

# IN THE HIGH COURT FOR ZANZIBAR

HOLDEN AT VUGA

CONSTITUTIONAL PETITION NO. 01 OF 2019

HASSAN KORNELY KIJOGOO ... .. PETITIONER

VERSUS

1. ATTORNEY GENERAL OF THE  
REVOLUTIONARY GOVERNMENT  
OF ZANZIBAR ... ..

2. MINISTER, MINISTRY OF STATE  
PRESIDENT'S OFFICE, CONSTITUTION, LEGAL  
AFFAIRS, CIVIL SERVICES AND GOOD GOVERNANCE ... RESPONDENTS

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## JUDGMENT

**DATE OF JUDGMENT: 15/5/2019**

**BEFORE: hon. ABDUL-HAKIM A. ISSA, J**

This is a Constitutional petition which has been filed by Hassan Kornely Kijogoo against the Attorney General of Zanzibar (AG) and the Minister of the Ministry of State President's Office, Constitution, Legal Affairs, Civil Services and Good Governance (Minister). The Petitioner is challenging the constitutionality of section 151(4) of the Criminal Procedure Act No. 7 of 2018 (CPA). The Petitioner who is an advocate of the High Court of Zanzibar was representing himself while all the Respondents were represented by Mr. Ali Ali Hassan, the learned Principal State Attorney and Mr. Juma Msafiri Karibona, the learned Senior State Attorney. Due to the seriousness of the matter which is being heard by the Court, with the consent of the parties the Court invited amici curiae, friends of the Court to assist the Court. The friends of the Court who appeared were Mr. Moh'd Saleh and Mussa Kombo, learned State Attorneys from Director of Public Prosecution's office and Mr. Rajab A. Rajab, the Secretary General of Zanzibar Law Society. The friends of the Court addressed the court right at the end after the Petitioner and Respondents have completed their submissions.

Mr. Kijogoo started his submission and adopted the reasons found in his petition. He said this petition was brought under sections 23 (1), 25 A (1) and 24(4) of the Zanzibar

Constitution, 1984 (the Constitution) which gives power to anyone to bring in Court a petition when the Constitution is breached or is about to be breached. He submitted that he is challenging section 151(4) of the CPA which contravenes section 93 (1) of the Constitution. He said the reasons for the challenge are found in paragraphs 4, 5, and 6 of the petition which he argued together.

He submitted that section 151(4) of the CPA gave powers to the Chief Justice alone and not to other judges to grant bail to the accused. The section clearly specifies so and hence it is against section 93 (1) which provides that there shall be a High Court of Zanzibar with all powers in criminal and civil cases. The judges of the High Court make the High Court and CJ is part of the High Court in trial of cases. Therefore, the powers given to one person who is CJ is equal to rob the powers of the Courts and give them to one person. He added that bail application is the criminal application in which any judge of the High Court has the power to hear it. But the Legislature enacted a law giving such powers to CJ which is not proper. The Constitution in section 4 has declared that it is a supreme law and any law which contravenes the Constitution is invalid. Therefore, section 151(4) of CPA is invalid.

Mr. Kijogoo went on to submit that in trial matters there is no issue of CJ, all judges have similar powers. Chief Justice's powers are found in administrative matters and not in trial matters. Bail application is a trial matter and not administrative; therefore, all judges of the High Court have powers to hear bail applications. Further, Mr. Kijogoo submitted that section 151(4) is a provision which discriminates judges of the High Court while section 93(2) of the Constitution laid down equality among the judges of the High Court. He said when an Act gives powers only to Chief Justice; the provision is discriminatory as it gives exclusive powers in the trial where all judges have similar powers.

In addition, Mr. Kijogoo submitted that section 151(4) hinders fair trial which has been laid down in section 12 (6) (a) of the Constitution. The components of fair trial include powers of the judge to recuse himself when he has interest on the case before him. Section 151(4) does not give directives on what to be done when the CJ has an interest on the matter before him. He added that the relatives of the CJ have no immunity in criminal matters; but under this provision the CJ has to hear the matter. Similarly, when

a party has no faith in CJ still the CJ has to hear his case as there is no other option. Therefore, the sense of fair trial is lost.

