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# Bail in Mainland Tanzania: An Overview of DPP'S Certificate on Denial of Bail

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## Abstract:

Bail is a universally recognized fundamental human right. The right requires a person not be forfeited his liberty except after he has been proven guilty, in accordance with the law. The law relating to bail occupies an important position in the administration of criminal justice. Unusually, the Criminal Procedure Act, National Security Act and the Economic and Organized Crime Control Act have placed the DPP with the power to certify in writing the denial of bail. The DPP's power to certify in writing the denial of bail has a tremendous effect on the administration of criminal justice. This article analyses the DPP's power to certify in writing the denial of bail and its legal implications in the criminal justice of Tanzania. This article establishes that DPP's power to issue bail certificate is uncontrolled, thus power is prone to abuse. The article *inter alia* finds out that the DPP's certificate violates principle of equality before the law and right of fair hearing, it ousts mandate of Courts to grant bail, it violates separation of power, it makes bailable and non bailable offences redundant, it makes DPP a custodian of public interest instead of the Court and it leads to prisons and remands congestion. It is recommended that there is a need to entrench limitations through legislative framework, including empowering the Court to set a time limit on the operation of the DPP's certificate.

**Key Words:** *Bail, Criminal Justice, DPP's Certificate, Mainland Tanzania*

## 1. Introduction

This article examines the DPP's certificate on denial of bail to the accused person. The article starts by introducing the concept of bail, the historical overview of the DPP's certificate on bail in Mainland Tanzania, the validity of the certificate,

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the implications of the DPP's bail certificate in the administration of criminal justice lastly is conclusion and recommendations.

## **2. Concept of Bail**

Bail is a temporary release of an accused person upon certain conditions pending the finalization of Court proceedings.<sup>1</sup> In most cases, it is like a conditional discharge because the person's liberty at that particular time is tied up with conditions.<sup>2</sup> The right to bail is a fundamental human right guaranteed by various human rights instruments.<sup>3</sup> In Tanzania, no article in the Constitution that expressly provides for the right to bail. However, the Courts in Tanzania have interpreted Articles 13 (6) (b) and 15, which provide for the presumption of innocence and liberty, to include the right to bail.<sup>4</sup>

The right to bail is fundamental in the administration of criminal justice. It guarantees the presumption of innocence.<sup>5</sup> This presumption is to the effect that a person is presumed innocent until his guilt is proven by due process of the law.<sup>6</sup> The right to bail secures the appearance of the accused during trial.<sup>7</sup> The right to bail promotes individual liberty. In recognizing the importance of individual liberty, the Msekwa Commission believed that depriving an individual of his liberty is a most serious step to be taken. It is beyond rational controversy that to deny bail to an accused person who is not yet convicted of the offence

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<sup>1</sup>Peter, C. M., *Human Rights in Tanzania: Selected Cases and Materials*, Rudiger Koppe Verlag: Koln –Germany, 1997, at p. 527.

<sup>2</sup>*Freeman Aikael Mbowe & Another v. Republic*, High Court of Tanzania at Dar es Salaam, Criminal Appeal No. 344 of 2018 (unreported) at p. 14-15.

<sup>3</sup>Article 9 of the Universal Declaration of Human Rights, 1948, article 6 of the African Charter on Human and Peoples' Rights, 1981.

<sup>4</sup>Vitalis, T., "Bail in Economic Cases in Tanzania: A Critical Assessment on the Law, Procedure and Practice", at p 110, *Freeman Aikael Mbowe & Another v. Republic*, High Court of Tanzania at Dar es Salaam, Criminal Appeal No. 344 of 2018 (unreported) at p. 14-15 and *The Attorney General v. Jeremiah Mtobesya*, Civil Appeal No. 65 of 2016, Court of Appeal of Tanzania at Dar es Salaam (Unreported), at p. 61.

<sup>5</sup>Article 13(6) (b) of the Constitution of the United Republic of Tanzania, 1977. And *Mansoor Yussuf Himid v. Director of Public Prosecutions*, High Court for Zanzibar Holden at Vuga, Criminal Application No. 3 of 2014 at p 8-9 (Unreported).

