

5 February 2018



Court of Appeal delivers landmark decision against DPP powers

- **DPP had powers under the Criminal Procedure Act (CPA) to issue certificate in any case to deny bail**
- **Court holds that this gives DPP too much power on persons liberty**
- **Holds provision too broadly drafted with no reasonable and fair procedure**
- **Court holds that such certificate to bail denies the suspect the right to be heard and the right to liberty, hence boldly declares such powers unconstitutional and null and void**
- **Judgment lays down the duty of the Court in a constitutional case alluding to five principles governing constitutional interpretation**
- **Court holds that right to a fair hearing entails equality between the contestants in the proceedings, DPP merely being one of the parties**
- **Court had services of two learned amici curiae, both asserting DPPs powers as being unconstitutional**
- **Judgment showcases independence of the Tanzanian Judiciary in criminal matters from the executive and legislature**

On 2 February 2018, the Court of Appeal of Tanzania, sitting in Dar es Salaam delivered a landmark decision on human rights and constitutional law in Civil Appeal no. 65 of 2016 between the Attorney General versus Jeremia Mtobesya. The bench, composed of five bold Justices of Appeal namely Luanda, J.A., Mussa, J.A., Mmilla J.A., Mugasha J.A., and Mwambegele J.A. revived the jurisprudence on the right to bail. The architecturally sound, and well-articulated Judgment was authored by Mussa, JA and forms the opinion of the entire bench. It now eliminates the powers of the Director of Public Prosecutions (DPP) from issuing certificates denying bail to accused persons, a certificate that many claim has been misused and issued arbitrarily to keep people in custody. The judgment is seen as a great victory for human and freedom rights.

Background and decision

In this case, the Attorney General filed an appeal challenging the decision of the High Court which held that since section 148(4) of the CPA neither passes the proportionality test nor can be saved by the derogation clause, it contravenes article 13(6) of the Constitution of the United Republic of Tanzania and thus unconstitutional and null and void. The well reasoned decision of the High Court (Lila, J, Kihyo, J and Ruhangisa, J) was in respect of a petition filed by the Respondent, in this case one Jeremia Mtobesya, who sought for a declaration that the provisions of section 148(4) of the CPA, which denies a suspect under police custody or a remanded accused person pending trial the right to challenge the DPP's certificate of objection to bail, were unconstitutional for contravening article 13(6)(a) of the Constitution.

Section 148(4) of the CPA states:

148(1) (4) Notwithstanding anything in this section contained, **no police officer or Court shall, after a person is arrested and while he is awaiting trial or appeal, admit that person to bail if the Director of Public Prosecutions, certifies in writing that it is likely that the safety or interests of the Republic would thereby be prejudiced; and a certificate issued by the Director of Public Prosecutions under this section shall take effect from the date it is filed in Court or notified to the officer in charge of a police station and shall remain in effect until the proceedings concerned are concluded or the Director of Public Prosecutions withdraws it. (emphasis ours)**

For further information on legal updates please contact:

Fayaz Bhojani
Managing Partner
M: +255 784 322751
E: fbhojani@fbattorneys.co.tz

Feizin Amlani
Head, Corporate Affairs
M: +255 688 253509
E: famlani@fbattorneys.co.tz

About FB Attorneys

FB Attorneys is an all service law firm based out of Dar es Salaam, Tanzania.

We cover all aspects of the law and specialise in all corporate and commercial matters including Mining, Oil & Gas, Tax, Litigation, Competition, Banking & Intellectual Property law.

FB Attorneys has been ranked as a tier 1 law firm by the IFLR 1000 in the Energy & Infrastructure and Financial & Corporate sectors, tier 1 by Legal 500 and band 2 by Chambers and Partners General Business Law.

FB Attorneys

8th Floor, Amani Place, Ohio Street
P. O. Box 19813
Dar es Salaam, Tanzania
T: +255 22 2135994/5
F: +255 22 2135996
E: info@fbattorneys.co.tz
W: www.fbattorneys.co.tz

Disclaimer

Information found in this legal update and any attachments are confidential and may be privileged or otherwise protected from disclosure, and intended solely for the use of the individual or entity to whom it is addressed to. If you are not the intended recipient, please notify the sender immediately and delete this message and any attachment from your system. Any views or opinions expressed in the message or its attachments are not necessarily those of FB ATTORNEYS.

