Pete** (supra).

The principle on the procedure prescribed under the law envisaged under article 15(2)(a) of the Constitution which emerged from **Daudi Pete** (supra) was, as already

shown above, cemented and expounded further by the Court of Appeal in **Jeremia Mtobesya** (supra) when it emphasised as follow at page 61 of the judgment:

> *a provision which completely eliminates the judicial process in matters of personal liberty cannot qualify to "prescribed procedure" or, by any standards, a due process, within the meaning of Article 15(2)(a). With respect, the obtaining procedure appears to us to be meaningless, much as it does not go so far as to affect the outcome, in that the accused is bound to be denied bail irrespective of what he may say in that regard.*

The statement of principle emerging from **Daudi Pete** which is binding to this court was in 2007 applied by this court in **Jackson Ole Nemeteni and Others vs Attorney General** (supra). The issue in this case, which was favourably referred to us by the counsel for the petitioner was, whether the denial of bail for the offence of armed robbery under the provision of section 148(5)(a)(i) of the CPA was violative of the provision of article 15(2)(a) of the Constitution. Applying the statement of principle evolving from **Daudi Pete,** this court in the said case of **Jackson Ole Nemeteni** (supra) was satisfied that the denial of bail for the offence of armed robbery under the above provision violated article 15(2) (a) of the Constitution because there was no procedure prescribed under the law for denying such an accused person bail as envisaged under article 15(2) (a) of the Constitution.

The statement of principle which we deduced from **Daudi Pete** and **Jeremia Mtobesya** are relevant to the present petition challenging section 148(5) of the CPA

denying bail to a host of offences specified as non-bailable. There is nothing on the principle suggesting that in so far as it relates to "procedure prescribed under the law" as envisaged under article 15(2)(a) of the Constitution, it was not meant to equally apply to the present case in which the envisaged "procedure prescribed under the law" was significantly relevant. We accordingly applied the principle as we laid the provisions of articles 13(3),(6)(b), and 15(2)(a) of the Constitution beside the impugned provision of section 148(5) of the CPA and endeavored to determine whether the constitutional provisions invoked squared with the former.

In our finding, we were clear on the following. In the first place, it was evident that the envisaged procedure under article 15(2)(a) of the Constitution which must be a procedure of safeguards by which a person accused of a non-bailable offence may be deprived or denied bail is non-existent under section 148(5) of the CPA or in the general scheme of the CPA. We were on this score in agreement with respective arguments of the counsel for the petitioner. Conversely, the arguments by the learned State Attorney that the provision is not violative of article 15(2)(a) of the Constitution as the provision was in accordance with the law and because the right to bail is not absolute are misplaced in view of the principle we deduced from the two leading authorities. The same finding would equally apply to the argument that the denial of bail under the provision is based on conditions clearly provided under the law. Apparently, the alleged conditions were neither stated nor shown as to how they conform to the procedure prescribed under the law pursuant to article 15(2)(b) of the Constitution and how this court should consider them as constituting a meaningful

procedure capable of affecting the outcome. We were of that view because it is settled law that any law which does not conform to the Constitution is violative of the Constitution and therefore null and void unless it is saved by the general derogation clauses.

Furthermore, we toyed on the impugned provision in a quest for "circumstances" envisaged under article 15(2)(a) of the Constitution. We had no difficulty in finding such circumstances under section 148(5)(ii) & (iii),(b),(c), (d),& (e) of the CPA quoted herein above. However, we could not find any such "circumstances" under section 148(5)(5)(i),(iv),(v)&(vi) of the CPA. The latter just mention offences. There is nothing in the nature of the envisaged circumstances. We were satisfied that with such omission the provision cannot be said to be consistent with the provision of article 15(2(a) of the Constitution.

