

5 August 2020



## A clawback: Court of Appeal holds bail denial is not unconstitutional

- Holds section 148(5) of CPA not unconstitutional as it meets test of proportionality, legitimacy and lawfulness
- Detention pending trial important for peace and order in community
- Acknowledges that accused staying in remand for long
- Judicial Review available to a person if DPP abuses power

On 18 May 2020, the High Court of Tanzania declared that section 148(5) of the Criminal Procedure Act Cap 20 (CPA), the key provision that denies bail to accused persons, was unconstitutional and ordered the Government to rectify this defect within 18 months, failure of which this section would be automatically expunged and the accused be allowed to apply for bail. The High Court Judges also ruled that considering that armed robbery was already ruled as being unconstitutional in the case of 'Mjomba Mjomba', and that the Government had not taken necessary steps within 18 months from the date of that decision, armed robbery would be immediately expunged from section 148(5) making itailable.

Aggrieved with the decision of the High Court, the Attorney General appealed to the Court of Appeal. Justices Mugasha, Ndika, Mwambegele, Kwariko and Kitusi, JJJJA, heard the appeal and today, 5 August 2020, delivered their judgment quashing the decision of the High Court and holding section 148(5)(a) as not unconstitutional.

### Background

The Petitioner, one Dickson Paulo Sanga, moved the High Court in a constitutional Petition challenging the provisions of section 148(5) of the 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 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). The Petitioner was successful at the High Court, which led to this appeal at the Court of Appeal.

### The Judgment

In quashing the High Court decision, the Court of Appeal held that section 148(5) is not unconstitutional stating the following:

1. Section 148(5)(b) to (e) of the CPA has no prescribed procedure which must be complied with in determining as to whether or not to admit to bail an accused person but it meets the test of proportionality, legitimacy and lawfulness and thus detention pending trial is necessary for striking the balance between individual

For further information on legal updates please contact:

E: [info@fbattorneys.co.tz](mailto:info@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 1 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  
E: [info@fbattorneys.co.tz](mailto:info@fbattorneys.co.tz)  
W: [www.fbattorneys.co.tz](http://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 2020. All rights reserved.



FB Attorneys



2020



2019

PROUD MEMBER OF



# LEGAL UPDATE

**FB** ATTORNEYS

5 August 2020

and societal basic rights. Therefore, the Court must satisfy itself that circumstances set under section 148(5)(b) to (e) of the CPA are met before granting bail.

2. The Court stands on its earlier decision in the Case of Daudi Pete that Section 148(5) (e) doesn't prescribe any requisite procedure for denial of bail contrary to Article 15(2)(a) of the Constitution but that infringement doesn't automatically mean that the same is ex facie ultra vires the constitution as the Constitution itself permits derogation from basic rights in certain circumstances as provided under Article 30 and 31 of the Constitution. It is stated in the Judgment "In this regard, where the Court finds a statutory provision to have infringed one or several fundamental rights, it must determine if the same is saved by Article 30 and 31 of the Constitution."
3. That for interest of justice in the purview of Article 30(2) the Court can still deny bail even if the prosecution doesn't object bail so as to strike a balance of the individual rights with wider societal rights and interest. Thus, the non bailable offences are serious offences necessitating detention pending trial which is crucial in ensuring availability of the accused during trial and to ensure peace and order to the community whose rights are fundamental and must be protected.
4. The Constitution frowns on the abuse or misuse of procedures in dispensing criminal justice, any individual aggrieved by any abuse by the DPP in the conduct of criminal justice can seek judicial review before the High Court.

As a passing, the Court implored the Executive Arm of the State to address operational problems adversely impacting on the criminal justice. The Court had this observation "...we are aware of the prolonged investigation and prosecution which makes some of the persons accused of non bailable offences to stay in remand for so long and in some instance beyond prescribed term of imprisonment of the offence, if found guilty. It is thus very probable that this is what precipitated the case at hand which is subject of the present appeal."

To read a copy of this judgment, [click here](#).

To read FB Attorneys update on the High Court decision of 18 May 2020, [click here](#).

For further information on legal updates please contact:

E: [info@fbattorneys.co.tz](mailto:info@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 1 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  
E: [info@fbattorneys.co.tz](mailto:info@fbattorneys.co.tz)  
W: [www.fbattorneys.co.tz](http://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 2020. All rights reserved.



FB Attorneys



2020



2019

PROUD MEMBER OF

