HE RIGHT TO BE PRESUMED INNOCENT: A CRITICAL ANALYSIS OF THE LAW AND PRACTICE IN TANZANIA

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ABSTRACT

The right to a fair trial in general and the right to be presumed innocent, in particular, has so far been recognised at both the national and international levels as an important aspect of the rule of the law. The enshrinement of the right in various international, continental and regional human rights instruments is proof of its importance within the context of a fair trial. In appreciation of its importance, Tanzania has become a party to continental and regional human rights instruments that recognise the right. However, the practices reveal a violation of the right to be presumed innocent more specifically by unbailable offences within the legal framework.

This work makes a critical analysis of the law and practice on the right to be presumed innocent in Tanzania by examining the extent of its enjoyment. The work concludes on the premise that the minimum acceptable standards of the right to be presumed innocent are not guaranteed and realised in Tanzania. To realise the right, the work recommends respect of international obligations by reforming the legal framework in order to align itself to the regional, continental, and international best practices.

***Keywords**:* Criminal Procedure and Practice/Fair Trial/the Right to be Presumed Innocent/Criminal Justice

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INTRODUCTION

The right to be presumed innocent in criminal proceedings is as old as the criminal justice system. If this right is guaranteed and realised, without any doubt, it enhances the protection of the accused person against the abuse of powers. A criminal trial runs on the presumption that the accused person is innocent until the contrary is proved. The right has claimed its deserving position in the administration of justice. Because of the significance of the right to be presumed innocent it has been codified in most human rights instruments.[i]

In the adversarial system of trial, the burden of proof lies on the prosecution. This presumption requires the prosecution side to rebut the presumption by collecting and presenting evidence on a required standard to prove that the accused is guilty. The principle on the presumption of innocence requires a judge or magistrate to consider only evidence presented before him in the course of the trial. The prosecution is duty bound to prove the charges against the accused person. As shall be demonstrated, the burden is discharged when a criminal charge against the accused person is proved above any reasonable doubt. In case of any reasonable doubt in the prosecution's case, the charge should be dismissed and the accused becomes entitled to an order of acquittal.

This work makes a critical analysis of the law and practice on the presumption of innocence in Tanzania. I argue that even though the right is contained within Tanzania's legal framework, its realisation is far from being the reality. The comparative analysis adopted in this work finds that other East African jurisdictions have made advancements in as far as the respect of the right is concerned. It is argued that Tanzania undesirably still lags behind other member states within the East African Community.

MEANING AND THE DEVELOPMENT OF THE PRESUMPTION OF INNOCENCE

The presumption of innocence is the right that guarantees the accused person his innocence and burdens the prosecution side to prove otherwise.[ii] The right plays an important role in the protection of human rights in general and in the enhancement of a fair trial in particular. It gives a person who is under investigation and criminal trial the benefit of the doubt, that, he is presumed to be innocent until the contrary is proved by his accuser.[iii] The trial without the

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presumption of innocence, at least in the adversarial system, would defeat the entire criminal justice.

This right has a long history. Indeed, some authors have dated the right as back as from Roman times.[iv] Some scholars contend that it originates from the Babylonian law.[v] For instance, it is said that the presumption of innocence is traceable is various old works such as the *Corpus Juris Civilis* collection which are believed to have existed as early as 530 BC.[vi] During this period, it is believed that the prosecutor had an obligation to prove the accusations against the accused persons. The prosecutor was obliged to produce concrete evidence against the accused person under the rules in the Justinian Code.[vii] There was also the presumption of innocence to the accused person provided under the Justinian Codes and English common law.[viii] Although to a different extent, from as far early as before Christ, the accused person was presumed innocent in criminal proceedings. His accuser was obliged to prove the contrary.[ix]

The right to be presumed innocent, like many other human rights, was formally recognised after the Second World War. Consequently, in modern times, the right to be presumed innocent forms part of most international human rights instruments such as the United Nations Declaration of Human Rights,[x] the European Convention for the Protection of Human Rights,[xi] as well as the United Nations International Covenant on Civil and Political Rights.[xii] On the East African side, the right to be presumed innocent enjoys recognition in both regional and continental human rights instruments. The major instruments in such category are the African Charter on Human and Peoples' Rights,[xiii] and Treaty for the Establishment of East African Community.[xiv] All these instruments affirm, in unequivocal terms the right to the presumption of innocence.[xv]

In Tanzania, the presumption of innocence is the Constitutional right. Every accused person is entitled, per Article 13 (6) of the Constitution of the United Republic of Tanzania of 1977, to be presumed innocent until the contrary is proved. In recognition of the right, the court has affirmed the position. For instance, in the case of *Hassan Othman Hassan @ Hasanoo vs Republic*,[xvi] it was held that the court is guided by the principle that an accused person is presumed innocent until proved guilty. It was further held that the accused person should be let to enjoy his freedom so long as he does not default appearances in court when so required until his rights are determined in the criminal case.