Further, he said fair trial also includes urgency of matters. For instance the matter is coming to Court under certificate of urgency, but the CJ is out of his office or out of country and is not expected to be back in few days. The Applicant still has to wait for the CJ. Similarly, when the CJ is sick, the Applicant has to wait for the CJ to get better even if it takes six months. He prayed for this Court to declare section 151 (4) invalid as it contravenes the Constitution and the Court should direct the Authority to amend that provision and gives powers back to the High Court.

Mr. Ali, the learned counsel for the Respondents started his submission by saying that the petitioner has been brought under section 93(1) of the Constitution, but this provision does not give power to invalidate other provisions. With respect to section 151(4) he said we should start with section 151 (1) which classified offences into bailable and non-bailable. The Courts may grant bail in bailable offences and in non-bailable offences the Court should not grant bail. If section 151(4) is not there all Courts would not have power to grant bail in non-bailable offences. Therefore, section 151(4) is an exception with respect to non-bailable offences. The Legislature considers that there are instances where bail should be granted and they put the discretion to the CJ who is also the High Court Judge. He submitted that this is not discrimination as CJ is also a High Court Judge, and it is not a strange thing to give power to a particular judge. This is seen in the Commercial Court, Industrial Court as well as Land Tribunal; and there is no argument about discrimination. Therefore, he submitted that the argument that section 151(4) contravenes the Constitution lacks merit.

He added that section 12(5) of the Constitution provides for the definition of discrimination. Therefore, giving different powers to the judges is not discrimination under that provision. Further, he said even if the Court finds there is discrimination, the proviso of section 12(5) applies as it gives power to the Government to correct some evils. The non-bailable offences, particularly sexual offences are a major problem in our society and the Government took measures to correct the problem. There is no issue of discrimination.

With respect to the issue of fair trial, particularly when the CJ has interest in the case, Mr. Ali submitted that bail application is an interlocutory application, and it does not stop other judges to hear the main case. He added that still the party aggrieved by the decision of the CJ can go to the Court of Appeal. Lastly, he submitted that section 12 (6) (a) which the Petitioner said has been violated does not talk about changes of judges. With respect to the application made under certificate of urgency, Mr. Ali submitted that under section 94(4) of the Constitution the seat of the CJ is not vacant. The President may appoint acting CJ until CJ comes back or a new one is appointed. Mr. Ali submitted that the petition lacks merit and prayed that it should be dismissed with cost.

Mr. Kijogoo in his reply started with section 93(1) and said the last words of this section add powers to the High Court. Section 151(4) limited those powers by allowing CJ alone to entertain issues of bail. He added that he agrees that section 151(4) is an exception but he insisted that the matter should be heard by the High Court and not CJ who is an administrative head.

With respect to the issue of establishing Commercial Court or Industrial Court, Mr. Kijogoo submitted that the law did not specify that it will be presided by Justice Rabia or Justice Mkusa. A case can be heard by any judge of the High Court sitting there. The problem in section 151(4) is mentioning CJ.

With respect to the issue of a case filed under certificate of urgency, Mr. Kijogoo submitted that section 94(4) talks about the administrative matters of CJ. If he is sick or absent, acting CJ will discharge those administrative duties. In hearing the cases there is no CJ, there is a transfer of file or transfer of cases. No person is acting in the trial proceedings. With respect to the issue of bias, Mr. Kijogoo submitted that a judge accused of bias is supposed to recuse himself. An aggrieved party appeal when bail is refused. He reiterated his prayer.

Mr. Moh'd who made his submission as a friend of the Court said section 93(2) of the Constitution provides for the existence of the High Court and a CJ is also a judge of the High Court. Section 93(1) of the Constitution, on the other hand, talks about powers and jurisdiction of the High Court and provides that High Court has unlimited jurisdiction. But the issue in this case is the special powers given to CJ under section 151(4) to entertain

bail application in non-bailable offences. He submitted that this is not a new thing in our laws. He cited the example of mainland Tanzania where there is a High Court, but there is a special High Court – where the judges have been given special powers. There is also Labour Division of the High Court and a Land Division of the High Court. He said this is a specialisation and a special power is given to a particular person.