<sup>6</sup>Peter, C. M., *Human Rights in Tanzania* at p. 529.

<sup>7</sup> Vitalis, T., "Bail in Economic Cases in Tanzania: A Critical Assessment on the Law, Procedure and Practice", *The Tanzania Lawyer, Volume 1 2019 Number 2* pp 110-142, at p. 110.

with which he is charged is to deny that individual his liberty.<sup>8</sup> The Commission went further and stated that a Court should only reach a decision to deny bail after most careful consideration of fact of the case, guided by law.<sup>9</sup> In this regard, only the Court is supposed to deny bail to the accused person.

The right to bail ensures that the accused person lives as a free man with minimal conditions.<sup>10</sup> It is said that the right to be free is a part of the right of access to criminal justice.<sup>11</sup> The right to bail promotes the right to work and assists the accused person in having time to meet his lawyer.<sup>12</sup> It embodies freedom from arbitrary detention and is a bulwark against punishment before conviction.<sup>13</sup> It also prevents the state from successfully employing its vast resources to cause greater damage to an un-convicted accused person than he can inflict on society.<sup>14</sup>

### **3. Historical Overview of DPP's Certificate on Denial of Bail in Mainland Tanzania**

To appreciate the current situation with regard to DPP's certificate on bail, it is important to trace the historical evolvement of the right of bail in Tanzania. In Tanzania, the right to bail was recognized even before the Universal Declaration of Human Rights of 1948. The right was provided by the Criminal Procedure Code of 1945.<sup>15</sup> The colonial government vested the powers to grant bail to the accused person in the hands of the police and the Court.<sup>16</sup> Under the Criminal Procedure Code, 1945, all offences wereailable except for murder and

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<sup>8</sup>Msekwa P. The Report of the Judicial System Review Commission, Dar es Salaam, Tanzania, 1977, at p.203.

<sup>9</sup>*Ibid.*

<sup>10</sup>*Mansoor Yussuf Himid v. Director of Public Prosecutions*, the High Court for Zanzibar, at Vuga, Criminal Application No. 3 of 2014, at p 8 (unreported).

<sup>11</sup> Information obtained in interview conducted in Dodoma with Advocate from Rweyongeza Company Advocates on 13<sup>th</sup> day of February, 2020.

<sup>12</sup> *Freeman Aikael Mbowe & Another v. Republic*, High Court of Tanzania at Dar es Salaam, Criminal Appeal No. 344 of 2018 (unreported) at p. 14-15.

<sup>13</sup>Bhandari. V., "Inconsistent and Unclear: The Supreme Court of India on Bail." *NUJS Law Review*, Vol. 6, No. 3, 2013, pp. 549-558 at p. 549.

<sup>14</sup>*Ibid.*

<sup>15</sup>Section 123 (1) of the Criminal Procedure Code, 1945.

<sup>16</sup>*Ibid.*

treason.<sup>17</sup> During colonial times, the DPP had no power to certify the denial of bail to the accused person in writing.

However, on some occasions, the enjoyment of the right of bail by the accused person did not make the DPP and prosecutors comfortable.<sup>18</sup> This is because in most occasions when prosecutors objected the grant of bail to the accused person, the Court disregarded the objection and instead granted bail to the accused person. The Court normally grants bail where the prosecutor or DPP failed to prove what he alleges against the accused person. When the prosecutor or DPP objected to the grant of bail to the accused person, let alone on the grounds of public safety or safety of the accused, the prosecutor was required to prove. The prosecutor was required to substantiate the allegations with solid grounds why the accused person should not be given bail.<sup>19</sup> Where the public prosecutors failed to discharge the burden of why the accused should not be given bail, the Court granted bail to the accused person.<sup>20</sup> The Courts could not deny bail to the accused person based on allegations. It was argued that if Courts were to act on allegations, fears, and suspicions, then the sky is the limit and one envisages no occasion when bail would be granted whenever such allegations are made.<sup>21</sup>

The burden of proof in objecting the denial of bail to the accused person complicated prosecutorial function. The prosecution department informed the Msekwa Commission of the need to vest prosecutors or DPP with the powers to limit bail to the accused person.<sup>22</sup> In turn, the Msekwa Commission advised the government on the need to limit the liberty of an individual in the following words:-

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<sup>17</sup>*Ibid.*

<sup>18</sup>Msekwa P. The Report of the Judicial System Review Commission, Dar es Salaam, Tanzania, 1977, at p.203.