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LEGAL BASIS OF THE PRESUMPTION OF INNOCENCE

The right to be presumed innocent until the contrary is proved as indicated forms an important component of a fair trial legal framework. The right is premised on the fact that a conviction carries with it such serious consequences. Further, prosecution of a crime is usually undertaken by the state with such resources in terms of finances and human. If such powers were not controlled, the obvious effects would be devastating results on the accused person. It is for the reason that the right serves several roles in the dispensation of justice. The right therefore, is based on the following;

Shields the Accused against Arbitrary Conviction

The right of the presumption of innocence is very essential in safeguarding against wrongful convictions. There are possible dangers inherent in conviction. The effects of being found guilty of a criminal offence are enormous as they touch on a person's liberty and at times loss of properties. The serious stigma a conviction carries is believed to necessitate the safeguarding of the accused from wrongful conviction.

What is important to note here is that the right intends to burden the prosecution with proving charges against the accused.[xvii] This rationale is taken by different authors as being the first and foremost reason for recognising the principle.[xviii] It is apparent that wrongful convictions create a need for the presumption of innocence especially if the charge has not been legally and convincingly proved. If the prosecution side were not burdened to prove the case against the accused person, the consequences would be far beyond reparation. The possibilities of wrongful convictions would have been more than obvious.

Prevent Misuse of Powers by the State

A criminal trial, in most cases, involves two unequal parties. The State with all the resources on one hand and normal human beings on the other hand. Much as the two sides are considered equal before the law, it should need much emphasis to point out the significant imbalance between the two. In such an emphatically truth, uncontrolled criminal proceedings would yield unquestionable risks of wrongful convictions. It is this reason, which calls for an emphasis on the principle of the presumption of innocence in criminal proceedings. With the resources at its disposal and powers that it wields, unless the state is tied to some principles, it is likely to abuse its powers. The presumption of innocence, therefore, informs the state that despite its powers, the criminal justice fact finding process should be approached on the conception of the

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innocence of the accused person. The presumption, therefore, helps in limiting the state actions.[xix] Although the applicability of the right remains the issue of debate,[xx] it is important as it limits the powers of the mighty.

In normal practice, the presumption of innocence is used as the tool of preventing state authorities or their agents from treating guiltily criminal suspects. In these premises, the presumption of innocence is conceived as a '*counterweight*' against all the real risks involved in an individualized suspicion. The criminal prosecutions, as noted earlier, has adverse consequences. DE Jong, F., and VAN, Lent, L., observe the consequences of criminal prosecution as putting the accused person's social status in jeopardy, it submits him to the State's vast powers, and it sets in motion processes possibly leading to conviction and detention.[xxi] Given these consequences, the importance of applying the right in a criminal trial cannot overemphasised.

THE PRACTICABILITY AND REALISATION OF THE RIGHT IN TANZANIA

Tanzania derivers its legal system from British colonial legacy based on colonial relations and the common law system. The Constitution of the United Republic of Tanzania, like any other Constitution of an independent country, constitutes a basic law of the land. Like any other right, the right to be presumed innocent is recognised and protected under Article 13, of the Constitution. The Constitution stipulates that every person charged with a criminal offence shall be deemed to be innocent until the contrary is proved.[xxii] Authorities are obliged to ensure that every person charged with any criminal offence is treated as innocent of the offence until proved guilty. From the foregoing, it is clear that the Constitution provides for the right of presumption of innocence.[xxiii] It is provided, in unequivocal terms, that a person should be treated as innocent until it is proved otherwise before the Court of law.

Usually a constitution contains declarations and aspirations of the people. To give effects to such aspirations, there should be put in place a legal framework that puts the aspirations and wishes of people into operations.[xxiv] All substantive and procedural laws should have both in contents and spirit, the aspirations of people. It is through various legislations through which the spirit of the constitution is brought to operation. Unless the laws are enacted in agreement

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with the letters of the constitution, the rights that are provided in the constitution will be meaningless.

Although the right to be presumed innocent is expressly provided under the Constitution,[xxv] like any other right that is provided, is subject to the rights and freedoms of other persons as individuals or as members of certain groups.[xxvi] This means that the right to be presumed innocent is not absolute as it is subjected to other rights. The right to be presumed innocent may be restricted in its applications where a state of public emergency is declared or when the country goes into the war.[xxvii] The Constitution mandates the President to declare a state of public emergency.[xxviii] In such a situation, the applicability of the right may not necessarily be what like what is provided in the constitutions. Limitations of right should find justification in the Constitution in order to maintain their legitimacy.[xxix] Usually, the proportionality test is applicable in assessing the legislation. The Court of Appeal has already held that Constitutional provision should not be construed to defeat its evident purpose, but to give it effective operation.[xxx]