© FB Attorneys 2018. All rights reserved.



A member of



5 February 2018

In its decision the Court of Appeal traced the rationale for the enactment of section 148(4) of CPA and found that it aimed at protecting the safety and interests of the United Republic from being prejudiced by the granting of bail and that the provision was imported from Zambia's Criminal Procedure Act, which has since changed narrowing down the powers of the Zambian DPP. The Court further argued that the list of unbailable offences in Tanzania has since been extended well beyond the offences of murder and treason attracting a possible or mandatory capital penalty and thus, the mischief sought to be addressed has been overtaken by events. According to the Court, since the justification for promulgation of section 148(4) has now been pre-empted and completely overridden with the addition of armed robbery, defilement, illicit trafficking in drugs or conveyance of drugs for commercial purposes, offences involving narcotic drugs, terrorism and money laundering being unbailable offences, *'what is the utility of having the DPP's certificate'?*

Before making its decision and to ensure that it has not missed out anything, the Court of Appeal meticulously reminded itself of the duty of the Court in a Constitutional case. The first duty is to lay the article of the Constitution which is involved beside the statute which is challenged and to decide whether the statute squares with the article of the Constitution. The second duty is to ascertain and declare whether the legislation is in accordance with or in contravention of the provision of the Constitution.

Further to that, the Court alluded to five principles governing constitutional interpretation as laid down in the case of *Julius Ndyango v Attorney General*. First, the Constitution is a living instrument having a soul and conscience of its own. Second, the provisions of the Constitution touching fundamental rights have to be interpreted in a broad and liberal manner. Third, until the contrary is proved, a legislation is presumed constitutional. Fourth, a person who challenges the constitutionality of a legislation has the onus to prove that such legislation is unconstitutional. Fifth, persons who support restriction of fundamental rights rely on claw back clauses or exclusion clauses have the onus to justify the derogation.

After a thorough analysis, the Court of Appeal concluded that it agreed with the decision of the High Court, and dismissed the Appeal, meaning that the DPP now has no powers to issue certificates denying bail to accused persons under section 148(4) of the CPA, which the Court categorically declared unconstitutional, and null and void.

Notable extracts from the judgment

"From other jurisdictions, it has been persuasively held that in determining the constitutionality of a statute, a Court must be guided by the object and purpose of the impugned statute, which object and purpose can be discerned from the legislation itself."

"We venture to say that the foregoing statement of principle applies, in similar vein, to the situation at hand. We say so because we have already indicated the extent to which the impugned provision does not require the DPP to specify or disclose the nature of the safety or public interest concerned. Once the certificate meets the validity test, which we have, again, extracted from the case of DPP v Ally Nur Dirie and another (supra), a Court of law as well as a police officer, in terms of section 148(4) of the CPA will have no other option than not to grant bail. Thus, in terms of the impugned provision, a Court or a police officer is, so to speak, not only compelled to accede to the DPP's ex parte statement of fact, not supported by any evidence, but the statute also tells the Court what order to give: to refuse bail. To us, such 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. But we say no more much as this particular Article was not the subject of the complaint in the Court below."

For further information on legal updates please contact:

Fayaz Bhojani
Managing Partner
M: +255 784 322751
E: fbhojani@fbattorneys.co.tz

Feizin Amlani
Head, Corporate Affairs
M: +255 688 253509
E: famlani@fbattorneys.co.tz

About FB Attorneys

FB Attorneys is an all service law firm based out of Dar es Salaam, Tanzania.

We cover all aspects of the law and specialise in all corporate and commercial matters including Mining, Oil & Gas, Tax, Litigation, Competition, Banking & Intellectual Property law.

FB Attorneys has been ranked as a tier 1 law firm by the IFLR 1000 in the Energy & Infrastructure and Financial & Corporate sectors, tier 1 by Legal 500 and band 2 by Chambers and Partners General Business Law.

FB Attorneys

8th Floor, Amani Place, Ohio Street
P. O. Box 19813
Dar es Salaam, Tanzania
T: +255 22 2135994/5
F: +255 22 2135996
E: info@fbattorneys.co.tz
W: www.fbattorneys.co.tz

Disclaimer

Information found in this legal update and any attachments are confidential and may be privileged or otherwise protected from disclosure, and intended solely for the use of the individual or entity to whom it is addressed to. If you are not the intended recipient, please notify the sender immediately and delete this message and any attachment from your system. Any views or opinions expressed in the message or its attachments are not necessarily those of FB ATTORNEYS.

