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LHRC
KITUO CHA SHERIA NA HAKI ZA BINADAMU

A Study on Non-Bailable Offences in Tanzania

Drawing Lessons and Inspiration

From Kenya, Malawi, Uganda, Zambia and Zanzibar

A Study on Non-Bailable Offences in Tanzania

For a Just and Equitable Society

Publishers

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ABSTRACT

Bail is a Constitutional Right in Tanzania. It is premised upon two constitutional provisions, namely, **Articles 13(6)(b) and 15(1) of the Constitution of the United Republic of Tanzania of1977 as amended**[1], which provide for the presumption of innocence and the right to liberty, respectively. These two provisions derive from a long-standing principle that, unless otherwise stated by a competent court with criminal jurisdiction, a person is presumed innocent. The principle has garnered credence in a number of authorities which shall be cited in due course.

However, against that presumption there is a contending interest. A person is arrested and detainedto make sure that he shall be present at the hearing of his case and be able to receive the intendedpunishment for his wrong doing upon a finding of guilt. Therefore, where there are chances that ifreleased on bail the foregoing purpose will be defeated, then a person's right to liberty and presumption of innocence will be compromised.

Suffice it to say, it is that contending interest that has brought about non-bailable offences. It is believed that some offences are so serious and their punishment so severe that if a suspect or accused person is given any chance, he might escape prosecution and its consequential punishment. This therefore brings about the notion that refusal to admit a person to bail does not presume a person guilty prematurely, but serves to protect the society by ensuring that potential offenders are properly dealt with according to the law.

That proposition seems to have guided the legislature in Mainland Tanzania to enact a long list ofnon-bailable offences. And on top of that long list, the Director of Public Prosecutions (DPP) hasbeen mandated by law to file a certificate objecting to bail if he has grounds to believe that admitting a particular suspect or accused person to bail might jeopardize public safety and security.Thus, in Tanzania Mainland, bail is restricted at the instance of being charged with a non-bailableoffence or upon a certificate by the DPP being filed objecting to grant of bail.

This paper discusses non-bailable offences in Tanzania Mainland. However, since the desired outcome of issuance of a certificate by the DPP objecting to grant of bail has the same effect as that which is attained by non-bailable offences, it is compelling to as well look at the said certificateand its ensuing consequences.

The paper takes on board views from individuals working in the human rights arena, on their perception on the existence of non-bailable offences and need to derogate from a person's right toliberty in a bid to protect the society from alleged criminals and consequences of their actions. It also draws lessons and inspiration from neighbouring countries, say Kenya, Malawi, Uganda and Zambia. Since Tanzania Mainland's criminal justice system regime differs from that which obtains in Zanzibar, this paper explores Zanzibar's criminal justice system regime to draw lessons and inspiration from there as well.

HISTORICAL BACKGROUND

In recent times, especially during the fifth phase regime, Tanzania Mainland has experienced an unprecedented incarceration of accused persons pending trial. A good number of accused persons were either charged with non-bailable offences or economic offences and their liberty curtailed by issuance of Director of Public Prosecution's (DPP) certificate of objection to bail. While accused persons remained in custody pending trail, it took an average of two to three years for trail to commence under the guise of incomplete investigations.

It is a fact that our **Criminal Procedure Act, Cap 20 [R.E 2019]**[2] creates room for arbitrary arrests and detentions for it allows arrests to be made on suspicions.[3] However, trial, and eventually conviction, cannot be based on suspicion however grave the suspicion is.[4]As a result, the arresting officer who acted on suspicion would be forced either to release the suspect on police bail or take him to court at the earliest opportunity, to be remanded in custody pending investigation.

2 Hereinafter to be referred to as "the CPA"

3 Sections 5, 7, 9 and 10 CPA read together – a police officer may arrest and put a person under restraint if he suspects or has reasons to believe that a commission of offence or apprehension of peace has or is about to take place.The police officer could be either acting on information received from an informer or on his own motion.

4 MT 60330 PTE Nassoro Mohamed Ally vs. Republic, Criminal Appeal No. 73 of 2002, Court of Appeal of Tanzania, at Dar es Salaam, (unreported)

The suspect would be remanded in custody pending investigation if suspected to have committed a non-bailable offence, or charged with an economic offence and the DPP issues a certificate of objection to bail.

Cognizant of the fact that charging a person with a non-bailable offence or an economic offence and then issue a certificate to object grant of bail would restrict the person's liberty, the DPP's office abused their statutory power and remanded a good number of accused persons pending trial.A number of doubtful charges were drafted and in it one or two counts of non-bailable offences oran economic offence featured, just to make sure that the accused person is not admitted to bail. A person's liberty and presumption of innocence mattered less in the hands of the DPP and those working under his instructions.

It became apparent that the office of the DPP used non-bailable offences and the certificate of objection to bail as a tool for enhancement of pre-trial detentions for their covert and ulterior gains.There was a deliberate violation of a person's constitutional right to liberty and presumption of innocence. These rights are internationally recognized human rights that Tanzania Mainland has committed to protect and uphold.

Legal and Human Rights Centre (LHRC), an organization committed to advocate for improvementof laws, policies and practice of duty bearers to adhere to international human rights standards, saw the need for advocating for reforms of the law governing non-bailable offences in Tanzania Mainland. the organization therefore commissioned a study on non-bailable offences in Tanzania Mainland so as to be informed of the current state of affairs and be equipped with the right tool for the intended advocacy.

METHODOLOGY

Information contained in this report is based on desk research and oral interviews conducted between the researcher and individuals working in the human rights arena. A larger part of this study however owes to desk research in which the researcher reviewed constitutions, criminal statutes and decided cases from the countries that were subject of review in this work.

Desk research explores the law and practice obtaining in Tanzania Mainland in relation to non- bailable offences, by looking the URT constitution, criminal statutes and courts' decisions on the subject matter. It also looks at criminal justice systems from four neighbouring countries who practice common law like Tanzania Mainland; which are Kenya, Malawi, Zambia and Uganda. The reason why these four countries were preferred in this study is that all have non-bailable offences in their criminal statutes but have a different mechanism of dealing with bail matters from the way Tanzania Mainland does. These are also neighbouring countries which share a lot in common with Tanzania Mainland, and therefore if something needs to be learnt, then it should befrom neighbours whose socio-economic and political cultures are more or less the same. As stated somewhere above, the study also looks at Zanzibar's criminal justice system regime because Zanzibar and Tanzania Mainland have two different criminal justice system regimes.
As pointed out above, the paper also incorporates views collected from individuals working in thehuman rights arena. The views were collected from oral interviews which aimed at finding out how they perceive existence of non-bailable offence in Tanzania Mainland and the necessity of derogation from a person's right to liberty in order to protect the society from allegedly dangerouscriminals and the consequences of their acts.

OBJECTIVE OF THE STUDY

The objective of this study is to come up with a paper that will show the impact of non-bailable offences in Tanzania Mainland and the relevance of amending the laws that establish those offences. The study will therefore inform LHRC in its advocacy work.

NON-BAILABLE OFFENCES IN TANZANIA MAINLAND: LAW AND PRACTICE

Attributed to its unique union, Tanzania has two criminal justice system regimes; the Mainland has its own regime as well as the isles. This fact has been acknowledged in a very recent decisionby the High Court of Tanzania in the case of **Republic vs. Farid Hadi Ahmed & 35 Others, Criminal Session No. 121 of 2020, (Dar es Salaam District Registry) (unreported)** where the court emphatically noted that the two sides of the union enjoy two different criminal justice system regimes. The focus of this paper is on the Mainland.

The Mainland criminal justice system regime, as regards to non-bailable offences, has passed through two distinct eras; one under the **Criminal Procedure Code, 1945**[5] and another under the **Criminal Procedure Act, [R.E 2019]**[6]**.** A fact worthy noting here is that the manner of handling non-bailable offences under the **Code** differs significantly from that which is found under the **CPA.** The differences shall be explored below.

1.1. THE CRIMINAL PROCEDURE CODE, (1945) ERA

1.1.1. Non-bailable offences

For about four decades, say between 1945 and 1985, criminal matters in Tanganyika, and later on Tanzania Mainland, were governed by the **Code**. Bail was one among many aspects covered underthe Code.

As pointed out above, Bail in Tanzania Mainland is a constitutional right, having its foundation in the Bill of Rights under **Articles 13(6)(b) and 15(1) of the URT Constitution**. The Bill of Rightswas introduced into the URT Constitution in 1984. One will therefore realize that from 1945 to 1984 bail was only provided for under the Code. Under **section 123(1) of the Code** any person arrested and detained without a warrant by a police officer in-charge of a police station[7], or who appeared or was brought before a Court, could apply to be released

on his own recognizance[8] or police bail or court bail, as the case could be.

Even before its recognition in the URT Constitution, courts considered bail as a matter of right and not one of privilege. The High Court of Tanzania, speaking through His Lordship Mweisumo J, in the case of **Tito Douglas Lyimo vs. R, [1979], LRT no. 55**, emphatically held that *'**bail is a right and not a privilege**.'* This right was however not to be enjoyed by those charged with murder or treason offences.[9] ***Murder and treason were two non-bailable*** offences in the Criminal Procedure Code era.

1.1.2. Court's powers to grant bail in non-bailable offences

An interesting point to note here is that the bar to grant of bail to a person charged with murder and treason offences was not absolute. In exceptional and unusual circumstances, the High Court, upon being moved in that regard, could hear and determine an application for bail in murder and treason cases. This mandate derived from the provisions of **section 123 (3) of the Criminal Procedure Code**, which reads,

"Notwithstanding anything contained in sub-section (1) of this section, the High Court may in any case direct any person be admitted to bail or that bail required by a subordinate court orpolice officer be reduced."[10]

In the case of **R vs. Lemanda s/o Obei, (1970) HCD n. 85,** Georges CJ, in an occasion where hewas dealing with a bail application brought forth by a person charge of murder, observed that,

"Section 123(3) of the Criminal Procedure Code does empower the High Court to direct a person be admitted to bail even though he has been charged with murder or treason."

8 Proviso to section 123(1) of the Criminal Procedure Code
9 Section 123(1) of the Criminal Procedure Code.Though, as we shall see later, under section 123(3) of the Criminal Procedure Code, the High Court in certain cases could release those charged with murder on bail pending trial.
10 Sub-section (1) stated hereinabove puts restrictions on bail in murder and treason cases

The High Court's mandate to determine bail applications in non-bailable offences was tested in murder cases more than treason. Consequently, there are at least few cases in which the High Court made its pronouncement on bail in murder cases. From those few cases, a common observation has been that, in murder cases bail would be allowed only in exceptional and unusual circumstances.

The reason being obvious that, given the gravity of the offence and the seriousness of the punishment to be meted on the accused person upon a finding of guilty, chances are high that the accused may seek to escape rather than face the possibility of suffering death penalty. The High Court however did not have a hard and fast rule to guide itself as to when and in what circumstances should bail in murder offences be granted. For instance, the High Court had two schools of thought on whether or not depositions in murder cases could assist the Court in considering a bail application. In one occasion the High Court, among other factors, and upon examining the depositions in the case, allowed a bail application on a likelihood that in the end the charges of murder would be reduced to manslaughter **[see the case of Republic vs. Njama Zuberi, [1985] TLR 241]**. In another instance however, the High Court declined to be moved by depositions and dismissed the application **[see the case of R vs. Lemanda s/o Obei, (1970) HCDn. 85].**

In **Lemanda s/o Obei** (supra), the court observed that,

"... I think this court should every loathe to examine depositions in order to attempt to predict what verdicts are likely to be arrived at by tribunals in which is vested the jurisdiction to determine criminal matters ... What I would say is this; that even if the Applicant is in fact found guilty of manslaughter the circumstances of this case are such that it would not be the sort of offence on which one would normally grant bail unless there are unusual circumstances."

The court did not find a killing as a result of a drinking session followed by a quarrel which ended up in a fatal blow, falling within the category of *'unusual circumstances'* and consequently declined to grant the sought bail and dismissed the application.

In **Njama Zuberi** (supra), the Applicant was a child of tender years held in custody at Handeni, where there were no facilities for keeping juvenile offenders. The boy's parents were able and willing to look after him and produce him in court as and whenever directed, and the charge was likely to be reduced to manslaughter. Granting the sought application for bail, the High Court heldthat,

"in the interest of the juvenile accused, it is necessary to remove him from custody where he is likely to associate with adult offenders and other undesirable influence."

Despite the contending views in the above two cases, the bottom-line is that during Criminal Procedure Code era, notwithstanding the existence of non-bailable offences, courts had an opportunity to hear and determine bail applications from accused charged of non-bailable offences.The Code did not take away the court's mandate completely, though the court itself was cautious when dealing with such applications.