Also, there are situations where the Legislature, either by fault or design legislates in limitation to the right to be presumed innocent.[xxxi] Individual rights may be severely curtailed under such circumstances. There are many reasons, for example, when there is a need to control certain rampant offences or on matters of public interest. For instance, the fifth phase government vowed to wage a serious war against corruption and economic sabotage. As a result, various legislations were enacted to that effect. Out of that good motive, some provisions in the enacted legislation have adverse impacts on the right to the presumption of innocence.[xxxii] An increased number of unbailable offences that the new criminal justice regime embraces, notwithstanding any intentions to their legislation has impacts on the right to be presumed innocent.[xxxiii]

Like the Constitution, *the Evidence Act*[xxxiv] provides for the presumption of innocence. The law provides that the accused to be found guilty of the offence charged, the same has to be proved beyond all reasonable doubts. This right is based on the constitutional safeguard of the presumption of innocence. In order to ensure just and fair judgments in criminal proceedings, Courts of the law insist proper proof of facts and not the mere allegation evidence.[xxxv] The rules and principles of evidence require that for the administration of justice, evidence should be voluntarily given. Therefore, evidence in whatever form that is obtained through torture or threats is not admissible.[xxxvi] This rule of evidence does not only impose a duty to state

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machinery charged with the investigation to act in restraints, but also assuring guaranteeing the presumption of innocence of the accused person. From this rule, it can be argued that the criminal trial in Tanzania serves far better purposes than finding and punishing the guilty.

Sections 55 and 56 of *the Evidence Act* provide for the relevance of the character of the accused person in criminal proceedings. While a good character is relevant, but a bad character of the accused is not relevant in criminal proceedings. In *Wilson Kyakurugaha vs Uganda* the court held that judgment cannot be based on past character and the record of the accused passing through the window was inadmissible because it is based on bad character.[xxxvii] In ***R vs Weir and Others***,[xxxviii] the UK Court of Appeal was called to determine the correctness or otherwise of a caution that had been administered to the accused who was alleged to have been in possessing a controlled drug. The trial Judge had admitted the caution; however, the appellate court reversed the decision because it was considered against the law of self-accusation. [xxxix]

As noted, according to Section 56 of *the Evidence Act*,[xl] in criminal proceedings the fact that the accused person is of bad character is irrelevant, unless evidence has been given that he is of good character in which case it becomes relevant. The Act further provides that a previous conviction for any offence becomes relevant, after conviction in the case under trial, to assess an appropriate sentence to be imposed by the court. However, such previous conviction cannot be brought up in the course of the trial to just prove that the accused is guilty based on his past conviction.

The prosecution in a case is bound to prove the case against the accused person. The standard of proof needed is beyond all reasonable doubt.[xli] The Evidence Act presumes the accused to be innocent and the Prosecution has to prove that the accused is guilty.[xlii] Unlike the medieval period where the accused person was obliged to prove his innocence, the position has changed considerably.[xliii] Indeed, the accused has no duty, he has the right to remain silent and let the prosecution prove the case against him beyond all reasonable doubts. The accused has to raise doubt in the prosecution case, and any doubt raised the accused gets favour.[xliv]

Another law that provides for the right is t*he Criminal Procedure Act* (CPA). The CPA is a basic source of criminal procedures in Tanzania.[xlv] All offenses under *the Penal Code* are tried under the procedures established under the CPA.[xlvi] However, if there is another law that provides the contrary procedure, it is that law that should be followed.[xlvii] General provisions of section 4 are on what should be done once an offence is committed under *the Penal Code*.

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The CPA gives general powers to the Police Offers to be exercised in the criminal process. Among the powers provided under this Act include powers and procedures of arrest with or without a warrant. However, such powers are limited such that they cannot be exercised arbitrarily. Such powers have to be exercised within the confines of the law and not by a personal wish. According to section 11 (1) of this Act,[xlviii] arrest is deemed to be made when a Police Officer or any other person effecting an arrest actually touches or confines the body of a person to be arrested. The provision of section 11(2) of the CPA, empowers a person effecting an arrest to use all necessary means to effect the arrest. The arresting officer is entitled to use reasonable force to effect the arrest. Such force may be permissible if the person to be arrested resists the arrested. The Act empowers many other persons than the Police to arrest a suspect of a crime.

This section is more discretional such that it creates a room of abuse. More often than not, some of the authorised officials misuse it. This section is misused through the use of excessive force in effecting arrest resulting in embarrassment and humiliation of the suspect. Various reports indicate abuse of powers of arrest and thus jeopardising the right to be presumed innocent.[xlix] This is done despite the fact that section 21 of the Act requires a Police Officer or other person not to, in the course of the arrest, use more force, or subject the person to greater indignity than is necessary to make the arrest or to prevent the escape of the person after he has been arrested.