<sup>19</sup>*Ibid.*

<sup>20</sup>*Ibid.*, at p. 205.

<sup>21</sup> Peter, C. M., *Human Rights in Tanzania: Selected Cases and Materials*, Rudiger Koppe Verlag: Koln –Germany, 1997, at p. 528.

<sup>22</sup>Above note 18.

There are situations however, in our considered view, in which, even if there was so much certainty the accused would almost surely turn up on the appointed date, the larger interest of justice and the community, and even those of the accused himself would require that bail be denied him albeit temporarily. Although it is not possible to give any definite description of such situations, we have in mind circumstance 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.

The Commission went further and recommended a provision to be enacted to match Section 123 (4) of the Criminal Procedure Code of Zambia, which provides as follows:-

Notwithstanding anything in this section contained no person shall be admitted to bail, either pending trial or pending appeal, if the Director of Public Prosecutions certifies that it is likely that the safety or interests of the Republic would thereby be prejudiced.<sup>23</sup>

However, in recognizing the impacts that the proposed provision of the law can bring, the Msekwa Commission cautioned that such a provision should be used sparingly and conscientiously as it may affect justice and liberty of the accused person.<sup>24</sup>

In abiding by the Msekwa Commission's advice, the government introduced Section 36 (2) in the Economic and Organized Crime Control Act, Section 19 in the National Security Act and Section 148 (4) in the Criminal Procedure Act.<sup>25</sup> For instance, in 1985, the DPP's power to certify in writing the denial of bail to the accused person was provided in the following terms:-

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<sup>23</sup>Msekwa. P.,The Report of the Judicial System Review Commission, Dar es Salaam, Tanzania, 1977, at p. 205.

<sup>24</sup>*Ibid.*

<sup>25</sup>*Ibid.*

Notwithstanding anything, in this section contained no person shall, for such period as the Court shall consider necessary in the circumstances of the, case concerned, 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 Republic would thereby be prejudiced.

In this provision, the DPP had the power to certify in writing the denial of bail to the accused person where he forms a position that the safety or interest of the Republic would thereby be prejudiced if the accused person is released on bail. However, the DPP's powers to certify in writing the denial of bail were under the Court's control. The Court was empowered to set the period of the DPP's certificate depending on the nature of the case concerned.

Later, Section 148 (4) of the Criminal Procedure Act was amended. The amendment removes the Court's control over the DPP's exercise of the power to certify in writing the denial of bail. Section 148 (4) of the Criminal Procedure Act, as amended, provides:

Notwithstanding anything in this section contained, no police officer or Court shall, after a person is arrested and while he is awaiting trial or appeal, admit that person to bail if the Director of Public Prosecutions, certifies in writing that it is likely that the safety or interests of the Republic would thereby be prejudiced; and a certificate issued by the Director of Public Prosecutions under this section shall take effect from the date it is filed in Court or notified to the officer in charge of a police station and shall remain in effect until the proceedings concerned are concluded or the Director of Public Prosecutions withdraws it.