1.1.3. Director of Public Prosecution's certificate of objection to grant of bail

The Criminal Procedure Code era was as well characterized by DPP's certificates objecting to the grant of bail to a suspect or an accused person. The certificate appeared as early as 1970 through **section 19 of the National Security Act, 1970.** The section, which still exists in the Act to date, provides that,

"Notwithstanding any written law to the contrary no person charged with an offence under this Act shall be admitted to bail, either pending trial or pending appeal, if the Director of Public Prosecutions certifies in writing that it is likely that the safety or interests of the United Republic would thereby be prejudiced."

A rather interesting fact to note here is that, as one reads through the case of **Attorney General vs. Jeremia Mtobesya**[11]**,** between pages 42 to 45, it appears the certificate came to be enacted in other statutes upon recommendation from the Judicial System Review Report of 1977. Reluctant to stretch the list non-bailable offences, the Commission recommended that the DPP be mandated, sparingly and in fit cases, to issue that certificate where it appears that the release of a suspect, accused person or convict, on bail would be prejudicial to public safety and interest. That is how the certificate came to be enacted in **the Code** and in **Economic and Organized Crimes ControlAct, Cap 200[R.E 2019] under section 35(2).**[12]

There is scanty of literature showing how the certificate was tested through courts during the Code era. Much of literature that exists on the certificate is in the post-Code era and the same shall be explored in the next part of this chapter. However, all that needs to be said here is that because the certificate existed in that era, if the same would have been issued, it would have the effect of restricting a person's right to liberty and in violation of his right to presumption of innocence. Theconsequential effect of the certificate matched that of the absolute bar to bail in non-bailable offences.

1.2. POST CRIMINAL PROCEDURE CODE ERA

1.2.1. Non-bailable offences

The Code was repealed and replaced in 1985 by the **Criminal Procedure Act**. At its inception, the **Criminal Procedure Act**, through **section 148(5)(a),** maintained the list of non-bailable offences to be murder and treason. To this date however, the list has been stretched to include otheroffences like armed robbery, defilement, trafficking in narcotic drugs, dealing in narcotic drugs contrary to the law, terrorism, money laundering,

human trafficking[13]. The section has also come up with circumstances and/or instance in which an accused might be denied bail in the event of happening of any of such circumstances or instances. These instances include, "where it appears that the accused person has previously been sentenced to imprisonment for a term exceeding three years; where 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; where it appears to the court that it is necessary that the accused person be kept in custody for his own protection or safety; where the offence with which the person is charged involves actual money or property whose value exceedsten 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."[14]

1.2.2. Contending schools of thought in Tanzania Mainland as to whether denial togrant of bail negates a suspect's or accused person's presumption of innocence.

As pointed out elsewhere above, bail is premised under the provisions of **Article 13(6)(b) and 15(1) of the URT Constitution**, which provide for the presumption of innocence and the right toliberty, respectively. However, it is noteworthy that there are two contending schools of thought as regards to presumption of innocence and the denial of bail. There are those who maintain the view that denial of bail negates the presumption of innocence; in that a person is supposed to enjoyhis liberty until he is pronounced guilty by a competent court with criminal jurisdiction. That despite the seriousness of the offence and the severity of the punishment, liberty is paramount. This position is supported by Biron J in **Patel vs. R, [1979] HCD No. 391** where it was held that,

13 Section 148(5)(a)(i) to (vi) of the Criminal Procedure Act, Cap 20 [R.E 2019], hereinafter referred to as Cap 20
14 Section 148(5) (b) to (e) of Cap 20

"a man whilst awaiting trial is as of right entitled to bail, as there is presumption of innocence until contrary proved."

On the other hand, there is another school which maintains that the right to presumption of innocence has to be balanced with the right of the society to protect itself against criminals and effects of their actions. A person is arrested and detained to make sure that he shall be present at the hearing of his case and be able to receive the intended punishment for his wrong doing upon a finding of guilt. Therefore, where there are chances that if released on bail the foregoing purpose will be defeated, then a person's right to presumption of innocence will be compromised. As was stated in the case of **DPP vs Daudi Pete**[15]**,** 'the rights and duties of an individual are limited by the rights and duties of the society, and vice versa, and that denial of bail to an accused person does not necessarily amount to treating such a person like a convicted criminal.'[16]

The second school of thought, which is the position that is supported by the highest Court in the land[17], seems to be the position obtaining in Tanzania Mainland at the moment. It is the position of the Court of Appeal, and it has been recently adopted by the High Court, asserting *stare decisis*,[18] that denial to grant of bail does not necessarily presume a suspect or accused person as a convict. It is just that the rights and duties of the society have outweighed an individual's right to liberty. It appears that when it comes to society's right to make sure that an offending individual has to be properly dealt with in accordance with the law, then the question that comes for consideration is not the individual's right to presumption of innocence but whether his right to liberty can be curtailed.

15 [1993] TLR 23, at page 23
16 See also DPP vs Daudi Pete (supra) at page 39 where the Court cited with approval the decision by Msumi J in Republic vs Peregrin Mrope, HC, Misc. Criminal Cause No. 43 of 1989.
17 The Attorney General vs. Dickson Paul Sanga, Civil Appeal No. 175 of 2020, Court of Appeal of Tanzania, at Dar es Salaam (unreported); DPP vs. Daudi Pete (supra),
18 Paul Dickson Sanga vs. The Attorney General, Misc. Civil Cause No. 29 of 2019, High Court of Tanzania (Main Registry) at Dar es Salaam, at page 32, first paragraph.

Like in the case of **Jackson Ole Nemeteni and Others vs A.G,** Misc. Civil Cause No. 117 of 2014, High Court of Tanzania at Dar es Salaam (unreported), for instance, it was held that,

"we are minded of the fact that denial for bail under section 148 (5) (a) of the Act is in the interests of defense, public safety and public order. We take judicial notice of the recent past when this country was rocked by a wave of unprecedented bank robberies, highway robberies and car – jackings ... the legitimate objective for denial of bail for armed robbery was to protect the society against dangerous criminals using firearms and organized gangs that holdup Villages, hijack buses or rob banks, people and homes."[19]

Court's interpretation of provisions relating to absolute bar to bail.

As stated earlier on, absolute bar to bail and the issuance of DPP's certificate all have the same effect of curtailing a person's liberty. The two sections that provide for an absolute bar to bail and mandate the DPP to issue a certificate objecting to grant of bail have been tested in courts in a number of cases. The cases shall be discussed hereunder, starting with those dealing with absolutebar.

The constitutional validity of **section 148(5) of the CPA**, which deals with non-bailable offences and circumstances which leads to an absolute bar to bail, has been tested at least in three cases filed before the High Court of Tanzania; the cases are **DPP vs Daudi Pete** (supra), **Jackson Ole Nemeteni and Others vs A.G,** (supra) and the recent **Dickson Paulo Sanga vs. the Attorney General**, Misc. Civil Cause No. 29 of 2019, High Court of Tanzania (Main Registry) at Dar es Salaam (unreported) and **Attorney General vs. Dickson Paulo Sanga**, Civil Appeal No. 1745 of2020, Court of Appeal of Tanzania at Dar es Salaam, (unreported).

19 At page 23 and 28 of the judgement in Jackson Ole Nemeteni and Others vs A.G, Misc. Civil Cause No. 117 of 2014, High Court of United Republic of Tanzania at Dar es Salaam (unreported),

The first litigant to approach the court challenging the constitutional validity of **section 148(5) ofthe CPA** was Mr. Daudi Pete. The **DPP vs Daudi Pete** (supra) is an appeal that was filed by the DPP against the decision of the High Court of Tanzania that had declared the provisions of **section 148(5)(e) of the CPA** unconstitutional for violating, inter alia, the rights to presumption of innocence and the right to liberty as provided for under the URT Constitution; and consequently granted bail to Mr. Pete. **Section 148(5)(e) of the CPA** prohibited grant of bail to an accused person charged with *an "act or any of the acts constituting the offence with which a person is charged consists of a serious assault on or threat of violence to another person, or of having or possessing a firearm or an explosive."*

Mr. Pete was charged in the District Court of Musoma District at Musoma with robbery with violence contrary to **sections 285 and 286 of the Penal Code, Cap 16**. He was denied bail and remanded in custody on the ground that the offence with which he was charged was non-bailable under the provisions of **section 148(5)(e) of the CPA**. Aggrieved, he applied bail before the High Court, and as above noted, he was granted bail.

In the **DPP vs. Daudi Pete** (supra), the Court of Appeal declined to hold that the section violates the right to presumption of innocence as provided for under **Article 13(6)(b) of the URT Constitution**[20]. Citing with approval the decision of **Republic vs Peregrin Mrope**, HC, Misc. Criminal Cause No. 43 of 1989, the Court held that,

'denying bail to an accused person does not necessarily amount to treating such a person like a convicted criminal.'

Noteworthy is the fact that the impugned section was ultimately declared by the Court of Appeal to be unconstitutional for depriving a person's right to liberty without there being prescribed procedures envisaged under **Article 15(2) of the URT Constitution** and not

20 DPP vs. Daudi Pete (supra) at pages 38 and 39

being saved by the provisions of **Article 30(2) of the URT Constitution.** Consequently, the Court of Appeal ordered the section to be struck out the statute book of the country and remarked that courts were free to grant bail in armed robbery cases, by judicially balancing between the interest of an individual and that of the community which he is a part.

Sometimes in 1998, vide Written Laws (Miscellaneous Amendments) Act, No. 12, the government repealed and replaced **section 148(5)(a) of the CPA** with another **section 148(5)(a)** with roman numbers. The new section had an extended list of non-bailable offences, and this time armed robbery featured as one of non-bailable offences. A striking characteristic of the newly enacted **section 148(5)(a) of the CPA** was that, like its predecessor, it did not have prescribed procedures to be followed when dealing with denial to grant of bail. Jackson s/o Ole Nemeteni and 19 co- accused persons faced the effect of this new subsection.

Jackson s/o Ole Nemeteni and 19 co-accused, stood charged before Moshi Resident Magistrate's court in Criminal Case No. 16, with two counts under the **Penal Code**, namely, conspiracy to commit an offence contrary to **section 384** and armed robbery contrary to **section 287A**. After they had entered a peal of not guilty to the charges, they were remanded into custody at the account of **section 148(5)(a)(i) of the CPA**, which prohibited grant of bail to accused persons charged witharmed robbery.

Aggrieved by that denial to grant of bail, Jackson and the 19 co-accused took up in arms and filed a constitutional petition before the **High Court of Tanzania vide Misc. Civil Cause No. 117 of 2004**,[21] challenging the constitutional validity of **section 148(5)(a)(i) of the CPA** for, inter alia, denying bail without there being prescribed procedures as envisaged under **Article 15(2) of the URT Constitution**. While partly allowing the petition, the High Court held,

21 Jackson Ole Nemeteni and Others vs A.G, Misc. Civil Cause No. 117 of 2004, High Court of United Republic of Tanzania at Dar es Salaam (unreported)

*"... that the absence of a **"procedure prescribed by law"** as provided in Article 15 (2) (a) of the Constitution, the administration of the provisions of Section 148 (5) (a) is susceptible to abuse, and cannot therefore be saved under Article 30 (2) of the Constitution. As regards to the offence of "armed robbery", we find that section 148 (5) (a) of the Act is violative of Article15 (2) (a) of the Constitution."*[22]

After it had declared the provisions of **section 148(5)(a)(i) of the CPA** unconstitutional for lack of procedures prescribed by law, the High Court was reluctant to strike out the impugned section from the statute book as the Court of Appeal did in the case of **DPP vs. Daudi Pete** (supra). Instead, the High Court, under the provisions of **Article 13(5) of the URT Constitution**, directed the Government to, 'take measures to have the definition of the offence of armed robbery rectified so as to fit only the suspects who are really a threat to public order and security, and who are the targets of the impugned section. The government was also directed to take measures to put in place the "procedure prescribed by law' as provided under Article 15 (2) (a) of the Constitution, by which a person charged of armed robbery may be denied bail.'[23]This was supposed to be done within 18 months from the date of order.[24]The order was handed down on the 13th day of July 2007.