Apart from providing powers to Police Officers during criminal processes, the Criminal Procedure Act provides for the rights of the accused. To protect the right to presumption of innocence as contained in the Constitution, the CPA provides for certain rights upon which should be enjoyed by the accused person to safeguard his right to be presumed innocent. Such rights include the following;

The Right to be informed of the Offence

Under the CPA, a person arrested is necessarily required at the time of the arrest to be informed by the person arresting him, of the offence for which he is arrested.[l] The law recognises the fact that the prosecution is bound to prove the case against the accused person. As such, the law gives the arrested person the right to remain silent, of course, except disclosing his personal details. The arresting officer is not allowed to ask the suspect anything connected to the claim unless he has disclosed the cause of the arrest.[li] The law requires the Police to explain to the suspect the cause of his arrest in a language that the suspect is conversant with. To further

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protect the presumption of innocence, the Police must disclose his names and rank to the suspect.

Before the arrested person is asked anything in connection with the charges against which he has been arrested, the law requires the Police to caution the accused person. The caution, besides informing the suspect that he is under arrest, must notify him that anything that he says would be used against him in the course of a trial should the prosecution decide so.[lii] Any statement that is recorded by the Police without cautioning the suspect may not be used in the criminal proceedings. Indeed, the law recognises such statements as caution statements based on the fact that they are extracted after administrating a caution to the suspect.[liii] Despite this clear position of the law, the abuse is common. Arbitrary arrests are common and in violation of the Constitution.[liv]

The Right of Plea

Another important issue to address under this part is the accused's plea. When an accused person is first brought before the court charged with an offence by which the court has powers to take cognizance of the same, the first thing as required by the law is for the court to ask the accused person to plead to such charge. In other words, the court must read over, explain the charge to the accused, and ask the accused whether he admits or denies the allegations contained therein. The answer given to this question by the accused is what is called a plea of the accused.

The accused then, subject to the general right to remain silent, will have to plead either guilty, not guilty, *Autrefois convict* or *Autrefois acquit* or pardon.[lv] The law requires plea to be personal, voluntary, done by a fit person, and free or nobody can be forced to plead. Furthermore, an involuntary plead is void in law. A plea must be taken by a fit person capable of understanding the proceedings and what he is pleading to, including the effect of his plea in law.

According to case law, in order to ensure the justice of the accused person is served, the plea should be clear and unambiguous. This means that it must be an unequivocal plea. In the case *of Nyaku Ntandu v R,*[lvi] the court, after considering the facts and circumstances of the pleas, quashed the conviction and sentence. In the said case, it was found that the prosecution was not inconsistent with the accused's statement, if accused thought, as he had reason to believe,

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that the man who came to his house late at night was "an enemy," this would be a defense to the charge. The appellate court, in this case, stated that the accused did not unequivocally plead guilty to the charge.

It must not be overemphasized that when the accused pleads not guilty, he should be so presumed to be innocent. The prosecution then, takes the charge, on the presumption of innocence of the accused, to establish the offence against the accused person. This rule is so strongly founded in criminal justice such that the accused cannot be convicted on the basis of the weaknesses of his defense but the strength of the prosecution evidence. In criminal law, the burden of proof lies on the prosecution.[lvii]

Access to Bail by the Accused Person

The right to bail in Tanzania depends on different variables. These include the nature of the offence charged, the court before which the accused stands, and the stage of the trial. As shall be shown shortly, for bail to granted or denied, the accused person or the court for that matters, should clear some important matters. Briefly, the discussion below focuses on some crucial aspects of bail in Tanzania.

Bail under Committal Proceedings

Committal Proceedings refers to the proceedings held by a subordinate court with a view to committing the accused person for trial by the High Court.[lviii] The law provides that such proceedings must be conducted when the charge has been brought against the person for the offence which is triable the High Court, [lix] or if advised by the Director of Public Prosecutions or otherwise that it is not suitable to be disposed-off by way of summary trial.[lx]

The position regarding powers of subordinate courts to grant bail pending committal has had no smooth history. The court has expressed various positions and at times contrary views. For example, in the case of *Ayub Huberth & 6 Others vs R,*[lxi] the court held that in committal proceedings subordinate courts are not totally constrained from exercising all activities aimed at relieving the accused.