In the second place, it was clear to us that section 148(5) of the CPA prohibits courts of law or a police officer from admitting to bail a person accused of a nonbailable offence. It means that once the accused person is charged with any offence listed under section 148(5) of the CPA or he fits into any of the listed situations under the impugned provision, the courts of law or a police officer have no option apart from denying him bail. We therefore agreed with the submissions of the counsel for the petitioner that the impugned provision ousts the judicial process in considering the possibility of admitting to bail a person accused of non-bailable offence.

Consistent with the statement of principle emerging from **Jeremia Mtobesya** (supra) quoted herein above, we are of the view that since the impugned provision completely

curtails the judicial power and due process in matters of personal liberty, it cannot qualify as "prescribed procedure." In this respect, we are firm that it violates the provision of article 13(3) of the Constitution which vest powers to the courts of law to protect and determine the rights, duties and interests of every person and community. The impugned provision to say the least circumvents the jurisdiction vested in courts of law under article 13(3) of the Constitution which in our view underlines the due process of law in determining and balancing the rights and interests of an individual against others and the public.

We are aware that the Court of Appeal in **Daudi Pete** held that denial of bail under the provision of the then section 148(5)(e) of the CPA did not amount to violation of the doctrine of separation of power and did not mean that the judicial functions were taken away by the legislature. However, such principle does not apply in the present petition because the Court of Appeal in **Daudi Pete** (supra) did not address and was not invited to consider the provision of article 13(3) of the Constitution which provides for powers of the courts of law to protect and determine the basic rights, duties and interests of every person and the community

In the third place, we considered the submissions and arguments on whether the impugned provision amounts to treating an accused person charged with a non-bailable offence as a convicted criminal and therefore violates article 13(6)(b) of the Constitution. As we pointed out at the beginning, the issue at stake as it relates to article 13(6)(b) of the Constitution and the impugned provision was once discussed by the Court of Appeal in **Daudi Pete** (supra). The ultimate finding of the Court of Appeal

on the issue was that section 148(5) (e) of the CPA as it then stood was not violative of article 13(6)(b) of the Constitution because denying bail to an accused person does not necessarily amount to treating such a person like a convicted criminal. This principle arose from the case of **Daudi Pete** (supra) whose circumstances were similar to the circumstances of the present petition. Whereas in **Daudi Pete** the impugned provision was the then section 148(5)(e) of the CPA which was challenged for violating article 13(6)(b) of the Constitution, in the present petition the impugned provision is section 148(5) of the CPA. In both cases, the provisions relate to non-bailable offences. In the context of the doctrine of stare decisis applicable in our jurisdiction and other jurisdictions in the commonwealth, this court being subordinate to the Court of Appeal is bound by the principle deduced from the decision in **Daudi Pete** (supra) as above shown. We are consequently constrained to find that the impugned provision of section 148(5) of the CPA is not violative of article 13(6)(b) of the Constitution.

Before summing up the overall effect of our findings, we must state briefly that the decision of this court in the case of **Gedion Wasonga** (supra) which was, among other authorities, relied on by the learned State Attorney did not persuade us. Apart from the fact that the provisions of the Constitution invoked in the case were different and on basis of which the case was decided, there were as above shown binding authorities of the Court of Appeal on the issues that were relevant in this matter.

Consequently, the overall effect of what we found above is that the whole of the provision of section 148(5) of the CPA denying bail to an accused person, charged with any of the specified non-bailable offences, or fitting into any of the stipulated situations under such provision, is violative of article 13(3) and 15(2)(a) of the Constitution in two contexts. First, the absence of a meaningful procedure for denying bail which would affect the outcome; and second, the ousting of the judicial function, and the due process, in matters pertaining to protection and determination of bail in respect of a person accused of, or charged with, an offence falling under the impugned provision.