He also cited section 121 of the Constitution which talks about Special Departments which were established by the Act of House of Representatives. He said in Special Departments there is an Appellate Court of Special Department and the chairperson is the Judge of the High Court. Therefore, the power of CJ under section 151(4) is the division of labour.

Mr. Moh'd added that section 151(4) did not discriminate judges of the High Court; the powers are still there under section 151 (5) which is on bail in bailable offences. With respect to the issue of absence of CJ or when he could not hear the bail application, Mr. Moh'd said section 94 (4) of the Constitution will be applicable and acting CJ will be appointed and the acting CJ will adjudicate the matter after being appointed by the President.

Lastly, Mr. Moh'd submitted that section 151(4) should not be interpreted literally. We should look on the mischief on which the Legislature intends to correct. The intention of the Legislature was to reduce the number of offences which were alarming. Bail has been provided, but a special procedure has been put in place. Therefore, section 151(4) is not violating the Constitution; it is laying down a special procedure for non-bailable offences.

Mr. Rajab who also made a submission as a friend of the Court started with section 3 (2) of the High Court Act, 1984 which provides that the High Court may be expanded to various divisions. He said this is why we have Industrial Court and the Commercial Court, but he submitted that he has not seen a law which is saying that the CJ shall have different powers. If a division is needed it could be created to deal with the issue of bail. It is not proper to give the power to one person. The present situation contravenes the Constitution.

With respect to the issue of fair trial, he submitted that first the Applicant should have faith to the judge. Otherwise the judge should recuse himself. He said section 94(4) of the Constitution does not provide a solution as it does not specify a particular period for appointment of judge when CJ is absent or recuse himself. He submitted further that the section 151(4) is discriminatory and was enacted maliciously. It gave exclusive powers to CJ to entertain bail maliciously. This creates queues of bail applications; it makes bail a punishment and not to make the accused attend the Court. He added that CJ is a judge of the High Court who is senior among the equal judges. To mention only CJ when we know he is not the only judge is discriminatory and it creates doubts about other judges whether they can discharge that duty or not. Lastly, he submitted that section 151(4) offends the Constitution particularly section 93 (1) and 12 (6) (a).

It is now the Court's time to examine and analyse the rival arguments of the legal counsels. But before I embark on this journey, I think it is opportune to recapitulate the principles that will guide the Court in this task. These are the principles that govern the interpretation of the constitution and resolution of constitutional disputes. These principles have mostly been developed by case law and laid down in **Julius Ishengoma Francis Ndyanabo V. The Attorney General** [2004] TLR 1, and **Kukutia Ole Pumbun and Another V. Attorney General and Another** [1993] TLR 159. The Court of Appeal in **Christopher Mtikila V. Attorney General** [2006] TLR 279 put together these principles as follows:

- a) The Constitution of the United Republic is a living instrument, having a soul and consciousness of its own. Courts must therefore endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in tune with the lofty purpose for which its makers framed it.
- b) The provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions, but grows and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must therefore be strictly construed. So Courts have a duty to interpret the Constitution so as to further fundamental Objectives and Directives of State policy.

- c) Until the contrary is proved, legislation is presumed to be constitutional. If possible, legislation should receive such a construction that will make it operative and not inoperative.
- d) Since there is a presumption of constitutionality of legislation save where there is a claw back or exclusion clause relied upon as a basis for constitutionality the onus is upon those who challenge the constitutionality of the legislation, they have to rebut that presumption.
- e) Where those supporting a restriction on a fundamental right rely on a claw back or exclusion clause in doing so, the onus is on them to justify the restriction.
- f) Whoever relies on a claw back or exclusion clause has to prove that the restriction are not arbitrary, unreasonable and disproportionate to any claim of state interest.
- g) Courts are not concerned with the legislative wisdom of Parliament. They are concerned only with its legislative competence.
- h) While Parliament cannot directly override a decision of a Court of law declaring a statute unconstitutional and pronounce it to have been valid, it can make a fresh law, free from unconstitutionality.
- i) Courts do accept that civilization owes quite as much to those who limit freedom as to those who expand it.
- j) A Constitution must not be construed in isolation, but in its context which includes the history and background to the adoption of the Constitution itself. It must also be construed in a way which secures for individuals the full measure of its provision.