© FB Attorneys 2018. All rights reserved.



A member of



5 February 2018

"Addressing now Article 13(6)(a), we entirely share Mr. Mpoki's sentiments to the effect that the impugned section 148(4) does not prescribe any procedure, let alone one which is reasonable, fair and appropriate to govern the issuance of the DPPs certificate. To that extent, we, again, agree with his submission that an accused person is not afforded any meaningful opportunity of being heard before he is denied bail by operation of the DPPs certificate. Despite the numerous statutory powers accorded to the DPP, it should be appreciated that, in a criminal proceeding, she is no more than a party, who, along with accused person, deserves equal treatment and protection before the law. In this regard, we should clearly express that it is utterly repugnant to the notion of fair hearing for the legislature to allot so much power to one of the parties to a proceeding so that he is able to deprive the other party of his liberty merely by her say- so and; much worse, to the extent that the victimized party as well as the Court or, as the case may be, a police officer, are rendered powerless. The right to a fair hearing, by its very nature, requires there be equality between the contestants in the proceeding. There can be no true equality if the legislature, as we have said, allows one party to deprive the other of his personal liberty merely by her say-so. All said, we just as well find that the impugned provisions infringe Article 13(6)(a) of the Constitution."

"It was further held that any law that seeks to limit fundamental rights of the individual must be construed strictly to make sure that it confirms to the foregoing requirement, otherwise the guaranteed rights under the Constitution may easily be rendered meaningless by the use of the derogative or clawback clauses of the very same Constitution."

"We shall now apply the two tests to section 148(4) of the CPA to see if it is saved by Article 30(2) of the Constitution. If we may express at once, it is most apparent that the impugned provision is, indeed, arbitrary. We have already indicated the extent to which the provision does not prescribe any procedure, let alone one which is reasonable, fair and appropriate to govern the issuance of the DPPs certificate. In the result, an accused person is not afforded any meaningful opportunity of being heard before he is denied bail by operation of the DPPs certificate."

"Turning now to the requirement that the law must not be drafted too widely, it is obvious, once again, that the impugned provision does not pass that test either. The provision is too broadly drafted and overbroad, much as it applies to all offences irrespective of their seriousness. As such, it may easily give away to an abuse of the powers conferred by it as the exercise of that power wholly depends on the DPPs whims."

"In the final event, we are minded to dismiss the appeal with costs and uphold the decision of the High Court to the effect that section 148(4) of the CPA is, indeed, unconstitutional as well as null and void on account of its derogation from the provision of article 13(6)(a) of the Constitution."

For further information on legal updates please contact:

Fayaz Bhojani
Managing Partner
M: +255 784 322751
E: fbhojani@fbattorneys.co.tz

Feizin Amlani
Head, Corporate Affairs
M: +255 688 253509
E: famlani@fbattorneys.co.tz

About FB Attorneys

FB Attorneys is an all service law firm based out of Dar es Salaam, Tanzania.

We cover all aspects of the law and specialise in all corporate and commercial matters including Mining, Oil & Gas, Tax, Litigation, Competition, Banking & Intellectual Property law.

FB Attorneys has been ranked as a tier 1 law firm by the IFLR 1000 in the Energy & Infrastructure and Financial & Corporate sectors, tier 1 by Legal 500 and band 2 by Chambers and Partners General Business Law.

FB Attorneys
8th Floor, Amani Place, Ohio Street
P. O. Box 19813
Dar es Salaam, Tanzania
T: +255 22 2135994/5
F: +255 22 2135996
E: info@fbattorneys.co.tz
W: www.fbattorneys.co.tz

Disclaimer

Information found in this legal update and any attachments are confidential and may be privileged or otherwise protected from disclosure, and intended solely for the use of the individual or entity to whom it is addressed to. If you are not the intended recipient, please notify the sender immediately and delete this message and any attachment from your system. Any views or opinions expressed in the message or its attachments are not necessarily those of FB ATTORNEYS.

© FB Attorneys 2018. All rights reserved.



A member of