The remaining issue is whether the provision of section 148(5) of the CPA is saved by articles 30(2) of the Constitution in as much as it violates the Constitution. The provision of article 30(2) of the Constitution, along with the proportionality test as applied in **Daudi Pete** (supra), **George Eliawony and Three Others vs Republic** [1998] TLR 190, and **Mbushuu @ Dominic Mnyaronje and Another vs Republic** [1995] TLR 97 were relied upon by the learned State Attorney for the respondent to support the view that the provision is saved by article 30(2) of the Constitution.

The submissions which were advanced by the learned State Attorney in a bid to persuade the court that the impugned provision is saved by article 30(2) of the Constitution were, if we were to summarise, anchored on the arguments that the impugned provision is; confined to only persons considered threats to justice, national economy and security; confined to serious offences; meant to protect rights and freedoms of others; meant to ensure public safety, public order, peace, preservation of public morality, and protecting disclosure of confidential information. She also added

that it is in line with article 30(1) &(2) of the Constitution as it reasonably interferes with the basic individual rights for the public interests.

On the part of the counsel for the petitioner, it was argued that the impugned provision is not saved by article 30(2) of the Constitution as it does not conform to the principle of lawfulness and proportionality test of a statutory provision articulated in **Kukutia Ole Pumbuuni and Another vs Attorney General and Another** (supra). Applying the principle to the circumstances of the present petition, the learned counsel cited the case of **Daudi Pete** (supra) and **Jackson Ole Nemeteni** (supra) in connection with how the principles were invoked and similar provisions denying bail to an accused person were respectively found to infringe the Constitution and not saved by article 30(2) of the Constitution. Similarly, a Ghanaian case of **Kpedu vs The Attorney General** (supra) was cited to show how similar provision was critically looked at and found to be so broad that it was open for abuse as it did not have any safeguard against arbitrary decision. It was also found that the provision had potentials of stultifying all provisions on personal liberty enshrined in the Ghanaian Constitution.

In respect of the impugned provision and the cited authorities the following aspects were therefore earmarked and forcefully brought to our attention. One, the impugned provision is so wide that it includes even an accused person who is not dangerous in terms of article 30(2) of the Constitution. Two, the impugned provision does not contain adequate safeguard and effective control against arbitrary decision and abuse by the prosecution when using the law to charge an accused person with a non-bailable offence. Three, it vests in the prosecution unfettered powers of framing any charge

against any accused person and thereby affecting the liberty of an accused person. Four, the provision does not have a time frame for completion of investigation, prosecution and detention prior to investigation or trial. And five, it outs the due process and directs the court to just refuse bail notwithstanding the circumstances of a case.

On our part, we unanimously found the above cited authorities relevant to the issue at stake. Our minds further converged on the fact that it is the settled position of law that the impugned provision which we found to be offensive of the respective provisions of the Constitution would be null and void unless it is saved by article 30(2) of the Constitution. We were also mindful that for such provision to be saved by article 30(2) of the Constitution, it must pass the lawfulness and proportionality test enunciated in **Kukutia Ole Pumbun and Another** (supra). Accordingly, guided by the above authorities and principles, we closely considered the details of the impugned provision of section 148(5)(a)(i),(ii),(iii),(iv),(v),&(vi),(b),(c),(d),(e), and (f) of the CPA.

In our consideration, we wondered whether the provision was broad and capable of being abused and of breeding arbitrary decisions; whether the provision contained enough safeguards against arbitrary decisions and effective control against abuse by the prosecution; and further wondered as to whether the limitations under such provision were excessive. We found the decision of **Daudi Pete** (supra) very insightful. In this case, the Court of Appeal descrjbed the provisions of the then section 148(5)(e) of the CPA in the following terms and we accordingly quote:

..... In our considered opinion the provisions of section 148(5)(e) are so broad that they encompass even accused persons who cannot reasonably be construed to be such a danger in terms of the relevant paragraph of the Constitution. For instance, these provisions cover an accused person who, while defending himself or his property against robbers uses excessive force resulting in the death of one or more of the robbers. They also cover an accused person who finds someone committing adultery with that person's spouse, and being provoked, seriously assaults and causes grievous bodily harm to the adulterer. Similarly, the provisions also encompass an accused persons who, to the knowledge of everyone, inherits a firearm from his or her parent but forgets to obtain a firearm licence, thereby unwittingly committing the offence of being in possession of a firearm without a licence. Section 148(5)(e) would also cover every person who, though licensed to possess a firearm, forgets to renew his or her licence within the prescribed period. Many mere such examples may be given. None of these persons can reasonably be said to be dangerous.