The petitioner in this matter has raised a very serious question which touched the right of the accused person to be admitted on bail. This Court now will attempt to give a historical glimpse to the provisions relating to bail. The right to bail has been provided in our criminal procedure laws since 1934 when the Criminal Procedure Decree, Cap. 14 of the Laws of Zanzibar was enacted. The right to bail was provided in section 117 to 127. But for our purpose in this case section 117 is relevant which provides:

***“117. (1) When any person, other than a person accused of murder or treason, 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 such officer or at any stage of the proceeding before such court to give bail, such person may be admitted to bail:***

***Provided that such officer or court may, instead of taking bail from such person, release him on his executing a bond without sureties for his appearance as hereinafter provided.***

***(2) The amount of bail shall be fixed with due regard to the circumstances of the case and shall not be excessive.***

***(3) Notwithstanding anything contained in subsection (1) the High Court may in any case direct that any person be admitted to bail or that the bail required by a subordinate court or police officer be reduced.***

The Criminal Procedure Decree was repealed and replaced by Criminal Procedure Act No. 7 of 2004 which retained provisions relating to bail in section 150 to 161, but the relevant provision for our purpose is section 150 which provides:

***“150. (1) When any person, other than a person accused of murder or treason or armed robbery or possession of firearms or drug trafficking, 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 such officer or at any stage of the proceeding before such court to give bail, such person may be admitted to bail.***

***(2) Such officer or court may, instead of taking bail from such person, release him on his executing a bond without sureties for his appearance as hereinafter provided.***

***(3) The amount of bail shall be fixed with due regard to the circumstances of the case and shall not be excessive.***



***(4) Notwithstanding anything contained in subsection (1) the High Court may in any case direct that any person be admitted to bail or that the bail required by a subordinate court or police officer be reduced.***

***(5) When a person has failed to comply with the conditions of the bail bond as regards the time and place of attendance, the Court may refuse to release him or her on bail when on a subsequent occasion in the same case he or she appears before the Court or is brought in custody and any such refusal shall be without prejudice to the powers of the Court to call upon any person bound by such bond to pay the penalty thereof.***

The effects of the 2004 amendments are that it added in the list of non-bailable offences the offence of armed robbery, possession of firearms, and drug trafficking. It also add a new subsection (5). In 2018 the CPA, 2004 was repealed and replaced by CPA, 2018 and the provisions relating to bail were retained in section 151 to 163. Section 151 has repealed and replaced section150 of old CPA and now it reads:

***“150. (1) When any person, other than a person accused of 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, 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 such officer or at any stage of the proceeding before such court to give bail, such person may be admitted to bail.***

***(2) Such officer in charge of police station or court may, instead of taking bail from such person, release him on his executing a bond without sureties for his appearance as hereinafter provided.***

***(3) The amount of bail shall be fixed with due regard to the circumstances of the case and shall not be excessive.***

**(4) Notwithstanding anything contained in subsection (1) of this section, the Chief Justice may in any case direct that any person be admitted to bail or that the bail required by a subordinate court or police officer be reduced.**

**(5) The High Court may, in case of bailable offences, direct that any person be admitted to bail or that conditions of bail required by a subordinate court or police officer be reduced.**

**(6) When a person has failed to comply with the conditions of the bail bond as regards the time and place of attendance, the Court may refuse to release him or her on bail when on a subsequent occasion in the same case he or she appears before the Court or is brought in custody and any such refusal shall be without prejudice to the powers of the Court to call upon any person bound by such bond to pay the penalty thereof.**

**(7) Violation of police bail bond may be enforced in court using the provision of this Act.**

**(Words in bold are the amendments made)**

The effects of the amendments made in section 150 for our purpose are that: firstly it added the offences which are now non-bailable. Before the amendments only murder, treason, armed robbery, possession of firearms, and drug trafficking were non-bailable offences, but now an offence relating to large quantity of drugs, rape, unnatural offence, defilement of boy, gang rape or incest have been added in that list.