For unknown reasons, since 13th July 2007 when the High Court ordered the government to put inplace prescribed procedures as envisaged under **Article 15(2) URT Constitution**, nothing has been done to date. A remark in that regard has recently been made by the High Court in **Dickson Paulo Sanga vs. the Attorney General** (supra),[25] where it was held that,

22 At page 29 paragraph 2 of the judgement
23 At page 32 of the judgement
24 Ibid
25 Hereinafter to be referred to as 'Dickson Sanga 1'

"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 bedenied bail."[26]

Between the time when **Jackson Ole Nemeteni** (supra) went to court and **Dickson Sanga 1** was filed, a lot had transpired. This period saw the right to liberty being assailed by law enforcers andthe prosecution who had an appetite of charging people with non-bailable offences just to make sure that their movement was curtailed. On a number of occasions people were charged with non-bailable offences while investigation of the charges they face remained incomplete for years. In the whole, pre-trial detention was the order of the day! As the High Court envisioned in **Jackson Ole Nemeteni** (supra), the restriction to grant of bail was arbitrarily used and abused to the greatestextent.[27]

In the wake of all what was happening, Dickson Paulo Sanga petitioned before the High Court of United Republic of Tanzania vide **Dickson Sanga 1** challenging the constitutionality of the wholeof **section 148(5) of the CPA,** which prohibited grant of bail to armed robbery, defilement, trafficking in narcotic drugs, dealing in narcotic drugs contrary to the law, terrorism, money laundering, human trafficking.[28]As pointed elsewhere above, the section has also come up with circumstances and/or instance in which an accused might be denied bail in the event of happening of any of such circumstances

26 At page 42 of the judgement
27 At pages 25 and 29 of Jackson Ole Nemeteni and Others vs A.G, Misc. Civil Cause No. 117 of 2014, High Court of United Republic of Tanzania at Dar es Salaam (unreported),
28 Section 148(5)(a)(i) to (vi) of the CPA,

or instances; which include, 'where it appears that the accused person has previously been sentenced to imprisonment for a term exceeding three years; where 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; where it appears to the court that it is necessary that the accused person be kept in custody for his own protection or safety; where the offence with which the person is charged involves actual money or property whose value exceeds ten million shillingsunless 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.'[29]

Dickson Sanga therefore aimed at scraping off the whole of **section 148(5) of the CPA** from the statute book so that all offences now could be bailable in Tanzania Mainland as is in other jurisdictions. Having heard Sanga's petition, the High Court held as follows;

a. The impugned section infringes the right to liberty for lack of prescribed procedures as provided for under Article 15(2)(a) of the URT Constitution,
b. The impugned section does not infringe on the presumption of innocence under Article 13(6)(b) of the URT Constitution as denial of bail to an accused person does not necessarily make that person appear as a convict.
c. The impugned section infringes the right to equality before the law under Article 13(3) ofthe URT Constitution; it undermines the powers vested in courts of law to protect and determine the rights, duties and interests of every person and community.

The Attorney General was aggrieved by the High Court decision and preferred an appeal before the Court of Appeal of Tanzania.[30]The Court of Appeal reversed the High Court decision holdingthat the provisions of **section 148(5) of the CPA** is constitutionally valid.

29 Section 148(5) (b) to (e) of CPA,
30 The Attorney General vs. Dickson Paul Sanga, Civil Appeal No. 175 of 2020, Court of Appeal of Tanzania, at Dar es Salaam (unreported), hereinafter to be referred to as "Dickson Sanga 2"

1.2.4. Court's interpretation of the provisions empowering the Director of Public Prosecutions to issue a certificate of objection to grant of bail

DPP's certificate of objection to grant of bail transcended into the Criminal Procedure Act rea.

Section 19 of the National Security Act, **1970** still exists even today. **Section 36(2) of the EOCCA** and **section 148(4) of the CPA** also provide for the said certificate. Jurisprudence reveal that the latter two sections have been tested more in courts than the former, and for that matter court's interpretation of the two latter sections shall be considered below.

Few years before **section 148(4) CPA** was declared by the constitutional court to be unconstitutional,[31] the section was rampantly used by the office of the DPP to object to grant of bail in cases where there was no public safety and interest at stake. The section was arbitrarily used and abused by the office of the DPP. In July 2015, a constitutional case[32] was filed before the constitutional court challenging the constitutional validity of the section as against an accused person's right to be heard as per **Article 13(6)(a) of the URT Constitution**. In the end the court was satisfied that the section indeed was violative of the cited Article and therefore declared the same to be unconstitutional. Aggrieved, the Attorney General took up in arms and appealed before the Court of Appeal of Tanzania.[33] The Court of Appeal also found the section to be unconstitutional, null and void, and ordered the same to be truck out of the statute book.

Section 148(4) CPA having been rendered inoperative, the office of the DPP turned its attention to the provisions of **section 36(2) of the EOCCA.** The section had been tested as early as 1990s[34] but between December 2015 when **section 148(4) CPA** was first declared to be unconstitutional to date, the use of **section 36(2) of the EOCCA** to object grant of bail to an

31 The section was declared unconstitutional in 22nd December 2015 in the case of Jeremia Mtobesya vs the Attorney General, Misc. Civil Cause No. 29 of 2015, High Court of Tanzania (Main Registry) at Dar es Salaam (unreported)

32 Jeremia Mtobesya vs the Attorney General, Misc. Civil Cause No. 29 of 2015, High Court of Tanzania (Main Registry) at Dar es Salaam (unreported)

33 Attorney General vs. Jeremia Mtobesya, Civil Appeal No. 65 of 2016, Court of Appeal of Tanzania at Dar es Salaam (unreported)

34 Director of Public Prosecution vs. Ally Nur Dirrie and Another, [1988] TLR 252

accused person charged with economic offences has been unprecedented. Its effect has put more people in remand custodythan any other time in the history of this country, not even at the time of its enactment in the 1980's. This therefore prompted a number of accused persons to test the application of the section in court through constitutional petitions and normal bail applications.

Among the first accused persons to test the constitutional validity of **section 36(2) EOCCA** was Gideon Otulu Wassonga and 3 Others[35] who approached the High Court of Tanzania, sitting as a constitutional court, seeking to challenge the section for being violative of the right to liberty andthe right to be heard, among others. However, the constitutional court dismissed the petition on the ground that the section is constitutionally valid. Wassonga and Others have preferred an appeal before the Court of Appeal challenging that decision since 2018 but the same has not been heard to date. Following Wassonga's petition, other accused person filed separate petitions challengingthe same section but their petitions faced the same fate as Wassonga's petition; and their respective appeals are still pending before the Court of Appeal.

Apart from those who took the Wassonga way, the constitutional petition way, there are others who went to court seeking to be granted bail through the provisions of **section 36(1) EOCCA**. Those bail applications were filed before the High Court of Tanzania, and upon filing of DPP's certificate under **section 36(2) EOCCA** the Court could not grant bail. The Court of Appeal in the case **Director of Public Prosecution vs. Li Ling Ling, Criminal Appeal No. 508 of 2015, Court of Appeal of Tanzania, at Dar es Salaam (unreported)** was of the view that once the certificatehas been duly filed, police officer in-charge of a police station or a court cannot admit a suspect or accused person to bail.

35 Gideon Wasonga & Others vs. Attorney General and Others, Misc. Civil Cause No. 14 of 2016, High Court of Tanzania (Main Registry) at Dar es Salaam (unreported)

One among many who approached the High Court in pursuit of their right to liberty was Mr. Emmanuel Simforian Massawe; he was unsuccessful in his first bite before the High Court. Aggrieved, he lodged an appeal before the Court of Appeal of Tanzania.[36]At the time when Massawe's case was called on for hearing, the Court of Appeal of Tanzania had delivered its judgement in the case **Attorney General vs. Jeremia Mtobesya** (supra) and declared a similar section to be unconstitutional, null and void and ordered the same to be truck of the statute book. While arguing Massawe's appeal, counsel invited the Court to apply the doctrine of sections *inparimateria* an hold that **section 36(2) EOCCA** is no longer a good law; but the court declined that invitation holding that the former case was a constitutional case while the latter is a criminal casethus the doctrine cannot crossover.

Thus, to date, **section 36(2) EOOCA** still exists in Tanzania Mainland and restricts grant of bail to suspects and accused persons alleged to have committed economic offences. In July 2016 an amendment was made to **EOOCA**[37] and increased the list of economic offences. Whenever an accused person is charged with an economic offence which is otherwise bailable and the DPP filesthe said certificate objecting to grant of bail, a court would refrain from granting that application.[38]But where such certificate has not been filed, a court would grant the sought bail.[39]

36 Emmanuel Simforian Massawe vs Republic, Criminal Appeal No. 252 of 2016, Court of Appeal at Dar es Salaam (unreported)
37 This Act may be cited as the Written Laws (Miscellaneous Amendments) Act, 2016, (Act No. 03 of 2016)
38 Ally Said Ahmed and 6 Others vs Republic, Misc. Economic Cause No. 03 & 04 of 2014, High Court of Tanzania (Corruption & Economic Crimes Division) –accused charged with economic offence, DPP filed a certificate objecting to grant of bail, court denied bail; George s/o Lazaro Ogur & Another vs. Republic, Misc. Criminal Application No. 05 of 201, High Court of Tanzania (Arusha District Registry), accused charged of economic offence, DPP filed certificate objecting to bail, court refused to grant bail; Mohamed Yahaya Mohamed @ Laizer vs. Republic, Misc. Economic Crimes Application No. 14 of 2018, High Court of Tanzania (Dar es Salaam Registry) – accused charged with economic offence, DPP filed a certificate objecting to bail, court refused to grant bail.
39 Aristidus Oensphory Massawe @ Bosco & Another vs. Republic, Misc. Criminal Application No. 9 of 2020, High Court of Tanzania (Moshi District Registry) – accused charged with economic offence, bail was not objected to, court granted bail; Mgweno Mnyagato & 2 Others vs. Republic, Misc. Criminal Application No. 174 of 2019, High Court (Dar es Salaam Registry) – accused charged with economic offence, DPP did not object to the application for bail – court granted bail;

1.3. VIEWS COLLECTED FROM INDIVIDUALS WORKING IN THE HUMAN RIGHTS FIELD ON THEIR PERCEPTION OF NON-BAILABLE OFFENCES

In the light of **DPP vs. Daudi Pete** (supra), **Jackson Ole Nemeteni** (supra), **Dickson Sanga 1** (supra) and **Dickson Sanga 2** (supra), it can be concluded that the primary reason for existence of non-bailable offences is to protect the society from dangerous criminals and consequences of theiractions. The researcher was interested to find out how individuals working in the human rights field perceive the existence of non-bailable offences in Tanzania Mainland and whether the same can really offer the said protection to the society. The views were collected from 13 individuals byway of oral interviews and below are the findings.

All interviewees were of the opinion that existence of non-bailable offences in Tanzania Mainland is a serious violation of the presumption of innocence and right to liberty as provided for under **Articles 13(6)(b) and 15(1) of the URT Constitution**. Sequel, they all pressed for abolition of the said un-warranted restriction on a person's presumption of innocence and right to liberty for the reason that the same does more harm than good in the present setting, in that;

a. Given the level of poor and weak investigative machinery in our country, people remain in custody for so long awaiting trial. This might be arbitrarily used for other covert and ulterior purposes other that which was intended.
b. The fact that our laws allow arrests before completion of investigation[40], non-bailable offences might be abused to fulfill ulterior motives, like the current state of affairs wherea good number of people are remanded in custody pending trial having being charged for allegedly commission of non-bailable offences while investigation remains incomplete for months and even years.

40 Arrests basing on suspicion or apprehension of breach of peace

It was also observed during the interview that existence of non-bailable offences in our jurisdictionis a reflection of the mistrust between the parliament and judiciary, in that, by enacting laws that put an absolute bar on the right to bail, the parliament sends a message to the judiciary that the latter is not trusted by the former to perform that judicial function. It was therefore emphasized that the parliament should not interfere with what the judiciary has been mandated to do by **Article 107B of the URT Constitution.**

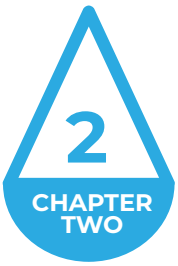
Despite the general observation that non-bailable offences should be abolished, majority of the interviewees were of the opinion that at times derogation is necessary, especially on serious offences. It was however their advice that, in the event derogation is to be allowed, then;

a. The same has to be supported by procedures which have been prescribed by the law as provided for under **Article 15(2)(a) of the URT Constitution**.The derogation should be sanctioned by a court of law upon being moved to that effect bythe prosecution, by adducing of evidence to the satisfaction of the court that indeed an accused person should not be admitted to bail.
b. Investigative machinery should be well equipped and properly staffed to enable speedy investigations that would lead to expeditious trials.