It is thus plain that the provisions of section 148(5)(e) are so broadly drafted that they are capable of depriving personal liberty not only to persons properly considered to be dangerous, but even to persons who cannot be considered to be dangerous in terms of the meaning of paragraph (b) of sub-Article (2) of Article 30. Such a statutory provision amounts to the Kiswahili proverbial rat-trap which catches both rats and humans, without distinction. A provision of

that nature attempts to protect society by endangering society. Section 148(5)(e) is such a provision. It does not therefore fit into Article 30(2)(a) of the Constitution and is consequently null and void.

We were satisfied that the reasoning employed by the Court of Appeal in **Daudi Pete** (supra) would relatively and respectively apply to each and every offence under the impugned provision; and thereby depriving personal liberty even to persons who cannot be considered to be dangerous and unintended ones. Indeed, the absence of a "procedure prescribed by law" as provided by article 15(2) of the Constitution makes the administration of the impugned provision susceptible to not only abuse but also arbitrary decisions as it was so stated by this court in **Jackson Ole Nemeteni** (supra). To make it worse, there were no controls or safeguards imposed against abuse or arbitrary decisions by which an accused person may be deprived of personal liberty. The pertinent absence of adequate safeguards and controls which may lead to abuse and arbitrary decisions is indeed discernable in the lack of procedure prescribed by law under which a person may be denied bail; lack of time frame within which an accused person may remain in detention before conclusion of investigation and trial or substitution of a charge; inordinate delays in completion of investigation and prosecution at the expense of personal liberty of an accused person; dropping of charge laid against an accused person and subsequent and immediate arrest and re-charging of the accused person; large numbers of persons accused of non-bailable offences held indefinitely in remand custody.

We were instructively referred to the law on non-bailable offences as it pertains in Zanzibar which is within the United Republic of Tanzania. With seemingly intrinsic intention of balancing the protection of the right to personal liberty of an accused person with the protection of the collective rights of the society, the law ingeniously provides for controls and safeguards against abuse and arbitrary decisions in charging an accused person with a non-bailable offence and holding him in remand custody for an indeterminate period of time without trial. It is also clear to us that the law permits the courts to consider bail in all offences including those classified as non-bailable, but that right is denied to the police who are non-judicial officers. And in so doing, the law in Zanzibar permits the courts to grant bail under certain conditions, even for offences described as non-bailable. It would thus appears that the "non-bailable offences" are so described because in certain conditions the accused may be refused bail by the High Court.

Relevant provisions of section 2, section 117(1)&(3) and section 117A(1),(2),&(3) of the Zanzibar Criminal Procedure Decree, cap. 14 as amended by the Criminal Procedure Act, No. 7 of 2004 stipulate the scheme in which an accused person of any non-bailable offence (i.e murder and treason) is refused, and may be granted, bail through a due process; which scheme in turn serves to reveal the extent to which the impugned provision is susceptible to arbitrary decisions and abuse. The above mentioned provisions of the Zanzibar Criminal Procedure Decree, cap. 14 as amended read as follow:

S. 2(i) accused person may be admitted to bail by any court as provided under section 117(1) and ***non-bailable offence means an offence specified under section 117(1) for which bail may be admitted only by the High Court under section 117(3);***

.....

.....

.....

S. 117(1) when any person, ***other than a person accused of murder or treason****, is arrested or detained....such person may be admitted to bail.*

(2).....