Secondly, under section 117(3) of the Criminal Procedure Decree and 150(4) of CPA, 2004 the High Court was empowered to grant bail in any case even those involving non-bailable offences. This provision has been in existence since 1934 in Criminal Procedure Decree, and was retained by Criminal Procedure Act, 2004. But the amendment has removed this power from the High Court and gave it only to the Chief Justice. This is the crux of this petition whether section 151(4) violates the Constitution particularly section 93(1) and section 12 (6) (a).

This Court will start with section 93 (1) of the Constitution and finds it important to reproduce the whole section 93. It reads:

***“93. (1) There shall be a High Court of Zanzibar which shall be a Court of record and which shall have unlimited jurisdiction on criminal and civil cases and other powers as may be conferred in accordance with this Constitution or any other law.***

***(2) The Judges of the High Court shall comprise the Chief Justice and other Judges not less than two who shall be referred to as High Court Judges.***

***(3) Notwithstanding there being a vacancy in the seat of a Judge of the High Court, the High Court shall be legally constituted.***

***(4) The office of Judge shall not be annulled while there is a person holding that office.***

***(5) The High Court shall hold its sittings at any place where the Chief Justice shall designate in that behalf.***

***(Unofficial translation)***

This provision clarifies about the status of the High Court; in clear words it provides that it is the court of record and has unlimited jurisdiction in criminal and civil cases. V. N. Shukla, on **Constitution of India**, 9<sup>th</sup> edn. (1994) has defined court of records: ***“as one whereof the acts and judicial proceedings are enrolled for perpetual memory and testimony and which has authority to fine and imprison for contempt of itself as well as of subordinate courts”***. The words unlimited jurisdiction means its jurisdiction is unlimited with reference to the subject matter, pecuniary value and local limits. C.K.Takwani on Civil Procedure, 3<sup>rd</sup> edition, (1994) on page 26 after referring to two Indian cases (***Official Trustee V. Sachindra*** AIR 1969 SC823 and ***Raja Soap Factory V. S.P. Shantharaj***, AIR 1965 SC 1449) defined jurisdiction as follows:

***“Jurisdiction may be defined to be the power or authority of a court to hear and determine a cause, to adjudicate, and exercise any judicial power in relation to it. In other words, by jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. Thus jurisdiction of a court means the extent of the authority of a court to administer justice prescribed with reference to the subject-matter, pecuniary value and local limits.”***

Therefore, from these definitions when we are referring to jurisdiction we are always referring to the power of the court to hear and determine cases. We are not referring to the individual or the power given to the individual. Hence, the High Court in accordance with section 93(1) of the Constitution is the court of record and can adjudicate any matter.

We find similar provision also in the High Court Act No. 2 of 1985. This Act lays down matters involving High Court and also lay down the hierarchy of the Courts in Zanzibar. Section 3 and 5 of the Act provides:

***“3. (1) The High Court for Zanzibar shall continue to exist and shall as heretofore have:-***

***(a) Unlimited jurisdiction to hear and determine any civil or criminal proceedings under any law in force in Zanzibar;***