The few who did not completely see the need for derogation from a person's right to liberty advanced the following arguments;

a. The notion that non-bailable offences are there to protect the society from dangerous criminals and consequences of their actions is just a mere scapegoat by the government to warrant its inefficiency to protect the society, for it is the duty of the government to protect its people. There could be other justifiable ways of protecting the society other than through curtailment of a person's right to liberty and presumption of innocence

b. Incarceration at the instance of being charged with non-bailable offences seriously affects an accused person's right to properly prepare for his defense, which in the end violates his right to a fair hearing enshrined under **Article 13(6)(a) of the URT Constitution**.
c. And if the main reason behind existence of non-bailable offences is to protect the society from allegedly dangerous criminals and consequences of their actions, how are economic offences and other white-collar crimes dangerous to the society to warrant incarceration of suspects associated with those crimes pending trial? This justification could only fit capital offences and not other crimes.



NON-BAILABLE OFFENCES IN NEIGHBOURING COUNTRIES; LAW AND PRACTICE

This chapter explore how other jurisdictions criminal justice systems have dealt with issues of non- bailable offences draw lessons and inspiration from their experience. The countries that are subject to review in this chapter includes include, Kenya, Uganda, Malawi and Zambia. These countries, like Mainland Tanzania, are common law jurisdictions with more or less the same rules of procedure. They all deal with bail matters and have non-bailable offences in their statute books. The only difference with Mainland Tanzania, and which is important in this work, is that each country has its own way of dealing with offences where bail may be restricted under the law.

In the course, Zanzibar's criminal justice system regime shall as well be explored in this Chapter. Zanzibar and Tanzania Mainland have two different criminal justice system regimes, and Zanzibar's way of dealing with non-bailable offences is a bit different from that which obtains in the Mainland and therefore worthy of study.

2.1. KENYAN CRIMINAL JUSTICE SYSTEM REGIME ON NON-BAILABLE OFFENCES

2.1.1. Non-bailable offences

Bail in Kenya is a constitutional right, provided for under **Article 49(1)(h) of the Constitution of Kenya of 2010**. The Article provides that *'an arrested person has a right to be released on bond or bail on reasonable conditions, pending a charge or trial,* ***unless there are compelling reasons not to be released****.'* The right to bail is further amplified under **section 123(1) of the Criminal Procedure Code, Cap 75**, which states, *'when a person is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that Court to give bail, that person may be admitted to bail.'*

Apart from **Section 123(1) of the Criminal Procedure Code, Cap 75** providing for release of a suspect or accused person on bail, it also enacts non-bailable offences in the Kenyan statute book;those offences are murder, treason, robbery with violence, attempted robbery with violence and any drug related offences. It appears however, that the High Court of Kenya, under the provisionsof **Section 123(3) of the Criminal Procedure Code, Cap 75,** has the mandate to hear and determine bail applications even in instances where applications are brought by those charged withnon-bailable offences.

2.1.2. Court's power to grant bail in non-bailable offences

The High Court of Kenya has had an occasion of dealing with applications for bail brought forth by accused persons charged of non-bailable offences. What has apparently been a crucial factor indetermining whether or not to release the Applicant on bail is the phrase '***unless there are compelling reasons not to be released'*** as stated under **Article 49(1)(h) of the Kenya Constitution of 2010**. The High Court of Kenya has exercised its mind on a number of cases when called upon to determine such applications.

Like in the case of **Republic V Joktan Mayende & 4 Others, Bungoma High Court Criminal Case No. 55 of 2009**, the High Court observed that "

*the phrase **compelling reasons** would denote reasons that are forceful and convincing as to make the Court feel very strongly that the accused should not be released on bond." It could 'generally refer to something necessary or crucial, as opposed to something merely preferred. Examples include national security, preserving the lives of a large number of individuals, andnot violating explicit constitutional protections.*[41]

41 Danfornd Kabage Mwangi [2016] eKLR, see also Hassan Mahat Omar & Another Vs Republic, Nairobi High Court Criminal Revision No. 31 of 2013,

The High Court of Kenya however appreciates that each case presented before it is unique and the compelling reasons may differ with each case.[42]An important point to note here is that the burden of proving that there are compelling reasons to convince the Court to deny bail to the Applicant lies on the state when objecting to the application. Emphasizing on this proposition, the High Court of Kenya in the case of **Republic v Danson Mgunya & another [2010] eKLR**[43] remarked that,

'... the state must prove to the satisfaction of the court that the accused though entitled to release, he should not be released because of the existence of compelling reasons which mustbe stated, described and explained.' If the state fails to do so, then the presumption in favour of bail prevails and the court will admit the accused on bail.[44]

There are other factors which might also be considered by the Court in granting bail to accused persons who are charged with non-bailable offences. Although the list has not been exhaustive, inthe case of **Republic V Lucy Njeri Waweru & 3 Others, Nairobi Criminal Case No. 6 of 2013,**the court listed some of the factors as being,

a. Whether the accused persons were likely to turn up for trial should they be granted bail,
b. Whether the accused persons were likely to interfere with witnesses,
c. The nature of the charges,
d. The severity of the sentence,
e. The security of the accused if released on bond, and
f. Whether the accused person has a fixed abode within the jurisdiction of the court,
g. accused's previous criminal record,
h. detention of the accused person for his or her own protection,
i. the probability of the accused person tampering with evidence, and,
j. the strength of the evidence.[45]

42 Republic vs. Naftali [2018] eKLR, at page 2
43 At page 9
44 Republic v Danfornd Kabage Mwangi [2016] eKLR at page 4
45 Republic v Naftali Chege & 2 others [2018] eKLR at page 3, Republic v Danfornd Kabage Mwangi [2016] eKLR at page 3,

Another factor, and one which has on a number cases has been at the center of court's attention each time an application for bail is brought by a person charged with a non-bailable offence, is the need for the court to balance between an individual's right to liberty and the interest of the society in general. Speaking through Mativo J, the High Court of Kenya in the case of **Republic v Danfornd Kabage Mwangi [2016] eKLR** had this to say on duty of the court in striking a balancebetween the two contending interests,

"There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the Constitution and Courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned.

Granting bail entails the striking of a balance of proportionality in considering the rightsof the Applicant who is presumed innocent at this point on the one hand, and the public interest on the other. The cornerstone of the justice system is that no one will be punishedwithout the benefit of due process. Incarceration before trial, when the outcome of the case is yet to be determined, cuts against this principle. The need for bail is to assure that the accused person will appear for trial and not to corrupt the legal process by absconding. Anything more is excessive and punitive."

In the whole, suffices to say that although murder, treason, robbery with violence, attempted robbery with violence and any drug related offences are non-bailable offences in Kenya, the High Court of Kenya has the mandate to hear and determine applications brought

before it byaccused persons charged with such offences. Guided by the factors above stated, the High Court will judiciously exercise its mandate and grant[46] or refuse[47] the said applications.

2.2. MALAWI CRIMINAL JUSTICE SYSTEM ON NON-BAILABLE OFFENCES

2.2.1. Non-bailable offences

In Malawi, as is in Kenya, bail is constitutional right deriving from the provisions of **Article 42(2)(e) of the Malawi Constitution of 1994** as amended. The Article provides to the effect that *"every person arrested for, or accused of, the alleged commission of an offence shall, in addition to the rights which he or she has as detained person, have the right to be released from detention with or without bail **unless the interests of justice require otherwise**."*[48] **Section 118(1) of the Criminal Procedure and Evidence Code, 1968** also govern bail matters in Malawi. It states to the effect that,

"when any person is arrested or detained without warrant by a police officer or appears or is brought before a court and is prepared at any time while in custody of such police officer or at any stage of the proceedings before such person maybe released on bail by such police officeror such court, as the case may be, on bond with or without sureties"

Noteworthy is the fact that **section 118(1) of the Criminal Procedure and Evidence Code, 1968**, as well, enacts the concept of non-bailable offences in Malawi. It restricts grant of bail to suspectsand accused person charged of offences that are punishable by death. And according to the **Malawi Penal Code, Cap 7**, offence punishable by death include murder, treason, rape, aggravated robbery

46 Republic v Naftali Chege & 2 others [2018] eKLR, Republic v Danfornd Kabage Mwangi [2016] eKLR, Aboud Rogo Mohamed & Another v REPUBLIC [2011] eKLR, Republic v Danson Mgunya & another [2010] eKLR
47 Republic V Milton Kabulit & 6 Others [2011] eKLR, Republic v Ahmad Abolafathi Mohamed & another [2013] eKLR
48 See also the provisions of section 1 of Part II of the Bail Guidelines Act, 2000

and house breaking & burglary.[49]However, on 28th April 2021 the Supreme Court of Appeal of Malawi in a landmark ruling in the matter of **Khoviwa versus the Republic (MSCA Miscellaneous Criminal Appeal Number 12 of 2017** abolished statutory death penalty. Thus, since non-bailable offences were only those whose punishment was death penalty, and following the abolition of death penalty, suffices to technically say that from 28th April 2021 Malawi did away with non-bailable offences as well.

2.2.2. Court's power to grant bail in non-bailable offences

Before abolition of death sentence in Malawi, the existence of non-bailable offences did not deterred the High Court of Malawi from admitting to bail accused persons charged with non- bailable offences. The High Court derived its mandate from the provisions of **section 118(3) of the Criminal Procedure and Evidence Code, 1968.** The mandate has been reinforced by a goodnumber of decisions both by the High Court and Supreme Court of Appeal. In the case of **McWilliam Lunguzi vs. Republic, MSCA Criminal Appeal No. 1 of 1995,** it was observed by the Supreme Court of Appeal that, *'that the High Court has power to release on bail a person accused of any offence,'* while in the case of **Fadweck Mvahe vs. Republic, MSCA Criminal Appeal No. 26 of 2005** it was held that *'the High Court has power to release on bail a person accused of any offence including murder.'*
In yet another case, **Christos Demetrios Yiannakis V Republic, [1995] 2MLR. 505,** the High Court of Malawi speaking through Mwaungulu Ag J remarked that,

"on the literal understanding of the provisions, therefore, there is nothing in sub – sections (1) and (3) which prevents the High court from granting bail for capital offences."

49 Sections 38, 133, 209 & 210, 301 and 309 of the Malawi Penal Code, Cap 7

Reading from the provisions of **Article 42(2)(e) of the Malawi Constitution of 1994**, **section 118(1) of the Criminal Procedure and Evidence Code, 1968** together with court jurisprudence on the subject[50] it becomes apparent that before the abolition of death penalty bail was not an absolute right; it could be derogated from where ***'the interests of justice so requires'.*** It is the duty of the state, and not that of the applicant, to prove on a balance of probability that the interest of justice requires the applicant be denied bail. In the case of **Fadweck Mvahe vs. Republic, MSCA Criminal Appeal No. 26 of 2005**, the Supreme Court of Appeal stated that,

'the onus is on the State to show or prove that the interests of justice require the accused person's continued detention.'[51]

In the case of **Clive Macholowe vs. Republic, Misc. Criminal Appeal No. 171 of 2004** it was also observed that,

"the practice should rather be to require the State to prove to the satisfaction of the court that in the circumstances of the case, the interests of justice require that the accused be deprived ofhis right to release from detention. The burden should be on the State and not on the accused.He who alleges must prove. This is what we have always upheld in our courts. If the State wants the accused to be detained pending his trial then it is up to the State to prove why the court should make such an order. It is ridiculous, in my opinion, to require the accused to prove why he should be released from detention."[52]

While considering the issue of the interests of justice, Court will be guided by factors such as;[53]

50 Fadweck Mvahe vs. Republic, MSCA Criminal Appeal No. 26 of 2005, at page 9
51 At page 10 of the judgement; See also Kettie Kamwangala vs. Republic, Misc. Criminal Appeal No. 6 of 2013
52 At page 5 of the judgement
53 Fadweck Mvahe vs. Republic, MSCA Criminal Appeal No. 26 of 2005; Harry Sone Machika vs. Republic, Misc. Criminal Application No. 34 of 1996; Edward Kufa vs. Republic, Misc. Criminal Application No. 167 of 2008; Kettie Kamwangala vs. Republic, Misc. Criminal Appeal No. 6 of 2013; Chimwemwe Mphembedzu vs. Republic, Bail Case No. 70 of 2011; Clive Macholowe vs. Republic, Misc. Criminal Appeal No. 171 of 2004

a. the likelihood of the accused person attending at his trial,
b. the risk that if released on bail the accused person will interfere with the prosecution witnesses or tamper with evidence,
c. the likelihood of his committing another offence or other offences while on bail,
d. the risk to the accused person, if granted bail and he returns to his village where the deceased's relations may harm him.
e. the gravity of the offence,
f. the punishment likely to be imposed
g. accused person's health,
h. the delay in bringing the Applicant up for trial.