Unlike in the old position where the DPP's certificate was subject to Court's control, the amendment removed the Court's ability to control DPP's certificate, denying the grant of bail. In the amended provision, once the certificate is filed in Court, the Court's hands to admit the accused person to bail are tied. The

accused person will have to stay in custody until the DPP withdraws the certificate or the concerned proceedings are concluded. Moreover, the DPP's certificate is left to operate in any case he considers appropriate. Currently, the DPP's certificate binds the Court<sup>26</sup> and the Court cannot control the DPP's certificate.<sup>27</sup> The Court of Appeal of Tanzania said that once the DPP's bail certificate is filed in a Court of law in Section 148 (4) of the CPA will have no other option than not to grant bail. Thus, in terms of the impugned provision, a Court is, so to speak, not only compelled to accede to the DPP's *ex parte* statement of fact, which is not supported by any evidence, but the statute also tells the Court what order to give, that is to refuse bail.<sup>28</sup>

The Criminal Procedure Act, the Economic and Organized Crime Control Act and the National Security Act of Tanzania make the DPP an adjudicative body of bail concerning the accused person.<sup>29</sup> Through this power, many accused persons have stayed in custody while waiting for their trial in the Court. In the event the DPP is not interested in the grant of bail to the accused person, he can file his certificate. The DPP's certificate is not arguable in Court as it operates as a direct order, what the Court has to do is to implement the DPP's decision not to grant bail to the accused.<sup>30</sup>

Thus, this article argues that this power is wrongly placed in the hands of the DPP and is prone to abuse as it has no control mechanism in place. This is grounded on the position that, since the DPP has no power to grant bail, he ought not to have the power to deny bail.<sup>31</sup> The power to deny bail ought to be exercised by the Court. The power to deny bail is wrongly vested to a person who

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<sup>26</sup>*Ibid.*, at p. 6.

<sup>27</sup>*Director of Public Prosecutions v. Li Ling Ling*, Court of Appeal of Tanzania at Dar es Salaam, Criminal Appeal No. 508 of 2015 at p 4-5.

<sup>28</sup> *The Attorney General v. Jeremiah Mtobesya*, Civil Appeal No. 65 of 2016, Court of Appeal of Tanzania at Dar es Salaam (Unreported), at p. 61.

<sup>29</sup> *Ibid.*, at.p.62

<sup>30</sup>*Ibid.*

<sup>31</sup> Section 36 (2) of the Economic and Organized Crime Control Act, Cap. 200 [R.E 2019].

does not have the power to grant the same. The power to deny bail ought to be exercised by the person who has the power to grant it.

Currently, in Mainland Tanzania, the DPP's power to certify in writing the denial of bail is still in force under the National Security Act<sup>32</sup> and the Economic and Organized Crime Control Act.<sup>33</sup>

#### **4. Validity of the DPP's Bail Certificate**

As noted above, the DPP has the power to certify the denial of bail in writing. However, for the DPP's certificate to be valid, it is supposed to meet the conditions stipulated by the law. The DPP's certificate will be valid if it meets the following two conditions: Firstly, the DPP must certify in writing.<sup>34</sup> Secondly, the certificate must be to the effect that the safety or interests of the United Republic are likely to be prejudiced by granting bail in the case.<sup>35</sup> Third, the certificate must relate to a criminal case, either pending trial or pending appeal.<sup>36</sup> There is no condition compelling the DPP to substantiate with evidence the nature or safety of the public when certifying in writing the denial of bail.<sup>37</sup>

#### **5. Mandate of the Court over DPP's Bail Certificate**

In Tanzania, the Court is the supreme organ in the dispensation of justice.<sup>38</sup> Being the case, the all parties to the case are subjected to the Court.<sup>39</sup> The Court is required to be above the accused person and the DPP in all aspects of the trial.<sup>40</sup> Court supremacy does not prefer the tendency of giving the DPP powers above the Court. According to the doctrine of court supremacy, it is wrong to

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<sup>32</sup> Section 19 of the National Security Act, Cap. 47 [R.E 2002].

<sup>33</sup> *Ibid* note 31.

<sup>34</sup> *Director of Public Prosecutions v. Ally Nur Dirie and Another* [1988] TLR 252 at p. 257.

<sup>35</sup> *Ibid*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> Article 107 A (1) of the Constitution of the United Republic of Tanzania, 1977.