In another case of *Brown Joseph Undule & 5 Others vs Republic,*[lxii] the matter before the court was whether the Magistrate's Court conducting a Preliminary Inquiry had the powers to grant bail. The court finally held that subordinate Courts have powers to grant bail during committal proceedings, even though they do not have powers to try the offences charged.[lxiii]

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On the contrary, in *R vs Dodoli Kapufi & Another,*[lxiv] the High Court held that the Magistrate ought to have determined bail application. When the matter went to the Court of Appeal, although confining its decision on the facts of the said case only, the highest court of the land found that the subordinate court had powers to release the accused person on bail pending committal proceedings. It was made clear that a subordinate court has powers to grant bail pending committal. It stated that sections 148 (1) and (5) (a) of the CPA which are the principal provisions governing bail empower subordinate courts to admit accused persons before them to bail for all bailable offences. It was further held that the powers of a subordinate court covered offences triable by the High Court save for those specifically enumerated under section 148 (5) (a) thereof, for which no bail is grantable by any court.[lxv]

When the accused faces the charge triable by the High Court Corruption and Economic Crimes Division, the issue of bail is tricky. Different courts are seized with jurisdiction to grant bail in economic crime cases.[lxvi] First, if the subject matter does not exceed ten million, the subordinate court that conducts committal proceedings is empowered to grant bail.[lxvii] However, where the value of a property exceeds ten million, or the value is not known, the High Court normal registry is the one that can grant bail.[lxviii] Finally, after the committal of the accused to the Corruption and Economic Court, it is the same court that has jurisdiction to grant bail.[lxix] Although the rationale of vesting jurisdiction in different courts on the same subject matter is not known, the position is as shown above. It is undesirable, for the right to bail that stands so important to guarantee the right to be presumed innocent to be put in such suspense. The subordinate court would have been empowered to grant bail in all cases and relieve the overburdened High Court with the unnecessary load.

Bail Pending Trial or Appeal

The discussion of the right to be presumed innocent is inseparable to the right to bail. Indeed, the right to bail and presumption of innocence are two complementary and inseparable concepts.[lxx] If the accused is presumed innocent, that presumption alone justifies the right to bail.[lxxi] The right to bail forms one of the pillars of the rule of the law and thus any law that limits the right to bail infringes the provisions. Given its importance, it is argued that the higher judiciary should be left free to exercise their wisdom to grant bail or otherwise depending on the facts of each case. Doing otherwise, would mean allowing one arm of the government to set working limits to the other arm.[lxxii]

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The right to bail pending investigation of trial or even appeal is an operational arm of the principle of presumption of innocence. The Constitution of the United Republic of Tanzania does not contain an express Article on bail. However the fact that international conventions to which Tanzania subscribed to recognise the right to a fair trial that includes the right to bail, and the applicable jurisprudence in such conventions will help courts when interpreting the domestic laws and the Constitution. Understandably, it cannot be said that the conventions form the basis of statutory or constitutional interpretation, rather it is the philosophy, general purpose, and practices behind the conventions that are of significance.[lxxiii]

Any approach that courts in Tanzania will take, has to be in conformity with international obligations that she has undertaken. As a party to the International Covenant on Civil and Political Rights, 1966 (ICCPR) Tanzania has an obligation to follow the Convention regardless of the legal traditions and domestic law. Paragraph 4 of General Commentary No. 32, obliges member states to follow the provisions of the ICCPR regardless of their domestic legal regime.[lxxiv] Tanzania, like any other state, is bound by the principle of *pacta sunt servanda* to perform treaty obligations.[lxxv]

Article 15 (1) protects a person's freedom, Article 13 (6) (b) requires every person accused of any criminal offence to be presumed innocent until he is proved guilty. With regard to these Articles, an accused person is entitled to bail since he is constitutionally regarded as innocent until the contrary is proved. Additionally, an accused person has a constitutional right to freedom, which cannot be violated, without any reasonable ground in accordance with Article 15 (1). Different scholars and court decisions insist that bail in Tanzania has to be seriously treated as a right and not a privilege.[lxxvi]

Section 148 of the CPA governs bail in Tanzania. Despite the fact that bail is a right, under this section, the right to bail is taken away by recognition of non-bailable offences. This provision has brought several controversies on the accused person's right to be granted bail and it brings questions on its constitutionality. In the *DPP vs Daudi s/o Pete,*[lxxvii] the Court of Appeal had to decide on the constitutionality of section 148(5) (e) of the CPA. The Court observed as follows;

> *"In the final analysis therefore, but for different reasons, we agree that section 148(5)(e) is unconstitutional and therefore struck out of the statute book of the country. This means that the courts have discretion to grant bail to person accused of the offences specified under*

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section 148(5)(e) in accordance with the law as it existed before the enactment of section 148(5)(e)"

Apart from affirmation by the highest court of the land that bail is a right and not a privilege, there are several cases in which the High Court's decisions on the constitutionality of section 148 of CPA have been overruled.[lxxviii] The existing uncertainty on the determination of bail creates a state of a constitutional quagmire as far as the right to bail is concerned. This is due to the fact that provisions of section 148(5) of CPA, autocratically take away the right to bail provided under the Constitution without allowing room for due process of law.
In the case of *Rev. Christopher Mtikila vs Attorney General,*[lxxix] the court held that the Constitution is the basic or paramount law of the land and cannot be overridden by any other law. Hence, it follows that, all other laws must derive their validity and legitimacy from the Constitution and therefore the aforesaid provisions of the CPA have a constitutional controversy. This is so because while the Constitution of Tanzania, as noted in Articles 13 and 15 recognise the right to be presumed innocent, yet section 148 of the CPA takes away that right.