The jurisprudence obtaining in Malawi as regards to grant or refusal of bail applications reflects court's endeavour to balance between an individual's right to liberty with the 'interest of justice'.And as observed elsewhere above, the onus of proving that the interest of justice require denial ofbail on the Applicant is cast upon the prosecution.

2.3. ZAMBIAN CRIMINAL JUSTICE SYSTEM ON NON-BAILABLE OFFENCES

2.3.1. Non-bailable offences

Like in Kenya and Malawi, bail in Zambia is also a constitutional right deriving from **Article13(3)(b) of the Constitution of Zambia**, as amended. The article states that,

"any person who is arrested or detained upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Zambia, and who is not released, shall be brought without undue delay before a court. And if any such arrested or detained person is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as

are reasonably necessary to ensure that the appears at a later date for trial or for proceedings preliminary to trial."

The Criminal Procedure Code Act, Cap 88 also deals with matters of bail. **Section 33 of the Act** deals with police bail, and provides to the effect that,

"when any person has been taken into custody without a warrant for commission of an offence, the officer in charge of the police station to which such person shall be brought may, in any case, and shall, if it does not appear practicable to bring such person before an appropriate competent court within twenty-four hours after he was so taken into custody, inquire into the case, and, unless the offence appears to the officer to be of a serious nature, release the person, on his executing a bond, with or without sureties, for a reasonable amount, to appear before a competent court at a time and place to be named in the bond. But, where any person is retained in custody, he shall be brought before a competent court as soon as practicable"

Section 123 of the Act on the other hand deals with court bail, and provides to the effect that,

"when any person is arrested or detained, or appears before or is brought before a subordinate court, the High Court or Supreme Court he may, at any time while he is in custody, or at any stage of the proceedings before such court, be admitted to bail upon providing a surety or sureties sufficient, in the opinion of the police officer concerned or court, to secure his appearance, or be released upon his own recognizance if such officer or court thinks fit."

The Juvenile Act, Cap 53 also provides for bail matters for persons under the age of 19 years. Under **section 59 of the Act**, if a person under the age of 19 years,

'is arrested, with or without a warrant, and he cannot be brought forthwith before a court, the police officer in charge of the police station to which he is brought shall inquire into the case,and may in any case, unless, (a) the charge is one of homicide or other grave crime, or (b) it is necessary in the interest of such person to remove him from association with any reputed criminal or prostitute, or the officer has reason to believe that the release of such person would defeat the ends of justice, shall, release such person on a recognizance, with or without sureties, for such amount as will, in the opinion of the officer, secure the attendance of that person upon the hearing of the charge, being entered into by him, or by his parent or guardian or other responsible person.'

Zambia also has non-bailable offences in its statute book. **Sections 33 and 123 of the Criminal Procedure Code Act, Cap 88** enacts non-bailable offences in the Act. **Section 33** prohibits grant of bail to suspects and accused persons charged with offences punishable by *death penalty*, while **section 123** prohibits grant of bail to persons charged with *murder, treason or any other offence carrying a possible or mandatory capital penalty; misprision of treason or treason-felony; or aggravated robbery*. **Section 59 of the Juvenile Act, Cap 53** also prohibits grant of bail to a juvenile who has been charged with *homicide*. **Section 43 of the Narcotics and Psychotropic Substances Act, 1993** as well prohibits grant of bail to persons arrested and charged with offences under the Act. **Section 173(5) of the Zambia Defence Act, Cap 106** prohibits grant of bail to officers in the defence force charged with offences of desertion and absenteeism without leave. The **Prevention of Public Security Act, Cap 112** also prohibits grant of bail to person charged with offences under the Act.

2.3.2. Court's powers to grant bail in non-bailable offences

The Supreme Court of Zambia acknowledges the prohibition of grant of bail to suspects and accused persons, only when they are brought to court without any delay. This position was stated in the case of **Chetankumar Shantkal Parekh v the People (1995) S.J. (S.C.),** where the Supreme Court remarked that,

"there is nothing in the Constitution which invalidates a law imposing a total prohibition on the release on bail of a person reasonably suspected of having committed a criminal offence, provided that he is brought to trial within a reasonable time after he has been arrested and detained. Before the stage when a trial becomes unreasonably delayed, it is constitutionally permissible to authorise deprivation of liberty, if authorized by law, and without making any provision for bail under any circumstances."

However, the Supreme Court in the same case went further and stated that,

*"where any trial is unreasonably delayed through no fault or stratagem of the accused, the arrested person must be released on what one might call "**constitutional bail**". Such bail is available and clearly overrides any prohibitions in the lesser laws so that Article 13(3) would apply to any unreasonably delayed case, whatever the charge and whatever s.123 of the C.P.C. or any other similar law may say."*

It is the High Court of Zambia that has the mandate to grant 'constitutional bail'. This position hasbeen stated in a number of cases in Zambia. In the case of **Oliver John Irwin vs. the People (1993**

- 1994) Z.R. 7 (S.C.), for instance, the Supreme Court of Zambia held that,

"the High Court has power to admit to bail in all cases including those relating to persons accused of murder and treason, subject to the rule that such persons are rarely admitted to bail. Such application must be made to the High Court. The subordinate court has no power to grant bail in a murder case, and the Supreme Court enjoys only appellate jurisdiction."

2.4. UGANDAN CRIMINAL JUSTICE SYSTEM ON NON-BAILABLE OFFENCE

2.4.1. Non-bailable offences

In Uganda, as is in Kenya, Malawi and Zambia, bail is a constitutional right. The right is provided for under **Articles 23(6) and 28(3)(a) of the Constitution of Uganda of 1995**. The latter Article provides for presumption of innocence while former gives three scenarios in which a person can be released on bail;

a. the person is entitled to apply to the court to be released on bail, and the court may grant that person bail on such conditions as the court considers reasonable;
b. in the case of an offence which is triable by the High Court as well as by a subordinate court, the person shall be released on bail on such conditions as the court considers reasonable, if that person has been remanded in custody in respect of the offence before trial for one hundred and twenty days;
c. in the case of an offence triable only by the High Court, the person shall be released on bailon such conditions as the court considers reasonable, if the person has been remanded in custody for three hundred and sixty days before the case is committed to the High Court.

Apart from the Constitution, written laws also provide for bail matters in Uganda; **the Criminal Procedure Code Act, Cap 116, the Trial on Indictment Act, Cap 23 (as amended in 2008) andthe Magistrates' Courts Act, Cap 16. Provisions in the Criminal Procedure Code Act** provide for police bail. Provisions of **section 75 of the Magistrates Courts Act** mandate a magistrates' court to admit an accused person to bail save in matter which an accused person has been chargedwith the following offences;

a. an offence triable only by the High Court;
b. an offence under the Penal Code Act relating to acts of terrorism;
c. an offence under the Penal Code Act relating to cattle rustling;
d. an offence under the Firearms Act punishable by a sentence of imprisonment of not lessthan ten years;
e. abuse of office contrary to section 87 of the Penal Code Act;
f. rape, contrary to section 123 of the Penal Code Act and defilement contrary to sections 129and 130 of the Penal Code Act;
g. embezzlement, contrary to section 268 of the Penal Code Act;
h. causing financial loss, contrary to section 269 of the Penal Code Act;
i. corruption, contrary to section 2 of the Prevention of Corruption Act;
j. bribery of a member of a public body, contrary to section 5 of the Prevention of CorruptionAct; and
k. any other offence in respect of which a magistrate's court has no jurisdiction to grant bail.

Section 14 of the Trial on Indictment Act on the other hand mandates the High Court to grant bail to an accused person at any stage of the proceedings. Section 15 of the same Act however restricts granting of bail to accused persons charged with the following offences;

a. an offence triable only by the High Court;
b. the offence of terrorism and any other offence

punishable by more than ten years imprisonment under the Anti-Terrorism Act, 2002;

c. the offence of cattle rustling contrary to section 266 of the Penal Code Act;
d. offences under the Firearms Act, punishable by more than ten years imprisonment;
e. rape, contrary to section 123 of the Penal Code Act;
f. aggravated defilement contrary to section 129 (3) and (4) of the Penal Code Act;
g. embezzlement, contrary to section 268 of the Penal Code Act;
h. causing financial loss, contrary to section 269 of the Penal Code Act;
i. corruption, contrary to section 2 of the Prevention of Corruption Act;
j. bribery of a member of a public body, contrary to section 5 of the Prevention of CorruptionAct; and
k. any other offence in respect of which a magistrates' court has no jurisdiction to grant bail.

Reading together the provisions of **sections 75(2) of the Magistrates' Courts Act** and **section 15 of the Trial on Indictment Act**, its apparent that in Uganda there are certain offence in which grant of bail is not as of right but one to prove that;

a. that exceptional circumstances exist justifying his or her release on bail; and
b. that he or she will not abscond when released on bail.

According to section 15(3) of Trial on Indictment Act, exceptional circumstances include, (a) grave illness certified by a medical officer of the prison or other institution or place where the accused is detained as being incapable of adequate medical treatment while the accused is in custody; (b)a certificate of no objection signed by the Director of Public Prosecutions; or (c)the infancy or advanced age of the accused.

In considering whether or not the accused is likely to abscond, the court may take into account such factors like, (a) whether the accused has a fixed abode within the jurisdiction of the court or is ordinarily resident outside

Uganda; (b) whether the accused has sound securities within the jurisdiction to undertake that the accused shall comply with the conditions of his or her bail;(c) whether the accused has on a previous occasion when released on bail failed to comply with the conditions of his or her bail; and (d) whether there are other charges pending against the accused.[54]

2.4.3. Court's powers to grant bail in non-bailable offences

Courts in Uganda, while granting bail, have always endeavored to uphold the right to presumption of innocence and the Applicant's right to liberty as enshrined in the Ugandan Constitution. Like in the case of **Tumwirukirire Grace vs. Uganda, HTC-05-CV-MA No. 94 of 2019**, it was heldthat,

"the legal essence behind bail is in respect to upholding one's right to personal liberty. This is especially the product of the presumption of innocence as protected under Article 28 (3) of the Constitution of the Republic of Uganda."[55]

In yet another case, **Col. Kiiza Besigye vs Uganda, Criminal Misc. Application No. 228 of 2005 & 229 of 2005**, the court remarked that,

"Liberty is the very essence of freedom and democracy. In our constitutional matrix here in Uganda, liberty looms large. The liberty of one is the liberty of all. The liberty of one must never be curtailed lightly, wantonly or even worse arbitrarily. Article 23, clause 6 of the Constitution grants a person who is deprived of his or her liberty the right to apply to a competent court of law for grant of bail. The Court's from which such a person seeks refuge or solace should be extremely wary of sending such a person away empty handed- except of course for a good cause. Ours are courts of Justice. Ours is the duty and privilege to jealously and courageously guard and defend the rights of all in spite of all."

54 Section 15(4) of Trial on Indictment Act

55 See also the case of Abindi Ronald and Anor v Uganda Miscellaneous Criminal Application No. 0020 of 2016, where it was held that "Under Article 28 (3) of the Constitution of the Republic of Uganda, every person is presumed innocent until proved guilty or pleads guilty. Consequently, an accused person should not be kept on remand unnecessarily before trial."

Despite the fact that courts do acknowledge the existence of the restrictions to grant of bail as provided for under section 15(2) of Trial on Indictment Act, those restrictions have not detained the Court in granting bail. In the case of **Tumwirukirire Grace** (supra), it was observed that,

"the Court's discretionary powers to grant bail are enshrined under Section 14 (1) of the Trialon Indictments Act and the conditions under which bail is to be granted under Section 15. These circumstances are broken down to proof of exceptional circumstances like grave illness, a certificate of no objection from the Director of Public Prosecution, infancy or advanced age; and the fact that the accused will not abscond to be proved by the accused having a fixed placeof aboard, sound sureties, among others. However, it is trite law that proof of exceptional circumstances is not mandatory as courts have the discretion to grant bail even where none is proved ... An Applicant should not be incarcerated if he has a fixed place of abode, has soundsureties capable of guaranteeing that he will comply with the conditions of his or her bail."