<sup>39</sup> Enrique, F. M., "Judicial Supremacy." *Philippine Law Journal*, Vol. 23, No. 4, 1948, p. 607-634 at p 608.

<sup>40</sup> Patterson, C. P., *Presidential Government in the United States; The Unwritten Constitution*. Chapel Hill, University of North Carolina Press. P 8.

empower the DPP to have powers which bind the Court. If the DPP's certificate binds the Court, then it is likened to saying that DPP's certificate is above the Court.<sup>41</sup>

The Court's mandate over the DPP's certificate was one of the issues in the case of *Director of Public Prosecutions v. Li Ling Ling*.<sup>42</sup> In this case the Applicant (*Li Ling Ling*) made a bail application before the High Court. In his counter affidavit, the DPP filed a certificate denying the issuance of bail to the Applicant. However, the High Court admitted the Applicant to bail. The High Court was of the view that the DPP's certificate could not bind the Court.<sup>43</sup>

Later on, the DPP appealed to the Court of Appeal of Tanzania. One of the grounds of appeal was that the High Court Judge erred in law in admitting the respondent to bail despite the DPP's certificate.<sup>44</sup> In the Court of Appeal, the issue for determination was whether the Trial Judge erred in law in admitting the respondent to bail despite the certificate filed by the DPP objecting bail. After submission of the parties to the appeal, the Court of Appeal held that the High Court erred in admitting the respondent to bail. This is so because the DPP had filed his certificate, and he had not withdrawn it or the proceeding had not yet ended. Thus, the Court of law does not have the power to rule against the DPP's certificate, once the certificate is properly filed in the Court by the DPP. Legally speaking, a decision of the Court of Appeal of Tanzania is binding to all courts and tribunals subordinate to it, regardless of its correctness<sup>45</sup>.

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<sup>41</sup> *The Attorney General v. Jeremiah Mtobesya*, Civil Appeal No. 65 of 2016, Court of Appeal of Tanzania at Dar es Salaam (Unreported), at p. 61

<sup>42</sup> *Director of Public Prosecutions v. Li Ling Ling* High Court of Tanzania at Dar es Salaam, Criminal Appeal No. 508 of 2015 at p 4-5 (unreported).

<sup>43</sup> *Ibid.*, at p 4-5.

<sup>44</sup> *Ibid.*, at p 6.

<sup>45</sup> *Jumuiya ya Wafanyakazi Tanzania v. Kiwanda cha Uchapishaji Tanzania*, [1988] TLR 146.

## **6.0 Implications of DPP's Bail Certificate in the Administration of Criminal Justice**

The DPP's bail certificate has impact on the administration of criminal justice. It has impacted both to the Court, the accused person and the government in the manner as hereunder;

### **6.1 Violation of the Principle of Equality Before the Law**

The right to equality before the law is a fundamental human right. This right is guaranteed by the Constitution of the United Republic of Tanzania<sup>46</sup> and international human rights instruments.<sup>47</sup> This right requires the parties in a case to be treated equally and be placed equally in the eyes of the law.<sup>48</sup> Under this principle, judges must ensure that all persons' rights are equally protected.<sup>49</sup>

Ordinarily, there are two competing parties in criminal trials, namely the Republic (DPP) and the accused person. Under the adversarial system, the DPP and the accused person deserve similar and equal treatment by the law.<sup>50</sup> They need equal treatment and protection because the DPP is no more than a party to a proceeding.<sup>51</sup> But in Tanzania, laws under discussion have vested the DPP with powers to the extent that he can curtail the accused person's liberty. The laws in Tanzania have made the DPP over and above the accused person. The DPP's certificate is against equality before the law. The Court of Appeal of Tanzania said that it is utterly repugnant to the notion of equality before the law for the legislature to allot so much power to one of the parties to a proceeding.<sup>52</sup>

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<sup>46</sup>Article 13 (1) of the Constitution of the United Republic of Tanzania, 1977.

<sup>47</sup>Article 7 of the Universal Declaration of Human Rights, 1948.

