

20 May 2020



Constitutionality of Bail Denial under Fire

Further to the FB Attorneys Legal Update issued on 18 May 2020, and having now obtained the Judgment in Miscellaneous Civil Cause No 29 of 2019 between Dickson Paulo Sanga versus The Attorney General (Judgment), we wish to provide the following updated Q&A:

What is the background of this case?

The Petitioner, one Dickson Paulo Sanga, moved the High Court in a constitutional Petition challenging the provisions of section 148(5) of the Criminal Procedure Act (CPA) that denies bail to accused persons in various offences the most popular being Money Laundering.

The Petition was filed at the High Court of Tanzania and assigned Miscellaneous Civil Cause no 8 of 2019 with the Attorney General as the Respondent.

The Petitioner was seeking orders that section 148(5) of the CPA (section 148(5)) infringes constitutional rights of presumption of innocence and the right to personal liberty as enshrined under Articles 13(6)(b) and 15(2)(a) of the Constitution of the United Republic of Tanzania (Constitution).

What is money laundering?

Money laundering is widely defined. According to section 3 of the Anti-Money Laundering Act (AML), money laundering means “engagement of a person or persons, directly or indirectly in conversion, transfer, concealment, disguising, use or acquisition of money or property known to be of illicit origin and in which such engagement intends to avoid the legal consequences of such action, and includes offences referred in Section 12.’

Section 12 introduces predicate offences that must have been committed for money laundering to exist. The AML defines predicate offences to include a very wide range of offences (where the most controversy arises) including illicit drug trafficking, terrorism, arms trafficking, corrupt practice, armed robbery, theft, kidnapping, smuggling, extortion, forgery, piracy, poaching, tax evasion, illegal fishing, illegal mining, environmental crimes in addition to any other offence that the Minister for Finance may publish by notice in the Gazette.

In short, if you commit one of the predicate offences above, a good number of which are normally bailable, you can also be charged with money laundering, which then makes the offence unbailable.

What does section 148(5) state?

This section provides that a police officer or a Court before whom an accused person is brought shall not be admitted to bail in offences like murder, treason, money laundering, offences relating to certain drugs, terrorism, armed robbery, amongst others. Since 1985 this list has been growing in the number of offences becoming unbailable.

What did the Court decide in this case?

The Court held that the whole of section 148(5) violates the Constitution since there is no procedure under which consideration for granting or refusing bail is in place to ensure

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due process. However the Judges did not stop there but invoked Article 30(5) of the Constitution to direct the Government to rectify this within 18 months, failure of which all section 148(5) offences will become bailable. The 18 month period is a sort of cool off period allowing the Government to take necessary action.

Does that mean that bail is now open for all accused?

No. Bail will not be open to the accused charged with offences specified under section 148(5) of the CPA until the expiration of the 18 months. Effectively the Government has a chance to rectify the unconstitutionality of section 148(5) within 18 months.

What does Article 30(5) of the constitution say?

Article 30(5) states the following:

Where in any proceedings it is alleged that any law enacted or any action taken by the Government or any other authority abrogates or abridges any of the basic rights, freedoms and duties set out in Articles 12 to 29 of this Constitution, and the High Court is satisfied that the law or action concerned, to the extent that it conflicts with this Constitution, is void, or is inconsistent with this Constitution, then the High Court, if it deems fit, or if the circumstances or public interest so requires, instead of declaring that such law or action is void, shall have power to decide to afford the Government or other authority concerned an opportunity to rectify the defect found in the law or action concerned within such a period and in such manner as the High Court shall determine, and such law or action shall be deemed to be valid until such time the defect is rectified or the period determined by the High Court lapses, whichever is the earlier.

This article of the Constitution allows the Court to give the Government an opportunity to rectify the defect found in the law. This is what the High Court has done here, giving the Government 18 months ie until about 17 November 2021 to have in place procedures prescribed by law under which consideration for granting or refusing of bail can be made. If such procedures will not be in place, all offences that are not bailable under section 148(5), which includes murder, treason, money laundering and the like will become bailable.

This is confusing. How can section 148(5) be unconstitutional and yet the Government is given time to change it?

There is a saving provision in the Constitution that allows the Court to give the Government such time to rectify the defect. The Court, in its own discretion, has decided to grant such time to the Government.

What about armed robbery? Why did the Court rule armed robbery as bailable?

In another Constitutional matter of Jackson Ole Nemeteni (Mjomba Mjomba), the Court ruled that section 148(5)(a)(i), which specifically denies bail to accused in armed robbery cases, was unconstitutional. However, just like in this Case, the Court gave the Government 18 months to rectify the error and have in place procedures, and the Government did not do so. Hence, with the 18 months having expired, it has been struck out from the CPA meaning that it now becomes bailable.

What does all this mean?

It is simple. The Government has to rectify the defect in section 148(5) of the CPA as discussed above within 18 months. If it does so, all offences under section 148(5) will continue to remain unbailable but the Courts shall have power to check or control the abuse or arbitrary decisions of charging unbailable offences or delay to prosecute unbailable offences to 'fix' people. If the Government does not rectify this defect, as in the case of armed robbery, all section 148(5) offences will become bailable.

What are the chances of that happening?

The Attorney General has filed a notice of appeal to the Court of Appeal. Should he

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succeed there, or should the Government put in place, within 18 months, procedures under which consideration for granting or refusing of bail can be made, then all section 148(5) offences will continue to remain unbailable, only that the Court shall have power to control when to grant or refuse bail based on the procedures.

What about money laundering?

It also continues to be unbailable for 18 months. If procedures under which consideration for granting or refusing of bail are made within 18 months, then money laundering will continue to remain unbailable but the Court will have to look at the circumstances of the case or the offender to decide whether to admit the accused to bail or not, and when, based on the procedures. The Court will have some control of such matters which is not the case now where accused persons remain in custody for many years.

What is the position of bail now?

All offences under section 148(5), except for armed robbery, will continue to be unbailable until either 18 months expire without any procedures in place, or this decision is overturned. As stated above, if the procedures under which consideration for granting or refusing bail are put in place (within the 18 months), then all section 148(5) offences will remain unbailable but with Courts having some control, based on the procedures, at what stage to proceed and grant bail. This will reduce the 'unlimited' time of the current detention where remandees are in prison for many years without investigations being completed or trial commencing.

What do you think the procedures will provide, and why are they needed?

There has been a public outcry that accused persons are taken to Court even before investigations are over, with investigations then never being completed and accused staying in remand prison for many years because their offences are unbailable. There are many accused persons in prison for over 5 years whose cases are still being investigated and their offences are unbailable so they cannot be released.

With proper procedures in place, the Prosecution will be required to act within the ambit of what is laid out there, failure of which the accused will be released. For example, the procedures could provide for maximum time allowed for investigation, time by which a trial must commence and end. That would ensure that the accused persons are not remanded in prison for an indefinite period of time.

In short, the procedure is intended to check the abuse of power to charge unbailable offences maliciously and to control inordinate delays to prosecute unbailable offences.

To read the Judgment [click here](#).

To read the FB Attorneys Legal Update issued on 18 May 2020 [click here](#).

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