***(b) N/A***

***(c) N/A***

***(2) The High Court may be expanded to various divisions”.***

***“(5) There shall be courts subordinate to the High Court as follows:-***

***(a) Regional Magistrates’ Courts;***

**(b) District Magistrates' Courts;  
(c) Kadhi's Courts; and  
(d) Juvenile Courts."**

If we look closely on all these provisions the powers of adjudicating criminal and civil cases have been vested in Courts. The High Court is the superior court and the courts mentioned in section 5 of the High Court Act are subordinate Courts. There is no court which has been established or called Chief Justice's Court. CJ is the head of judiciary and also judge of the High Court as provided in section 93 (2). Therefore, this Court is of the view that the powers in the Constitution and the High Court Act in adjudicating the criminal and civil cases have been vested in Courts and not person. The CJ as the head of the judiciary has been vested with additional powers of administration of the judicial machinery. Section 93(5) of the Constitution is one instance of such powers given to CJ to decide where the High Court shall sit. More powers of administration have been given to the CJ by the High Court Act, but more notably is seen in section 13 which provides:

***"The Chief Justice shall regulate the distribution of business in the court and all actions and proceedings before the Court shall be heard and determined by a single judge, unless the Chief Justice otherwise directs or where the law provides otherwise."***

This provision in a nutshell provides for the role of the CJ in the administration of justice; he is in charge of the distribution of business in court. But everything else regarding proceedings and actions before the Court are dealt with by the judge in charge of a particular matter, and the CJ himself being a judge of the High Court has similar power to deal with such matter. In addition, more powers have been granted to CJ by section 19 of the High Court Act in which CJ has been given powers to make rules of the Court in various matters. But to put the matters to rest recently the Legislature enacted the Judiciary Administration Act No.11 of 2018. Section 22 to 24 of this Act provides for the functions and duties of the CJ. It is worth to look at sections 22 (1) and 24, which read:

***"22. (1) The Chief Justice shall be the head of Judiciary and shall, in addition to function provided for under the***

***Constitution or any other written law performs functions and exercise powers provided for under this Act.”***

***“24. (1) The Chief Justice shall be responsible for overseeing performance of judicial function of the courts, including the issuance of directives, supervision over court sittings and the assignment of judicial duties.***

***(2) The direction of duties shall include, without restricting the generality of those terms, the power to:***

***a) determine the sitting of the court;***

***b) assign judges to sittings;***

***c) assign cases and other judicial duties to judges;***

***d) determine the sitting schedules and places of sittings for judges;***

***e) determine the total annual, monthly, and weekly work load of judges; and***

***f) prepare hearing list and assign courtroom.***

***(3) N/A***

***(4) N/A***

All in all in all we have seen the laws particularly the Constitution, the High Court Act and the Judiciary Administration Act have provided numerous powers to the CJ in terms of administration of the business of the Court and judiciary in general. But there is no single provision which has granted CJ additional power different to other judges in the adjudication of the criminal and civil cases. Therefore, hearing and determining bail application is part of the adjudication of criminal cases and this Court found section 151 (4) to be very much unique and the Petitioner’s argument has merit on this.

Mr. Ali and Mr. Moh’d have opposed the Petitioner’s arguments and argued that this is just a division of labour and there is nothing strange about it. Various courts have been established which have taken away the powers of the High Court citing the Commercial Court, the Industrial Court and the Land Tribunal as example. This Court finds this argument very weak as the Commercial Court and Industrial Court are both divisions of the High Court. Similarly, the Land Tribunal is a Court which is subordinate to the High

Court and its appeal lies to the High Court. Section 3(2) of the High Court Act, which provides that the High Court can be expanded into divisions clarified this matter.

Therefore, the creation of these courts has not taken away the power of the High Court, but most importantly the power of adjudication in all these courts have been vested in the courts themselves and not to the individual. Any judge appointed in this division can preside in Commercial as well as Industrial Court, and when he withdraws from the case for accusation of bias or conflict of interest another judge can hear the matter. Hence, this Court is of the firm view that the new section 151(4) has violated section 93 (1) of the Constitution by taking away the power of the High Court in granting bail in non-bailable offence and granting the same to CJ who is not a Court established in Zanzibar.

But the contravention alone is not sufficient to declare section 151(4) as unconstitutional. This then takes us to the second issue which is whether section 151(4) meets the proportionality test. The proportionality test as laid down in ***Kukutia Ole Pumbun*** case (supra) is that the legislation has to satisfy two requirements, namely: it is not arbitrary and that the limitation imposed by law is no more than is reasonably necessary to achieve the legitimate objection.