(3) ***Notwithstanding anything contained in subsection (1) the High Court may in any case direct that any person be admitted to bail.....***

117A(1) ***The hearing of case in which a person is charged with non-bailable offence must commence within nine months from the date when a person so charged was arrested. If the hearing does not commence within the said period of nine months, the accused person shall be admitted to bail unless the Court, for reasons to be recorded in writing, direct otherwise****.*

(2) ***If, at any time after the conclusion of the trial of a person accused of a non-bailable offence*** *and before judgment is delivered,* ***the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody,*** *on the execution by him or her of a bond*

(3) Any Court which has released a person on bail under subsection (1) or (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him or her to custody without sureties for his or her appearance to hear the judgement to be delivered.

The Ghanaian case of **Kpedu vs The Attorney General** (supra) was referred to us by the counsel for the petitioner as we pointed out above. As shown in the submissions of the counsel for the petitioner, the case had to do with constitutionality of a statutory provision which by its nature, had prohibited bail to an accused person facing a charge of non-bailable offence which included murder, treason, robbery and terrorism. Consistent with what we stated above, we were clear that what the Ghanaian Supreme Court found and stated in relation to the statutory prohibition of bail in non-bailable offences is ideally instructive and inspirational in understanding the situation of lack of safeguards and effective controls confronting an accused person charged with a non-bailable offence in Mainland Tanzania. The relevant part of the judgment reads and we hereby quote as follow:

The danger posed by this law, that is s. 96(7) of Act 30, is that it sets no time frame in which the investigations should end; it sets no time frame within which the provision should cease to apply whether or not investigations have been concluded; it sets no specific conditions in which they are to apply. It means therefore that if the prosecution prefers any of these charges against another person whether the facts support the charge or not, the court's only duty is to put you

away because the law says so. It is a sure recipe for abuse of executive power to stultify all the provisions on personal liberty enshrined in the Constitution. It is necessary to state that the issue whether to deprive a person of his personal liberty under Article 14 of the Constitution is not a magisterial or executive act, but a judicial one. I recall the words of Justice Frank Murphy in his dissenting opinion in the case of Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946) at 219 that: "Liberty is too priceless to be forfeited through the zeal of an administrative agent."

.....

.....

Since the provision is clearly inconsistent with the provisions on personal liberties guaranteed under the Constitution it should not be left to stand. Indeed any law that violates any of the Chapter 5 rights under the Constitution is itself unconstitutional.

The above statement is true and apt when one takes accounts of the administration of the impugned provision and its susceptibility to arbitrary decisions and abuse. All considered, we could not in the circumstances find that the impugned provision, in so far as it violates articles 13(3), and 15(2)(a) of the Constitution, is in any way saved under article 30(2) of the Constitution.

Having found as herein above, we toyed on whether we should straight away strike out the whole of the provision of section 148(5) of the CPA. We are aware that in the case of **Jackson Ole Nemeteni** (supra) whose decision was delivered on 13/07/2007, this

court declared that the provision of section 148(5) (a)(i) of the CPA in so far as it related to denial of bail to armed robbery is unconstitutional for violating article 15(2)(a) of the Constitution. The court did not struck out the provision right away. Instead, it invoked the powers conferred under article 30(5) of the Constitution and directed the Government to take measures, within eighteen (18) months from the date of the judgment, to, among other things, put in place a "procedure prescribed by law" as provided under article 15(2)(a) of the Constitution, by which a person charged with armed robbery may be denied bail.

Despite the amendments on non-bailable offences that were effected after the decision of this court, we are clear that there were no meaningful procedures prescribed by the law which was put in place to provide a scheme for dealing with bail in respect of persons accused of armed robbery and thereby rendering the respective provision valid Regrettably, in what seems as contemptuous to the court order the time frame for rectification had since elapsed without any meaningful procedure under which a person accused of armed robbery could be denied bail. Under the premise, we accordingly find that section 148(5)(a)(i) of the CPA in relation to armed robbery is no longer valid law pursuant to the decision of this court in **Jackson Ole Nemeteni** (supra). We forthwith declare the denial of bail in respect of armed robbery null and void and accordingly struck out from the statute book as was so found and held by this court.