The High Court of Tanzania in a landmark case has held that the right to bail is a constitutional one and provisions of the law that infringe on the same are void to the extent of their contradiction.[lxxx] As such, bail should be made available to every person and anybody who thinks such a person does not deserve to be released on bail should approach the court to prove the contrary. This process will make sure that the right to be presumed innocent is protected until the contrary is proved. Otherwise, the prevailing legal framework would mean the opposite that the accused is guilty until proved innocent. This would defeat not only common sense and law but amounts to overhauling the entire criminal justice legal framework in Tanzania. As discussed in the previous chapter, also this goes contrary to what Tanzania undertook to respect in various international legal instruments that she signed and ratified.[lxxxi] Therefore, as it stands now, in Mainland Tanzania, the right to bail is not such worth guaranteed. The Constitution, which normally offers strong protection, falls short in Mainland Tanzania. The Constitution does not contain an express provision on the right to bail unlike other jurisdictions as shall be shown below. Furthermore, the Constitution contains a general limitation clause whose outcome is to make all rights contained in the Constitution not absolute such that they may be derogated any time through legislative means.

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THE COMPARATIVE ANALYSIS ON BAIL FROM OTHER EAST AFRICAN JURISDICTIONS

On the contrary, the law relating to bail in Zanzibar is quite different from that of her sister Mainland Tanzania. Following the introduction of the new Constitution of Zanzibar in 2010, there are provisions, which are relevant to the right to bail. The Constitution provides for the presumption of innocence, which as it has been already discussed before, calls for bail for any person alleged to have committed any criminal act.[lxxxii]

The Criminal Procedure Act, 2018 has provisions on bail. The Act defines bailable offence as an offence, in which the accused person may be admitted to bail by any court or Police in Charge of the Police station.[lxxxiii] It further defines non-bailable offence as an offence specified under section 151 (1) of the Act for which bail may be admitted only by the direction of the Chief Justice under section 151 (4) of the Act.[lxxxiv] This categorisation, serves no purpose in as far as bailable and non-bailable offences are concerned. Apparently, all offences in Zanzibar are bailable, except that jurisdiction to grant bail is vested in different levels. Despite the fact that the Act designates murder, treason, armed robbery, possession of firearms, drug trafficking, an offence relating to a large quantity of drugs, rape, unnatural offence, defilement of boy, gang rape or incest as non-bailable offences,[lxxxv] however, the same Act gives powers to the Chief Justice of Zanzibar to direct that any person charged with any of these offences be admitted to bail.[lxxxvi]

Like Zanzibar, Uganda and Kenya have gone far by safeguarding the principle of presumption of innocence in terms of the right to bail. The *Constitution of Uganda, the Magistrates Court Act*,[lxxxvii] *the Trial on Indictment Act,*[lxxxviii] *the Police Act*,[lxxxix] the *Ugandan People's Defense Forces Act*,[xc] and *the Criminal Procedure Code*,[xci] read cumulatively, guarantee the right to bail. The Constitution of Uganda expressly provides the right to bail.[xcii] It expressly entitles an accused person to apply to the court to be released on bail subject to the legal requirements and conditions, which must be fulfilled before the grant of bail.[xciii] In a progressive way, the Constitution of Uganda sets the time within which a trial has to commence. If the trial does not commence as stipulated, the person so charged has to be released on bail. It is provided that if the accused person has been in remand for One Hundred Twenty days before trial with respect to an offence triable by the High Court or subordinate courts, then the accused person is to be released on bail.[xciv]

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Furthermore, it is provided that if the accused person has been in remand for one Hundred and Eighty days in respect of an offence triable by the High Court, he or she is to be released on bail but subject to fulfilment of some requirements.[xcv] Moreover, the Constitution of Uganda embodies the principle of presumption of innocence.[xcvi]

Despite the Constitution of Uganda being express on the right to bail, the concept of non-bailable offences exist. However, this concept exists only as far as Magistrates' Courts are concerned. There are some offences, which are not bailable by Magistrates' Courts. For one to be granted bail under such circumstances he or she is supposed to apply to the High Court of Uganda. Although the wording used may be confusing, the technical legal consequence of the said provisions is that, there is no non bailable offence in Uganda. All offences are bailable, however, the right to bail is accessible at different court levels.[xcvii]