In certain instances, only availability of reliable sureties to stand for the Applicant Court be a goodand sufficient ground for grant of bail application. In the case of **Mugisha Ronald V Uganda HCT- 01-CR-CM-NO-050 of 2018,** it was held that,

"Since the sureties appear responsible persons who will ensure the accused returns to court tostand trial, and in view of the presumption of innocence under Article 28 (3) of the Constitutionof the Republic of Uganda, 1995, I find and hold that this is a fit and proper case to grant bailto the Applicant."[56]

56 See also the case of Tumwirukirire Grace vs. Uganda, HTC-05-CV-MA No. 94 of 2019, where is was held that "in the instant case I find that the Applicant has provided substantial sureties in three outstanding sureties especially as they are close kin who have the ability to compel the Applicant to comply. I do not agree with learned Counsel for the state that being relatives and one a teacher will hinder the Applicant's compliance. "If the courts are simply to act on allegations, fears or suspicions, then the sky would be the limit and one can envisage no occasion when bail would be granted whenever such allegations are made"

However, it is important to point out here that Courts in Uganda have not always been that progressive in grant bail applications in all occasions. There are some instances in which courts have been very strict in application of standards which guide the Court as to whether or not to grant bail. Like it occurred in the case of **Kwoyelo Thomas @ Latoni vs. Uganda, Misc. Criminal Cause No. 20 of 2018**, having looked at all the circumstances obtaining in the matter and in relation to the Applicant, the court observed that,

"in respect to the case in hand, while the court remains alive to the need to protect and preserve the constitutional rights and guarantees of the Applicant which include the presumption of innocence, the right to apply for bail and the right to be tried without undue delay, the court notes the trial of the accused person commenced on the 11th of March 2019 and the testimonyof two witnesses has already been heard. In view of the complexity of the trial, the gravity of the offences with which the accused is charged and the history of the case (the trial having commenced and having gone to the constitutional court and eventually to the supreme court ofthe land), I find that the nine years the Applicant has been in custody remains within the acceptable limits."

In yet another instance, in the Matter of Bail Application by **Tigawalana Bakali Ikoba, Criminal Case No. 161 of 2003**, it was observed that,

"I am, now, in this application, dealing with a bail application involving a young, educated and prominent politician. He has a lot to fear and a lot to lose, when and if, he has to face thecharge now preferred against him. He would do anything and go to any length to avoid or avert the proceedings now hanging on his neck. This may involve or include absconding or exerting his influence on the would-be prosecution witnesses ... In conclusion, I find the Applicant has not adduced evidence to the satisfaction of the court that he suffers from such grave illness that cannot be treated medically while he is in custody where is he being held.

I also find, that notwithstanding the sound sureties who he produced and who I regard as substantial, the Applicant, if released on bail, would interfere with the prosecution witnesses or abscond or do both. For the reasons stated above, this application for bail fails and is accordingly dismissed."

2.5. ZANZIBAR CRIMINAL JUSTICE SYSTEM ON NON-BAILABLE OFFENCES

2.5.1. Non-bailable Offences

In Zanzibar, like in the other four jurisdictions under review, the right to liberty is a constitutionalright, premised upon **Articles 14(1) and 16(1) of the Constitution of Zanzibar of 1984,** as amended. However, **Articles 14(2) and 16(2)** of the same constitution allows for derogation from the right to liberty where there are prescribed procedures put in place to govern the derogation process.

Section 151(1) of the Criminal Procedure Act, 2018 allows a suspect under police custody or an accused person before a court of law to be admitted to police bail or bail pending trial, as the case may be. However, the same sub-section restricts grant of bail to persons accused of committing murder, treason, armed robbery, possession of firearms, drug trafficking, an offence relating to large quantity of drugs, rape, unnatural offence, defilement of boy, gang rape or incest;these are non-bailable offences in Zanzibar.

In Zanzibar, like in Uganda, there is a prescribed time within which prosecution of a criminal case has to commence, or else an accused person has to be admitted to bail. It is a requirement of the law that hearing of case in which a person is charged with non-bailable offence must commence within six months from the date when a person so charged was arrested. Where the hearing does not commence within the said period of six months, the accused person shall be admitted to bail unless the court, for reasons to be recorded in writing, direct otherwise. [57]

57 Section 152(1) & (2) of the Criminal Procedure Act, 2018

Where, 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 such offence, it shall release the accused, if he is in custody, on the execution by him or her of a bond without sureties for his or her appearance to hear the judgement to be delivered.[58]

2.5.2. Court's powers to grant bail in non-bailable offences

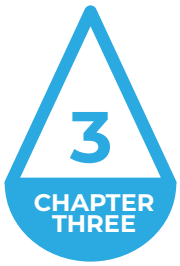
Section 151(4) of the Criminal Procedure Act, 2018 mandated the Chief Justice of Zanzibar to grant bail in any offence, including non-bailable offence. Those powers did not however last long because in 2019, a constitutional petition[59] was filed before the High Court of Zanzibar calling to question the constitutionality of that provision of the law. The High Court, upon deliberation, declare the said provision to be unconstitutional. As regards to the court's powers to grant bail in non-bailable offences, the High Court remarked,

"therefore, the law as it stands right now is that accuseds who have been charged with non- bailable offences mentioned in section 151(1) will not be entitled to be admitted to bail as there will be no court with power to grant bail under section 151(1). Whether this also violates the constitution or not is not the subject of this Petition. But matter is on the hands of the legislature to re-examine the provisions relating to bail."

It therefore follows that currently in Zanzibar, in the light of the foregoing pronouncement by the High Court, there is no court which has the mandate to hear and determine an application forbail in non-bailable offences unless and until the legislature amends the impugned provision to allow courts to grant bail in such offences.

58 Section 152(3) of the Criminal Procedure Act, 2018

59 Hassan Korney Kijogoo vs the Attorney General of the Revolutionary Government of Zanzibar and Others, Constitutional Petition No. 1 of 2019 (unreported)



NOTABLE FINDINGS FROM EXPOSITIONS IN CHAPTER ONE AND TWO

Chapter One of this paper has explored the law and practice in Mainland Tanzania, before and after the coming into force of the **CPA** and how courts in this part of the union dealt with matters of bail in the two different eras. It has also incorporated the views of individuals working in the human rights arena on the existence of non-bailable offences in Tanzania Mainland and the need for derogation from a person's right to liberty in the protection of the society. Chapter Two has shown how bail matters are handled in Kenya, Malawi, Zambia, Zanzibar and Uganda. From the expositions in the two chapters there are some common aspects which are noteworthy, and the same shall be considered below.

3.1. Bail; a right or privilege?

Before enacting the Bill of Rights in the URT Constitution, bail seemed to be an absolute right. This can be drawn from the remarks made by the High Court of Tanzania while dealing with matters of bail before 1984. In **Tito Douglas Lyimo** (supra), the High Court held that *'bail is a right and not a privilege'* whereas in **Patel** (supra) it was held that *"a man whilst awaiting trial is as of right entitled to bail, as there is presumption of innocence until contrary proved."*

With the enactment of **Article 15(2) of the URT Constitution**, the position seems to have changed. Nowadays a person's right to liberty can be derogated from in certain circumstances. As was stated in the case of **Daudi Pete** (supra), the rights and duties of an individual are limited by the rights and duties of the society. A similar position was taken in the case of **Jackson Ole Nemeteni** (supra) where it was held that,

"we are minded of the fact that denial for bail under section 148 (5) (a) of the Act is in the interests of defense, public safety and public order. We take judicial notice of the recent past when this country was rocked by a wave of unprecedented bank robberies, highway robberies and car – jackings ... the

legitimate objective for denial of bail for armed robbery was to protect the society against dangerous criminals using firearms and organized gangs that holdup Villages, hijack buses or rob banks, people and homes."

This position has also been supported by majority of the individuals working in the human rights field who were orally interview by the researcher in the course of undertaking this study.
Kenya seems to be supportive of the proposition that bail is not absolute. In the case of **Danfornd Kabage Mwangi** (supra), it was held that,

"there is no denying the fact that the liberty of an individual is precious and is to be zealouslyprotected by the constitution and courts. Nonetheless, such a protection cannot be absolute inevery situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced."

In **Chetankumar Shantkal Parekh** (supra), the Supreme Court of Zambia also remarked that

"there is nothing in the Constitution which invalidates a law imposing a total prohibition on the release on bail of a person reasonably suspected of having committed a criminal offence, provided that he is brought to trial within a reasonable time after he has been arrested and detained. Before the stage when a trial becomes unreasonably delayed, it is constitutionally permissible to authorise deprivation of liberty, if authorised by law, and without making any provision for bail under any circumstances."

In line with need to protect the society from dangerous criminals as was held in **Jackson Ole Nemeteni** (supra), the six jurisdictions under review have come up with a list of non-bailable offences. Below is a schedule of those offences.

SN	Country	List of Non-Bailable Offences
1	Tanzania (Mainland)	murder and treason, armed robbery, defilement, trafficking in narcotic drugs, dealing in narcotic drugs contrary to the law, terrorism, money laundering, human trafficking.
2	Kenya	murder, treason, robbery with violence, attempted robbery with violence and any drug related offences.
3	Malawi	murder, treason, rape, aggravated robbery and house breaking & burglary.
4	Zambia	murder, treason or any other offence carrying a possible or mandatory capital penalty; misprision of treason or treason-felony; or aggravated robbery; juvenile charged with homicide; offences under the Narcotics and Psychotropic Substances Act, 1993; offences of desertion and absenteeism without leave under the Zambia Defence Act, Cap 106; offence under the Prevention of Public Security Act, Cap 112.
5	Uganda	an offence triable only by the High Court; the offence of terrorism and any other offence punishable by more than ten years imprisonment under the Anti-Terrorism Act, 2002; the offence of cattle rustling contrary to section 266 of the Penal Code Act; offences under the Firearms Act, punishable by more than ten years imprisonment; rape, contrary to section 123 of the Penal Code Act;aggravated defilement contrary to section 129 (3) and (4) of the Penal Code Act; embezzlement, contrary to section 268 of the Penal Code Act; causing financial loss, contrary to section 269 of the Penal Code Act; corruption, contrary to section 2 of the Prevention of Corruption Act; bribery of a member of a public body, contrary to section 5 of the Prevention of Corruption Act; and any other offence in respect of which a magistrates' court has no jurisdiction to grant bail.
6	Zanzibar	murder, treason, armed robbery, possession of firearms, drug trafficking, an offence relating to large quantity of drugs, rape, unnatural offence, defilement of boy, gang rape or incest.

Notable however, from the constitutions of all the six countries under review, is the fact that bail is a constitutional right. Although all the five constitutions take cognizance of the fact that at timesthe right can be derogated from, each has put in place some safeguards to guard against arbitrary derogation and abuse. And that is why, for instance, **Article 15(2) of the URT Constitution** allows derogation from the right to liberty where the process should be prescribed by the law.

3.2. Power of the Court to hear and determine bail applications in non-bailable offences

Before 1985, when **Criminal Procedure Act, Cap 20 [R.E 2019]** came into force, the High Courtin Tanganyika and then Tanzania Mainland, under the provisions of **section 123 (3) of the Criminal Procedure Code**, could hear and determine bail applications in non-bailable offences. This was emphasized in **Lemanda s/o Obei** (supra) where it was held that,

"Section 123(3) of the Criminal Procedure Code does empower the High Court to direct a person be admitted to bail even though he has been charged with murder or treason." ***And it is in the same vein that the High Court granted bail in the case of Njama Zuberi (supra)and declined in the case of Lemanda s/o Obei (supra).***

However, with coming into force of the **Criminal Procedure Act, Cap 20 [R.E 2019],** High Court's powers to hear and determine bail applications in non-bailable offences was repealed. Whenever approached, the High Court has declined to grant bail to the Applicants.[60]

60 Pascal Peter Lufunga vs. Republic, Misc. Criminal Application No. 12 of 2020, High Court of Tanzania (Dar es Salaam District Registry) - applicant charged with trafficking in narcotic drugs, non-bailable offence, court refused to grant bail; David fulgence Mchuma vs. Republic, Misc. Criminal Application No. 05 of 2020, High Court of Tanzania (Dar es Salaam Registry) – applicant charged with trafficking in narcotic drugs, non-bailable offence, court refused to grant bail; Saada Ahmed Uledi & 3 Others vs. Republic, Misc. Criminal Application No. 100 of 2019, High Court of Tanzania - applicant charged with money laundering offence, non-bailable offence. Court refused to grant bail; Adam Said Kawambwa vs. Republic, Misc. Criminal Application No. 106 of 2019, High Court (Dar es Salaam Registry) – applicant charged with money laundering offence, non-bailable, court refused to grant bail; William Ernest Nturo vs. Republic, Misc. Economic Cause No. 55 of 2018, High Court of Tanzania (Dar es Salaam District Registry) – applicant charged with money laundering, non-bailable offence, court refused to grant bail; Joash Jumbura Nyamasagara vs. Republic, Misc. Economic Cause No. 248 of 2019, High Court of Tanzania (Dar es Salaam Registry) – applicant charged with money laundering offence, non-bailable, court refused to grant bail; Hussein s/o Hussein @ Hassan vs. Republic, Misc. Criminal Application No. 27 of 2020, High Court of Tanzania (Mwanza District Registry) – applicant charged with terrorism offence, non-bailable, court refused to grant bail; Said Abubakari Mbaraka vs. DPP, Misc. Criminal Application No. 08 of 2020, High Court of Tanzania (Shinyanga District Registry) – applicant charged with unlawful possession of narcotic drugs, non-bailable, court refused to grant bail; Joel Emmanuel Malugu & 4 Others vs. DPP, Misc. Criminal Application No. 29 of 2020, High Court of Tanzania (Dar es Salaam) – applicant charged with money laundering offence, non-bailable offence, court refused to grant bail; Alloycious s/o Gonzaga Mandago & Another vs. Republic, Misc. Criminal Application No. 30 of 2020, High Court of Tanzania (Dar es Salaam District Registry) – applicant charged with money laundering, non-bailable, court declined to grant bail; Martine Ike vs. Republic, Misc. Criminal Application No. 58 of 2020, High Court of Tanzania (Dar es Salaam District Registry) – applicant charged with trafficking in narcotic drugs, non-bailable, court declined to grant bail; Erick Jamson Mwashigala & Another vs. Republic, Misc. Criminal Application No. 119 of 2020, High Court of Tanzania (Mbeya District Registry) – applicant charged with money laundering offence, non-bailable, court refused to grant bail.