<sup>48</sup>*Ndyanabo v. Attorney-General* [2002] 3 LRC 541.

<sup>49</sup>Commonwealth Human Rights Initiative, *Fair Trial Manual; A Handbook for Judges and Magistrates*; (United Kingdom, London: 2010), at p. 8.

<sup>50</sup>*Attorney General v. Jeremiah Mtobesya*, Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 65 of 2016 (unreported) at p. 62.

<sup>51</sup>*Attorney General v. Jeremiah Mtobesya*, Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 65 of 2016 (unreported) at p. 62.

<sup>52</sup>*Ibid.*

Giving one party to a proceeding more power is to contradict the principle of equality before the law.<sup>53</sup>

This paper supports the decision of the Court of Appeal in the case of *Attorney General v. Jeremia Mtobesya*. In this case the Court of Appeal held that, it is not proper for the law to grant so much power to one of the parties to a proceeding so that he can deprive the other party of his liberty to the extent that the victimized party as well as the Court, are rendered powerless. There can be no equality if the legislature allows one party to a proceeding the power to block bail and deprive the other of his right to bail,<sup>54</sup> by allowing the DPP to order the Court not to grant bail to the accused person the right to equality before the law is infringed.<sup>55</sup>

## 6.2 Violation of the Right of Fair Hearing

The adjudication rules require the decision maker to hold a fair hearing before making a decision. Fair hearing is founded on the right to be heard, which requires the parties to the case to be heard, the rule against bias in the sense that no man is supposed to be a judge in his cause, and the right to be given reasons for the decision.<sup>56</sup> The right to fair hearing is important in the administration of criminal justice. If this right is violated in respect of any decision, that decision must be declared null and void.<sup>57</sup> The High Court of Tanzania held that a fair hearing is founded on natural justice, which requires that no man shall be a judge in his case (*nemo iudex in causa sua*) and that no man shall be condemned unheard (*audi alteram partem*).<sup>58</sup>

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<sup>53</sup>Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977.

<sup>54</sup> *Attorney General v. Jeremia Mtobesya*, Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 65 of 2016 (unreported) at p. 62

<sup>55</sup> Peter, C. M. Amicus Curiae Brief in the case of *Attorney General v. Jeremia Mtobesya*, Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 65 of (unreported).

<sup>56</sup>*Cowasjee (Aden) v. Cowasjee* (1963) EA 84 at p. 88. See also Chipeta, B.D., *Administrative Law in Tanzania*, at p. xl.

<sup>57</sup>*General Medical Council v. Spackman* (1943) AC 627 at p. 644.

<sup>58</sup>*Felix Mselle v. Minister for Labour and Youth and Three Others* [2002] TLR 447.

The Court of Appeal of Tanzania held that the provision of Section 148 (4) of the Criminal Procedure Act denies the accused person a meaningful opportunity of being heard before he is denied bail by operation of the DPP's certificate. It has been clearly observed that in the conduct of criminal proceedings, the DPP is a party to the case together with the accused person.<sup>59</sup> Although the DPP is a party to the case, he is given the power to decide that the accused person should or should not be entitled to enjoy the right of bail. This power has made the DPP a decision decision-maker in his own cause. On top of that, the accused person is not given an opportunity to challenge or object the certificate.<sup>60</sup> This power of the DPP breaches the right to a fair hearing.<sup>61</sup> Breach of fair hearing is a travesty of justice.<sup>62</sup>

It is argued in this study that the Courts' inability to grant bail to the accused person on the ground of the DPP's certificate is to bar the enjoyment of the right to bail and fair trial to the accused person.<sup>63</sup> The right to a fair trial is fundamental to the rule of law and democracy, and this right is absolute and cannot be limited.<sup>64</sup> A fair hearing requires the Court to hear both parties to the case. Similarly, the duty to grant or refuse to grant bail should be vested in the Courts and not otherwise. The DPP being a party to the case, should not hold monopoly rights to determine the liberty of the other. The DPP's certificate has the illusory effect, which determines the outcome of the question of bail and thus does not confer the opportunity to the accused person to exercise his constitutional right of being heard.<sup>65</sup>

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<sup>59</sup> Above note. 52

<sup>60</sup> *Ibid* at p. 62.