In Uganda, Courts have jealously protected the right to bail thus the presumption of innocence. In the case of *Layan Yahaya vs Uganda,*[xcviii] the Court observed that any court in Uganda, which denies an accused person from being granted bail, such Court would be acting unconstitutionally. Further, it has been held that the discretional powers of the Judges or Magistrates to grant or deny bail has to be logically determined by releasing the accused person on bail.[xcix]

Likewise, in the case *of Uganda Law Society vs Attorney General*,[c] the Constitution Court observed that what is absolutely guaranteed by the Constitution of Uganda is the right to apply for bail but it is not guaranteed that bail will automatically and absolutely be granted. The court will have to judiciously exercise its discretion as to whether to grant the accused bail or not. The test as to whether or not to grant bail, the court held, should be whether the accused will turn up for a trial or not.[ci] If the Court is satisfied that the accused will turn up, the accused should be released on bail.

The Position in Kenya is not different from the Ugandan one. The Constitution of Kenya of 2010 provides for absolute right to bail.[cii] The Constitution provides clearly that an arrested person has the right to be released on bail on reasonable conditions, pending a charge or trial unless there are compelling reasons not to be released. Like the Ugandan position, it is the duty of the Court to exercise its discretionary power to determine whether to grant bail or not. The Court is constitutionally required to grant bail save for only when there are compelling reasons

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not to do so. The compelling reasons are genuine possibilities of absconding and possible interference with witnesses.[ciii]

However, an impediment may be detected from *the Criminal Procedure Code*, which designates offences of murder, treason, robbery with violence, attempted robbery with violence and any related offence as non-bailable.[civ] This provision of the Code since the coming of the 2010 Constitution has been held to be unconstitutional although it has not been amended by the Legislature.[cv] Before 2010, the position in Kenya was the same as it is in Mainland Tanzania where there existed both bailable and non-bailable offences. Capital offences as mentioned above were not bailable.

In Kenya there is an important innovation regarding bail. This innovation is not found in laws enacted by the Parliament but it has developed through case laws. Such innovation is the recognition of anticipatory bail. Anticipatory bail is a bail pending arrest. Under this kind of bail, a person who has genuine reasons to believe that he is in imminent danger of being arrested may apply for bail to the court of law. The case of *W'Njuguna vs Republic*[cvi] is very relevant as it provides for a scenario when a person applied for anticipatory bail. In this case, the Court observed that, while it is true that the right to anticipatory bail or bail pending arrest is not specifically provided for by statute, such right is envisaged by Article 84(1) of *the Constitution of Kenya*.

Article 84 (1) of the Constitution offers any litigant an alternative and direct access to the High Court to pray for any order when there is an allegation that his fundamental rights and freedoms as provided for under Articles 77 to 83 of the Constitution have been or are likely to be contravened. The progressive interpretation of the Constitution by the Court, as can be seen, has brought not only protection but as well affirmed the right to a fair trial by guaranteeing the right to be presumed innocent.

CONCLUSION

The right to be presumed innocent cannot be replaced in any criminal trial within the context of a fair trial. The importance of the right is reflected in its recognition in major human rights international instruments. Moreso, the right is enshrined within the Constitution of Tanzania. It can thus be said that the right enjoys both domestic and international recognition. Indeed,

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General Comment provides the application of the international human rights jurisprudence within the domestic legal framework, regardless of the local position.

Notwithstanding the above position, the right to be presumed innocent has not receive full recognition because of the inefficient both in law and practice. However, we submit that, Tanzania has an obligation to meet its international obligations undertaken in various international instruments. That is why Tanzania has to observe the presumption of innocence even if its domestic legal framework has some deficits.

As discussed, the right to be presumed innocent is not fully enjoyed in Tanzania most specifically because of some laws that restrict the right to bail. Since bail is premised within the right to be presumed innocent, which is a fundamental right violation of which is only allowed upon conviction. This position is even well provided under international human rights law.[cvii] That being the case it appears that, designating some offences as non-bailable sounds violating this fundamental right of presumption of innocence and fair trial in general. This is the position that has been taken by most East African Countries and some parts of Tanzania.

WAY FORWARD

It has been shown that Tanzania is a member to various international human rights instruments. As shown, the right to be presumed innocent is non-derogatory one. The right should be guaranteed notwithstanding the domestic legal framework available. Tanzania signed and ratified the said instruments and options are limited than respecting the provisions of the said instruments. As said by Human Rights Committee,[cviii] Tanzania should amend its domestic laws to align to the international obligations undertaken.