In view of our conclusion in respect of the denial of bail in respect of armed robbery under section 148(5(a)(i) of the CPA, we were therefore only left with the other offences and/or situations under impugned provision in respect of which an accused

person is denied bail without a procedure prescribed by law and without due process. We were satisfied that submissions of both counsel as were their respective pleadings were agreeable that some of the offences in the list of non-bailable offences, such as murder and treason, have been in the statute book since the relevant statute was first enacted.

Striking out the remaining part of such provision (as the denial of bail in respect of armed robbery had already been adjudged) from the statute book right away, without having in place a procedure prescribed by law under which consideration for granting or refusing bail can be made, is likely to unnecessarily cause havoc in the whole system of administration of criminal justice. The interest of justice would thus demand that we invoke article 30(5) of the Constitution to direct the Government as we hereby do so, to make the requisite rectification within a period specified below.

In the end, we allow the petition as follows: We hold that section 148(5) of the CPA as amended from time to time is violative of article 13(3), and 15(1),(2)(a) of the Constitution. Since section 148(5)(a)(i) of the CPA in relation to the denial of bail for armed robbery had already been previously adjudged and found to be violative of article 15(2)(a) of the Constitution and declared null and void and hence struck out from the statute book, we shall maintain such position. With the exception of the denial of bail for armed robbery which had already been adjudged as herein above shown, we invoke article 30(5) of the Constitution and hold that the remaining part of section 148(5) of the CPA which includes everything but not armed robbery shall remain to be valid for a further period of eighteen (18) months from the date of this judgment and

within such period the Government is directed to make the requisite rectification. In the event the remaining part of the provision of section 148(5) of the CPA herein specified is not rectified within such period of eighteen (18) months from the date of this judgment, it shall forthwith be invalid, null and void and automatically rendered struck out from the statute book as from the expiry of such period. As the petition was in the public interests, we make no order as to costs.

Dated at Dar es Salaam this 18th day of May 2020.

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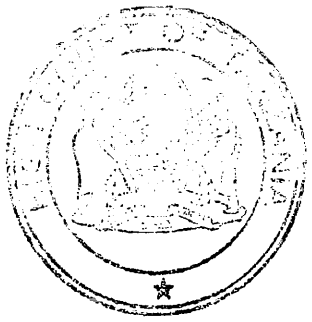
B. S. MASOUD
JUDGE



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S. M. KULITA
JUDGE

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J. L. MASABO
JUDGE

(ii) Section 148(5)(a)(i) of the CPA in relation to the denial of bail for armed robbery had already been previously adjudged and found to be violative of article 15(2)(a) of the Constitution and declared null and void and hence struck out from the statute book.

(iii) With the exception of section 148(5)(a)(i) of the CPA in relation to the denial of bail for armed robbery which remains struck out from the statute book, the remaining part of section 148(5) of the CPA which includes everything but not armed robbery shall remain valid for a further period of eighteen (18) months from the date of the judgment pursuant to article 30(5) of the Constitution.

(iv) The Government is accordingly directed to make the requisite rectification within such period of eighteen (18) months.

(v) In the event the remaining part of the provision of section 148(5) of the CPA herein specified is not rectified within such period of eighteen (18) months, it shall forthwith be invalid, null and void and automatically rendered struck out.

(vi) No order as to costs.

BY THE COURT

Given under our Hand and the Seal of the Court this 18th day of May, 2020.

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B. S. MASOUD
JUDGE

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S. M. KULITA
JUDGE

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J. L. MASABO
JUDGE

Extracted on 19th day of May, 2020

Issued on .....20th.....day of ...MAY...2020