In an interview between the researcher and those individuals working in the human rights field, itcame out clearly that those individuals desired the court be given the powers to hear and determinebail applications even in those cases where accused persons have been charged with non-bailableoffences.

In Kenya, the High Court of Kenya has the mandate to hear and determine bail applications brought forth by accused persons charged with non-bailable offences. This mandate derives from the provisions of **Section 123(3) of the Criminal Procedure Code, Cap 75,** which provides to the effect that

"the High Court may in any case direct that an accused person be admitted to bail or that bailrequired by a subordinate court or police officer be reduced."

In Malawi, under the provisions of **section 118(3) of the Criminal Procedure and Evidence Code, 1968,** the High Court in Malawi can admit to bail an accused person charged with non- bailable offences. The mandate has been reinforced by a good number of decisions both by the High Court and Supreme Court of Appeal.

In the case of **McWilliam Lunguzi vs. Republic, MSCA Criminal Appeal No. 1 of 1995,** it was observed by the Supreme Court of Appeal that *'that the High Court has power to release on bail a person accused of any offence,'* while in the case of **Fadweck Mvahe vs. Republic, MSCA Criminal Appeal No. 26 of 2005** it was held that *'the High Court has power to release on bail a person accused of any offence including murder.'*In yet another case, **Christos Demetrios Yiannakis V Republic, [1995] 2MLR. 505,** the High Court of Malawi speaking through Mwaungulu Ag J remarked that,

"on the literal understanding of the provisions, therefore, there is nothing in sub – sections (1)and (3) which prevents the High court from granting bail for capital offences."

In Zambia bail in non-bailable offences is granted under the provisions of **Article 13(3) of the Zambia Constitution**. In **Chetankumar Shantkal Parekh** (supra) it was held that,

"where any trial is unreasonably delayed through no fault or strategem of the accused, the arrested person must be released on what one might call "constitutional bail". Such bail is available and clearly overrides any prohibitions in the lesser laws so that Article 13(3) would apply to any unreasonably delayed case, whatever the charge and whatever s.123 of the C.P.C.or any other similar law may say."

It is the High Court of Zambia that has the mandate to grant 'constitutional bail'. This position hasbeen stated in a number of cases in Zambia. In the case of **Oliver John Irwin vs. the People (1993 - 1994) Z.R. 7 (S.C.),** for instance, the Supreme Court of Zambia held that,

"the High Court has power to admit to bail in all cases including those relating to persons accused of murder and treason, subject to the rule that such persons are rarely admitted to bail. Such application must be made to the High Court. The subordinate court has no power to grant bail in a murder case, and the Supreme Court enjoys only appellate jurisdiction."

In Uganda, as per the provisions of **sections 14 and 15 of the Trial on Indictment Act,** and **section 75 (2) of the Magistrates' Courts Act**, it is the High Court of Uganda that has the mandateto hear and determine bail applications on non-bailable offences. In the **Tumwirukirire Grace** (supra), it was observed by the High Court that,

"the court's discretionary powers to grant bail are enshrined under Section 14 (1) of the Trial on Indictments Act and the conditions under which bail is to be granted under Section 15.

There is always the feeling that it is only a court of law that has the mandate to hear and determine individuals' rights. And in some jurisdictions, like in Tanzania Mainland, that mandate has a constitutional reinforcement.[61]It is therefore desirable that even when the society wants to protect itself from alleged criminals, at least that person should be given an opportunity to

61 Article 107A of the URT Constitution

appear before an impartial court of law to vindicate his right to liberty and have that court make a pronouncement with regard to that right. That is the reason why in Kenya, Malawi, Zambia and Uganda the High Court has been mandated to hear and determine bail applications even in non-bailable offences.

3.3. What guides the court while considering bail applications in non-bailable offences

As pointed out elsewhere above, before 1985 in Tangayika and then Tanzania Mainland, the High Court had mandate to hear and determine bail applications in non-bailable matters. The High Court could grant bail in exceptional and unusual circumstances. In **Lemanda s/o Obei** (supra), the court observed that,

'what I would say is this; that even if the Applicant is in fact found guilty of manslaughter the circumstances of this case are such that it would not be the sort of offence on which one would normally ***grant bail unless there are unusual circumstances****.'*

Individuals working in the human rights arena when interviewed were of the view that any derogation from a person's right to liberty and presumption of innocence has to be safeguarded by procedures prescribed by the law.

In Kenya, what has become a crucial factor in determining whether or not to release the Applicant on bail is the phrase '***unless there are compelling reasons not to be released'*** as stated under **Article 49(1)(h) of the Kenya Constitution of 2010**.

In the case of **Republic V Joktan Mayende & 4 Others, Bungoma High Court Criminal Case No. 55 of 2009**, the High Court observed that,

"the phrase compelling reasons would denote reasons that are forceful and convincing as to make the court feel very strongly that the accused should not be released on bond." It could 'generally refer to something necessary or crucial, as opposed to something merely preferred. Examples include national security, preserving the lives of a large number of individuals,

and not violating explicit constitutional protections.'[62] *The court however appreciates that each case presented before it is unique and the compelling reasons may differ with each case.*[63]

Although the list has not been exhaustive, in the case of **Republic V Lucy Njeri Waweru & 3 Others, Nairobi Criminal Case No. 6 of 2013,** the court listed some other factors as being,

a. Whether the accused persons were likely to turn up for trial should they be granted bail,
b. Whether the accused persons were likely to interfere with witnesses,
c. The nature of the charges,
d. The severity of the sentence, (e) The security of the accused if released on bond, and
e. Whether the accused person has a fixed abode within the jurisdiction of the court. Others include,
f. accused's previous criminal record,
g. detention of the accused person forhis or her own protection,
h. the probability of the accused person tampering with evidence, and,
i. the strength of the evidence.[64]

In Malawi, it is the 'interest of justice' that would guide the Court in determining a bail applicationby an accused person charged with a non-bailable offence. Looking at the provisions of **Article 42(2)(e) of the Malawi Constitution of 1994**, **section 118(1) of the Criminal Procedure and Evidence Code, 1968** together with a few decided cases, like it **Fadweck Mvahe** (supra) and **Clive** Macholowe (supra), it becomes apparent that in Malawi bail is not an absolute right; it can be derogated from where ***'the interests of justice so requires'.***

Other factors include, (a) the likelihood of the accused person attending at his trial, (b) the risk that if released on bail the accused person will interfere with the prosecution witnesses or tamper with evidence, (c) the likelihood of his committing another offence or other offences wile on bail, (d) the risk to

62 Danfornd Kabage Mwangi [2016] eKLR, see also Hassan Mahat Omar & Another Vs Republic, Nairobi High Court Criminal Revision No. 31 of 2013,
63 Republic vs. Naftali [2018] eKLR, at page 2
64 Republic v Naftali Chege & 2 others [2018] eKLR at page 3, Republic v Danfornd Kabage Mwangi [2016] eKLR at page 3,

the accused person, if granted bail and he returns to his village where the deceased's relations may harm him, (e)the gravity of the offence, (f) the punishment likely to be imposed and,indeed, (g) accused person's health, and (h) the delay in bringing the Applicant up for trial. [65]

In Zambia, the only consideration seems to be the delay in prosecuting an accused person's case. Like it was stated in **Chetankumar Shantkal Parekh** (supra),

"where any trial is unreasonably delayed through no fault or strategem of the accused, the arrested person must be released on what one might call "constitutional bail". Such bail is available and clearly overrides any prohibitions in the lesser laws so that Article 13(3) wouldapply to any unreasonably delayed case, whatever the charge and whatever s.123 of the C.P.C.or any other similar law may say."

In Uganda, As provided for **section 15(2) of Trial on Indictment Act**, there are two factors which would guide the Court in determining a bail application in non-bailable offences; (a) that exceptional circumstances exist justifying his or her release on bail, and (b) that he or she will not abscond when released on bail.

Exceptional circumstances include, (a) grave illness certified by a medical officer of the prison orother institution or place where the accused is detained as being incapable of adequate medical treatment while the accused is in custody; (b)a certificate of no objection signed by the Director ofPublic Prosecutions; or (c) the infancy or advanced age of the accused.[66]

In considering whether or not the accused is likely to abscond, the court may take into account such factors like, (a) whether the accused has a fixed abode within the jurisdiction of the court or is ordinarily resident outside Uganda; (b) whether the accused has sound securities within the jurisdiction to undertake that

65 Fadweck Mvahe vs. Republic, MSCA Criminal Appeal No. 26 of 2005; Harry Sone Machika vs. Republic, Misc. Criminal Application No. 34 of 1996; Edward Kufa vs. Republic, Misc. Criminal Application No. 167 of 2008; Kettie Kamwangala vs. Republic, Misc. Criminal Appeal No. 6 of 2013; Chimwemwe Mphembedzu vs. Republic, Bail Case No. 70 of 2011; Clive Macholowe vs. Republic, Misc. Criminal Appeal No. 171 of 2004

66 Section 15(3) of Trial on Indictment Act,

the accused shall comply with the conditions of his or her bail;(c) whether the accused has on a previous occasion when released on bail failed to comply with the conditions of his or her bail; and (d) whether there are other charges pending against the accused.[67]

As noted above, any derogation from a person's right to liberty should be guided by some prescribed procedures that guarantee safeguards against arbitrary use and abuse. This is what this sub-part is all about. There should be guidelines in place to guide the court while assessing whether or not to admit the Applicant to bail even though the society desires the Applicant to be in remand custody pending trial.

3.4. The duty to prove that an application for bail in non-bailable offences should not be granted is on the prosecution

In Tanzania Mainland, prior to 1985 when the **Criminal Procedure Act [R.E 2019]** was enacted, the High Court had the mandate to hear and determine bail applications in non-bailable offences. Reading from the cases of **Njama Zuberi** (supra) and **Lemanda s/o Obei** (supra), it is apparent that the duty to prove that an applicant should be granted was on the applicant and not on the prosecution. Like in **Lemanda s/o Obei** (supra) it was counsel for the applicant who was struggling to convince the Court that exceptional and unusual circumstances exist to warrant the release of his client on bail; though the court in the end declined to grant the application.