Mr. Kijogoo in his second argument has touched the issue of bias, conflict of interest, and a fair trial. Mr. Kijogoo has argued that the power under section 151(4) has been vested to CJ alone and the problem arises when the Applicant is a friend, relative, neighbour or a family member of the CJ. This means the CJ is obliged to hear the matter even when he has an interest on the matter. Further, it has been argued that the Applicant may not have faith on the CJ, as he could be a person they have quarrelled in the past or otherwise, but the Applicant still have to accept the matter being heard by the CJ. Lastly, it has been argued that the CJ could fall sick or he could be out of country for a long period and a bail application has been brought to Court as a matter of urgency. The Applicant will have no recourse than to wait for the CJ to come back; this affects the concept of fair trial and offends section 12 (6) (a) of the Constitution.

Mr. Ali on behalf of the Respondents has only addressed the issues of fair trial and that of bias. On the issue of application being filed under certificate of urgency when the CJ

is sick or out of country, Mr. Ali argued that this could be resolved by section 94 (4) of the Constitution whereby the President may appoint acting CJ until the CJ recovered from illness or is back in his office when he is on vacation or has travelled abroad. Mr. Moh'd also take a similar view that after the appointment of acting CJ, he will take charge and adjudicate the matter.

On the issue of bias, Mr. Ali argued that the CJ should continue to hear the matter and if the party is aggrieved he can appeal to the Court of Appeal. Mr. Ali did not address the issue of conflict of interest, but Mr. Moh'd argued that section 94 (4) would apply even on the issue of conflict of interest.

This Court will start with section 94(4) of the Constitution which provides:

***“In the event that the office of a Judge is vacant or the Chief Justice is for any reason unable to perform the functions of his office, those functions shall be performed by one of the Judges who shall be appointed by the President for that purpose as Acting Chief Justice and that Judge so appointed shall perform those functions until a new Chief Justice is appointed and assume the functions of office of the Chief Justice or until the Chief Justice who was unable to perform his functions resumes office”.***

***(Unofficial translation)***

This provision is very clear that it applies when the Chief Justice for any reason is unable to perform the functions of his office. The word used is for any reason, which means it includes when he is sick, he is on vacation, he is travelling abroad etc. An acting CJ shall be appointed by the President to discharge his functions. With due respect to the learned counsels the provision used the words “functions of his office” as CJ; the functions of the office of the CJ have been explained above and are particularly laid down in the High Court Act and in the Judiciary Administration Act.

These are functions involving administration of the court business and judiciary in general. They do not involve the functions of adjudication of criminal and civil cases.



When CJ is sick or is on vacation acting CJ is appointed but he does not go to the CJ's office and start determining the cases which the CJ left pending. These cases remain as they are and when CJ is back he has to finish his cases. In the adjudication of cases there is no issue of acting. Files have to be assigned or transferred to a particular judge in order for that judge to be able to deal with it. In addition when that judge is dealing with that file he is dealing with it as himself with full authority and not on behalf of the CJ. In adjudication of cases one judge cannot adjudicate a case on behalf of another. Therefore, the acting CJ cannot discharge the duties of CJ in adjudication of cases which the CJ has assigned himself or are pending on CJ's desk.

Hence, section 151(4) created a problem by mentioning only CJ, and section 94(4) of the Constitution does not assist in this matter. When the CJ is sick, is on vacation or has travelled abroad, the bail applications would still be waiting for him, and worse he cannot assign those bail applications to other judges because of the bar created by section 151(4). He has to hear them himself. Therefore, this Court is of the view that this matter impact on the sense of fair trial, and contravened section 12 (6) (a) of the Constitution. Justice need not only be done, but must be seen to be done.