Further, Tanzania is a member of the East African Community having signed and domesticated the Treaty that establishes the Community. Under the Treaty for the establishment of the Community, it is provided that the Partner States must harmonise their legal frameworks and their judgements. The Treaty provides

> *"…In order to promote the achievement of the objectives of the Community as set out in Article 5 of this Treaty, the Partner States shall take steps to harmonise their legal training and certification; and shall encourage the standardisation of the judgements of courts within the Community."*[cix]

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Now, Tanzania's position on bail is relatively different from that of its sister states in Uganda, Kenya, and Zanzibar. The harmonisation of positions in East African Jurisdictions is essential because it is the requirement of the Treaty. The positions in other East African jurisdictions as discussed above are seen as progressive. Indeed, as shown, it is unquestionable that the position in Tanzania is far behind other States. If it is harmonisation and standardisation, the Tanzania position needs to change and adopt the position applicable in other East African jurisdictions.

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[xiii] Article 7(b). Also see *the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 1998*

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[xxi] DE **Jong**, F., and **VAN, Lent**, L., (2016), *Ibid.*
[xxii] *Ibid.* Article 13(6)(b).
[xxiii] PETER, Chris. M., *Ibid.* See also Article 13 of the Constitution of the United Republic of Tanzania, 1977. (1997)
[xxiv] SHIVJI Issa G., *et al*,(2004), *Ibid.*
[xxv] See Article 13(6)(b) of the Constitution of the United Republic of Tanzania. It provides clearly as to the right to be presumed innocent until the contrary is proved before a competent court.
[xxvi] Article 30(1) of the Constitution of Tanzania provides that the right and freedom that are provided in the Constitution shall be exercised in a manner that does not cause interference or curtailment of rights of other persons.
[xxvii] See Article 31(1) of the Constitution of Tanzania.
[xxviii] See Article 23(1), *Ibid.*
[xxix] See Article 30(2) of the Constitution of Tanzania
[xxx] The Attorney General v Lesinoi s/o Ndeinai & Others [1980] T.L.R. 214.
[xxxi] See for example section 148 of the CPA that limits the right to bail in contravention to the right of presumption of innocence.
[xxxii] Section 148 (5) (b)-(e) of the CPA where offences that are unbailable are listed. These offences are murder, treason, armed robbery, and illicit trafficking of drugs. Also, section 19 of *the Written Laws (Miscellaneous Amendments) Act*, 2007, Act No. 15 of 2007 amended section 148 of the CPA to include Money Laundering as a non bailable offence
[xxxiii] The Economic and Organised Crimes Control Act was amended where various offences were added to the list of economic offence. Bail in such offences is cumbersome to secure.
[xxxiv] Cap 6 [R.E 2002].
[xxxv] John Magula Ndongo vs Republic. (*Supra*)
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[xxxvii] Criminal Appeal No. 51 of 2014 [2014] UGCA 49.
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[xlix] The Legal and Human Rights Center, (2018), Tanzania Human Rights Report 2017. The same thing is repeated in the Legal and Human Rights Center, (2019), Tanzania Human Rights Report 2018.
[l] The *Criminal Procedure Act*, *Op Cit.* Section 21 (1).
[li] *Ibid*, Section 53.
[lii] *Ibid.*
[liii] Section 53 of the CPA contains details of the caution that should be administered to the suspect before recording his statement. For instance, under section 53(c), the Police must notify the suspect that he is not obliged to answer any question asked of him by a police officer, other than a question seeking particulars of his name and address; and, that, subject to this Act, he may communicate with a lawyer, relative or friend.
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[lxii] Misc. Criminal Application No. 34 of 2008, High Court DSM, (Unreported).

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[lxxvii]*Ibid.*
[lxxviii] [1993] TLR 22.
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[lxxx] Dickson Paulo Sanga Vs The Attorney General, Miscellaneous Civil Cause No. 29 of 2019, High Court of Tanzania, Main Registry, (Unreported). In this case, the Court on May 18, 2020 gave the Government 18 months to amend section 148 of the CPA to give room for the Court to exercise the discretion in granting bail. However, the Respondent filed a notice of appeal on the same day. The position will clear perhaps after hearing of the said appeal.
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[lxxxii] Constitution of Zanzibar, 2010, Article 12 (6) (b).
[lxxxiii] *Criminal Procedure Act of Zanzibar*, 2018, section 2.
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2019, Unreported), declared these provisions as unconstitutional and ordered the necessary amendment to allow all Judges of the High Court to grant Bail.

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[lxxxviii] *The Trial on Indictment Act*, Cap 23.

[lxxxix] *The Police Act*, Cap 302.

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[xcv] *Ibid.* Article 23 (6) (c).

[xcvi] *Ibid.* Article 28 (3) (a).

[xcvii] According to section 75(1) of *the Magistrates Court Act*, the Magistrates' Courts in Uganda have no jurisdiction to grant bail in respect to offences of terrorism, cattle rustling, abuse of office, rape, embezzlement, causing financial loss, defilement, offences under the Fire Arms Act punishable by at least ten years imprisonment or more, offences triable by only the High Court, Corruption, Bribery and any other offences for which the Magistrate Courts have no jurisdiction to grant bail.

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