In Kenya the duty rests on the prosecution to prove to the satisfaction of the court that there are compelling reasons not to admit the applicant to bail. In the case of **Republic v Danson Mgunya& another [2010] eKLR**[68] remarked that

'... the state must prove to the satisfaction of the court that the accused though entitled to release, he should not be released because of the existence of compelling reasons which must be stated, described and explained.' If the state fails to do so, then the presumption in favour of bail prevails and the court will admit the accused on bail.[69]

67 *Section 15(4) of Trial on Indictment Act*
68 *At page 9*
69 *Republic v Danfornd Kabage Mwangi [2016] eKLR at page 4*

In Malawi, it is the duty of the state, and not that of the Applicant, to prove on a balance of probability that the interest of justice requires the Applicant be denied bail. In the case of **Fadweck Mvahe vs. Republic, MSCA Criminal Appeal No. 26 of 2005**, the Supreme Court of Appeal stated that

'the onus is on the State to show or prove that the interests of justice require the accused person's continued detention."[70]

In the case of **Clive Macholowe vs. Republic, Misc. Criminal Appeal No. 171 of 2004** it was also observed that,

"the practice should rather be to require the State to prove to the satisfaction of the court that in the circumstances of the case, the interests of justice require that the accused be deprived of his right to release from detention. The burden should be on the State and not on the accused. He who alleges must prove. This is what we have always upheld in our courts. If the State wants the accused to be detained pending his trial then it is up to the State to prove why the court should make such an order. It is ridiculous, in my opinion, to require the accused to prove why he should be released from detention."[71]

It has been pointed above that in Zambia the leading factor that will move the court to grant bail in non-bailable offences would be the fact that the Applicant's trial has been unreasonably delayed. It seems therefore that it is upon the prosecution to prove to the court that trial has not been unreasonably delayed if they really wish that the Applicant should not be admitted to bail.

In Uganda, the onus of proving that (a) that exceptional circumstances exist justifying his or her release on bail, and (b) that he or she will not abscond when released on bail rests on the Applicant. However, it is important to note here that courts in Uganda have at times disregarded the dischargeof that burden by the Applicant and granted bail anyway taking into account other factors. In the case of **Tumwirukirire Grace** (supra), it was observed that

70 At page 10 of the judgement; See also Kettie Kamwangala vs. Republic, Misc. Criminal Appeal No. 6 of 2013
71 At page 5 of the judgement

"the Court's discretionary powers to grant bail are enshrined under Section 14 (1) of the Trial on Indictments Act and the conditions under which bail is to be granted under Section 15. These circumstances are broken down to proof of exceptional circumstances like grave illness, a certificate of no objection from the Director of Public Prosecution, infancy or advanced age;and the fact that the accused will not abscond to be proved by the accused having a fixed placeof aboard, sound sureties, among others. However, it is trite law that proof of exceptional circumstances is not mandatory as courts have the discretion to grant bail even where none isproved ... An Applicant should not be incarcerated if he has a fixed place of abode, has sound sureties capable of guaranteeing that he will comply with the conditions of his or her bail."

And in the case of **Mugisha Ronald V Uganda HCT- 01-CR-CM-NO-050 of 2018,** it was also held that *"Since the sureties appear responsible persons who will ensure the accused returns to court to stand trial, and in view of the presumption of innocence under Article 28 (3) of the Constitution of the Republic of Uganda, 1995, I find and hold that this is a fit and proper case togrant bail to the Applicant."*[72]

Individuals working in the human rights field were of the view that the burden of proof that an accused person should not be admitted to bail should be on the prosecution to satisfy the court to that effect.

Since bail is a right, it is incumbent upon whoever wants the right to be derogated from to satisfy the court that circumstances obtaining in that particular case warrant the sought derogation. It is not enough for the law just to put an absolute bar to grant of bail without any valid justification, given the fact that each case has its own peculiar facts.
It is therefore desirable that, like it is in Kenya and Malawi, the burden of proving that an accused person should not be

72 See also the case of Tumwirukirire Grace vs. Uganda, HTC-05-CV-MA No. 94 of 2019, where is was held that "in the instant case I find that the Applicant has provided substantial sureties in three outstanding sureties especially as they are close kin who have the ability to compel the Applicant to comply. I do not agree with learned Counsel for the state that being relatives and one a teacher will hinder the Applicant's compliance. "If the courts are simply to act on allegations, fears or suspicions, then the sky would be the limit and one can envisage no occasion when bail would be granted whenever such allegations are made"

admitted to bail should be on the prosecution and not on the accused personas is in Zambia, Uganda and Mainland Tanzania before 1985.

3.5. Prescribed time within which trail in non-bailable offences has to commence

One of the biggest out cries in Tanzania Mainland is the amount of time taken by the prosecution to commence trial in non-bailable offences. Accused persons charged with non-bailable offences in Tanzania Mainland spend an average of two to three years in remand awaiting trial to commence. This, in toto, violates a person's presumption of innocence.

This problem however seems to have been addressed in Zanzibar and Uganda. In these two jurisdictions, the prosecution has been given the time within which to commence trail in non- bailable offences. Failure of observing that time limit, the accused person would be entitled to beadmitted to bail.

In Zanzibar the Criminal Procedure Act, 2018 requires trial to commence within six months from the date when a person so charged was arrested. Where the hearing does not commence within the said period of six months, the accused person shall be admitted to bail unless the court, for reasonsto be recorded in writing, direct otherwise.[73] In Uganda, **Articles 23(6) of the Constitution** provides to the effect that, a person is supposed to be released on bail where,

a. *in the case of an offence which is triable by the High Court as well as by a subordinate court, the person shall be released on bail on such conditions as the court considers reasonable, if that person has been remanded in custody in respect of the offence before trial for one hundred and twenty days;*
b. in the case of an offence triable only by the High Court, the person shall be released on bail on such conditions as the court considers reasonable, if the person has been remanded in custody for three hundred and sixty days before the case is committed to the High Court.

Being mindful of the fact that at times right to liberty can be derogated from, as is provided for inthe respective constitutions, Zanzibar and Uganda have put some safeguards against arbitrary pre-trial detentions by limiting the time within which

73 Section 152(1) & (2) of the Criminal Procedure Act, 2018

trial in non-bailable offences should commence.In other words, in Zanzibar and Uganda, much as it is allowed to arrest and detain a person beforetrial, as it currently obtains in Tanzania Mainland, the time for such detention has not been left at the discretion of the investigators and prosecution. The legislature has put a threshold for the time and sanctioned non-compliance on the part of investigators and prosecution by allowing an accused person to be let at liberty.

RECOMMENDATIONS & WAY FORWARD

In the preceding chapters we have seen, even in our jurisdiction, that bail is not absolute; it can bederogated from through **Article 15(2) of the URT Constitution.** This proposition has been subject of court's consideration in a number of occasions and courts of record in our jurisdiction have found the derogation permissible under **Article 15(2) of URT Constitution** while trying to balance the interests of an individual versus those of the society. Even individuals working in the human rights arena were supportive of the derogation in serious offences.

One notable fact from all the five neighbouring countries under review is that even in their jurisdictions bail is not absolute; they all have non-bailable enacted in their criminal statutes. The only remarkable difference is that in the four out of the five jurisdictions, the High Court has been mandated to hear and determine bail applications in non-bailable offences. Therefore, the first recommendation would be that the **Criminal Procedure Act, Cap 20 [R.E 2019]** be amended to give the High Court the mandate to hear and determine bail applications in non-bailable offences on case by case basis unless there are compelling reasons for continued detention/refusal of bail. At the time when the list of non-bailable offences in our criminal statutes has incredibly increased and there is a big wave towards arbitrary charging innocent individuals with non-bailable offences to further pre-trial incarcerations, the only safe and reasonable safeguard against abuse is to give the High Court mandate to hear determine bail applications in non-bailable offences. And this is not a new thing in our jurisdiction; before 1985 the High Court used to hear and determine bail applications.

In **Daudi Pete** (supra), **Jackson Ole Nemeteni** (supra) and even **Dickson Sanga 1** (supra), the Court has been emphatic that, although **Article 15(2) of the URT Constitution** permits derogation from the right to liberty, there should be prescribed procedures in place to safeguard against arbitrary derogation and abuse. And where there are no such procedures in place, then the Court has not hesitated to declare that derogation to be unconstitutional.

Individuals working in the human rights arena have also expressed the view that if derogation is to be allowed, then the same has be done in accordance with properly laid down procedures prescribed by the law.

What obtains in other jurisdictions, especially in Kenya, Malawi and Uganda, is that there are some prescribed procedures which would assist a court of law while considering a bail application from an accused person charged with non-bailable offences. In Kenya, when considering a bail application in non-bailable offences, the duty would be upon the prosecution to satisfy the court that there are compelling reasons which warrant not admitting the Applicant to bail.

In Malawi, the court would consider whether the interest of justice require that a person accused of committing a non-bailable offence should not be admitted to bail pending trial; and the duty to convince the court to hold as such vests on the prosecution.

This is the best practice that should as well be adopted in Tanzania. In non-bailable offences, a court should only be precluded from admitting an accused person to bail where there are compelling reasons or interest of justice beg that such a person should not be so admitted to bail. Otherwise bail should be readily available even in non-bailable offences and courts be mandated to determine bail application on cases by case basis based on the fact of a particular.

It is therefore recommended that the **Criminal Procedure Act, Cap 20 [R.E 2019]** be amended to put in place a provision that would require, in all non-bailable offence, the prosecution to move the court to the effect that an accused person who has applied for bail should not be admitted to bail because of compelling reasons or the dictates of interest of justice. That proposition by the prosecution should be supported by material facts and not mere apprehension of fair.

Pre-trial detentions in the past few years have been on the rise. A good number of accused persons have been charged with non-bailable offences and investigation in the charges they face remained incomplete for long. This has been possible because unfortunately

our laws regulating criminal proceedings have not addressed the issue of protracted investigations in non-bailable offences. Zanzibar and Uganda have however addressed the issue and it is something worthy of implementing in our jurisdiction in the event it is felt that at times pre-trial detentions are necessary. As is in Zanzibar and Uganda, the legislature in Tanzania Mainland should limit the time within which investigations have to be conducted and trial commence and sanction non- compliance by allowing bail to an accused person in the event trial does not commence within the prescribed time. It is therefore recommended that the **Criminal Procedure Act, Cap 20 [R.E 2019]** be amended to incorporate such a provision.

With regard to DPP's certificates of objection to bail, it is recommended that they should be removed completely from the two statutes; say **the National Security Act, 1970 and Economic and Organized Crimes Control Act, Cap 200 [R.E 2019]**. As was stated in the case of **Attorney General vs. Jeremia Mtobesya** (supra), at the time the DPP's certificate was introduced into our laws there were only two non-bailable offences and there was a concern that

'there are certain circumstances where the safety of the accused person and the gravity or other circumstances surrounding the offence with which a person is charged, would necessitate the limitation of his liberty, albeit temporarily.'

It was therefore recommended that if the DPP is allowed, sparingly and in fit cases to issue the certificate, it will go a long way to take care of the gap that existed. However, the court observed further that,

"with the foregoing legislative developments, the so-called "legal straight jacket" the Commission conscientiously sought to avoid, has been overtaken and is, presently, fully fledged with a sizable number of unbailable offences. That being the obtaining position, a question begs: If it is, as such, as plain as pike - staff that the reasons for which the Commission justified the promulgation of section 148(4) have been pre-empted and completely overridden; what is the utility, if at all, of having the DPP's certificate? As we pose the question lest we be misunderstood to suggest that we are bent towards determining the constitutionality of the impugned provision on account of its usefulness or otherwise: Far from it!"

The Court of Appeal's remark is to the effect that, at the moment, the sole purpose for which the section providing for the certificate was enacted has been surpassed by numerous amendments to the **Criminal Procedure Act, Cap 20 [R.E 2019]** stretching the list of non-bailable offences beyond the two original offence; murder and treason. In that vein, suffices to say that the certificateis at the moment not useful; its usefulness has been rendered nugatory by the long list of non-bailable offences at the moment. The two statutes should therefore be amended to remove the saidcertificate from our statute book.

Another reason that begs for amendments on the two pieces of legislation is the fact that a similarprovision in **Criminal Procedure Act, Cap 20 [R.E 2019]** has been declared by the Court of Appeal to be unconstitutional, null and void and ordered to be struck off the statute book. It is therefore absurd, under the doctrine of *inpari materia*, to still maintain the same provisions in other statutes. It defies the whole sense of rule of law!

However, in the event it is felt that the certificate is still needed, though we hold otherwise, then a duty should be cast on the prosecution to give reasons as to why an accused person or suspect, asthe case may be, should not be admitted to bail. The practice as it stands, the prosecution not givingreasons[74] for objection to grant of bail, is subject arbitrary use and abuse by the prosecution and violate Constitutional Rights to fair hearing. A good number of accused persons are in remand custody on account of the said certificate and there no justifiable reasons for restriction of their liberty.

74 Factual reasons as opposed to mere apprehension of fear and/or spite.

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1st Step: Dial *150*00# to access your MPESA account.
2nd Step: Select 4 – Pay By Mpesa.
3rd Step: Select 4 – Enter Business Number.
4th Step: Enter Business number (275454)
5th Step: Enter the reference number.(1234)
6th Step: Enter the amount you want to pay.
7th Step: Enter your "PIN" to confirm.
8th Step: Enter 1 to confirm the transaction

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