On the issue of bias or when the CJ has a conflict of interest on the matter before him; these matters do not fall under the ambit of section 94(4) that CJ is unable to perform his functions. The issue of bias and conflict of interest is very clear in the law; V. N. Shukla on *The Constitution of India* (supra) on page 574 said:

***“If a member of a judicial body is “subject to a bias” (whether financial or other) in favour or against any party to a dispute, or is in such a position that bias must be assumed to exist, he ought not to take part in the decision or sit on the tribunal. Any direct pecuniary interest, however small, in the subject-matter of enquiry will disqualify a judge, and any other interest, though not pecuniary, will have the same effect, if it is sufficiently substantial to create a reasonable suspicion of bias. The reason for this clearly is that having to adjudicate between two or more parties, the adjudicator must give his adjudication with an independent mind without any indication of bias towards one side or the other in dispute.”***

Our jurisdiction is also teemed up with authorities on the issue of bias. To mention few: **Republic V. Albert Awour and 3 Others** [1985] TLR 20, **Republic V. Seif Sharrif Hamad** [1992] TLR 277, and **Registered Trustees of Social Action Trust & Another V. Happy Sausages Ltd and Others** [2004] TLR 264. In Albert Awour case the High Court adopted the test of right minded person. It provides:

***“In determining whether or not there is bias, the court should not be guided by the subjective view of the accused, rather the test should be whether, in the circumstances of the case, right minded persons would think that there is a likelihood of bias.***

The Court of Appeal in **Registered Trustees of Social Action** case laid down the test of apparent bias. It adopted the test of apparent bias as stated by House of Lords in **Porter and another V. Magill** [1902] ALL ER 465 in which the Court must ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased.

Coming back to the case in hand, the proper approach for the CJ to take when there is apparent bias or when he has a conflict of interest is to withdraw from the case. The question now is who will hear those bail applications when the CJ withdraws from the case. Section 151 does not provide an answer.

This Court, of course is not entitled to question the wisdom of the Legislature in enacting this provision, but is not satisfied by the reasons advanced by Mr. Ali that the non-bailable offences are problem in the society and the Government took measures to correct this problem. Similarly, Mr. Moh'd has asked the Court not to interpret section 151(4) literally and we should look on the mischief the legislature intends to correct. The purpose was to reduce the number of offences which are alarming. That is why the power has only been given to CJ.

There is no doubt the purpose is good and the arguments may be attractive to the ear, but they are not supported by empirical evidence. There is no evidence at all to suggest that by giving such power to CJ alone will reduce the number of people committing the non-bailable offences. In fact as we have shown above this provision did not exist

before, either in Criminal Procedure Decree, Cap. 13, or the Criminal Procedure Act, 2004; therefore, such arguments must be supported by evidence.

Therefore, taking into consideration all arguments advanced this Court is of the firm view that section 151(4) is arbitrary and the limitation imposed is unreasonable and unnecessary. Therefore, section 151(4) did not meet the proportional test and since it also contravened section 93(1) and 12 (6) (a) of the Constitution; this Court declares that section 151(4) is unconstitutional. This Court finds that there is no need to venture on the issue of discrimination as these points are sufficient to dispose of the matter.

Having declared that section 151(4) as unconstitutional, the position of law is that this Court cannot revive the old section 150(4); this matter falls in the powers vested in the Legislature. 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 now not be entitled to be admitted to bail as there will be no Court with power to grant bail under S. 151. Whether this also violates the Constitution or not is not the subject of this petition. But the matter is on the hands of the legislature to re-examine the provisions relating to bail. This petition succeeds and there is no order as to cost.

***It is so ordered.***

(Sgd) ABDUL-HAKIM A. ISSA, J  
**15/5/2019**

**COURT**

This Judgment was delivered in open Court on this 15.5.2019 in the presence Petitioner and Mr. Juma Msafiri and Mr. Ali Issa for the Respondents.

(Sgd) ABDUL-HAKIM A. ISSA, J  
**15/5/2019**

**COURT**

The right of appeal has been explained.

(Sgd) ABDUL-HAKIM A. ISSA, J  
**15/5/2019**

***I certify that this is a true copy of the original.***

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DEPUTY REGISTRAR  
**HIGH COURT - ZANZIBAR**

**/HALLY/**

/HALLY/