<sup>61</sup> *George Lugga Maliya Mkono v. Principal Secretary of the Ministry of Science, Technology and Higher Education and 2 Others* [2000] TLR 48; and Ssekaana, M., *Public Law in East Africa*, Law Africa, Kampala, (2013) at p. 143.

<sup>62</sup> *Sadiki Athuman v. Republic* [1986] TLR 238.

<sup>63</sup> *Emmanuel Simforian Massawe v. Republic*, Court of Appeal of Tanzania at Dar es Salaam, Criminal Appeal No. 252 of 2016, (unreported) at p. 3.

<sup>64</sup> *Ibid.*, at p. 6.

<sup>65</sup> *Ibid.*

### 6.3 It Ousts Mandate of Courts on Bail

The DPP's certificate has implications for the administration of criminal justice. The implication is that, once the DPP's certificate is filed in Court, no court can admit that person to bail until the proceedings concerned are concluded or the DPP withdraws it.<sup>66</sup> These provisions derogate the mandate of the Court in dealing with matters of personal liberty.<sup>67</sup> The DPP's certificate bars the Court from entertaining and granting bail to the accused person. Simply put, the law dictates what the Court should or should not do.<sup>68</sup> Thus, the DPP's certificate under these provisions renders the Court powerless to grant bail to the accused person.<sup>69</sup>

This paper observes that courts of law have no power to grant bail to the accused person where the DPP has filed a certificate in terms of the provision of Section 36 (2) of the Economic and Organized Crime Control Act and Section 148 (4) of the Criminal Procedure Act. It is submitted that the DPP's power to certify in writing the denial of bail to the accused person curtails the Court's mandate to entertain and grant the bail application. The provision such as this renders the Court helpless when the accused person makes an application for bail considerations. It is not correct for the law to allow power to the DPP to the extent that he can file a document that binds the Court while the Court is the final authority in the dispensation of justice in Tanzania.

### 6.4 It Leads to Violation of Separation of Powers

The doctrine of separation of powers states that a different body of persons is to administer each of the three organs of the state.<sup>70</sup> None of them has a controlling

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<sup>66</sup>Section 36 (2) of the Economic and Organized Crime Control Act, Cap.200 [R.E 2019]; and Section 148(4) of the Criminal Procedure Act, Cap.20 [R.E 2019].

<sup>67</sup>Above note 62.

<sup>68</sup>*Attorney General v. Jeremiah Mtobesya*, Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 65 of 2016 (unreported) at p. 62.

<sup>69</sup>*Director of Public Prosecutions v. Ally Nur Dirie and Another* [1988] TLR 252 at p. 256.

<sup>70</sup>Fineface. O., "The Theory of Separation of Powers in Nigeria: An Assessment", *African Research Review, An International Multidisciplinary Journal, Ethiopia Vol. 6(3) Serial No. 26 of 2012*, pp. 127-134, at p 127.

power over either of the others. To preserve the liberty of the individual and avoiding tyranny, separation of powers is necessary.<sup>71</sup> Usually, enforcement of laws undertaken by the DPP falls within the ambits of the executive arm of state. The United Republic of Tanzania's Constitution recognises the separation of powers doctrine. Suppose doctrine of separation of powers is a constitutional principle. In that case, it does not make sense to allow the DPP, a member of the executive responsible for prosecuting cases on behalf of the government, to control bail and individuals' liberty, which is a judicial issue.<sup>72</sup> The DPP's certificate on non-grant of bail violates the separation of powers and, more so, constitutes a gross violation of the Court's power on bail consideration.

### **6.5 It makes bailable and non-bailable offences redundant**

Several laws of Tanzania empower the Court to grant bail to the accused person.<sup>73</sup> The Court grants bail to the accused person if the offence committed by the accused person is bailable. Likewise, the Court denies bail to the accused person where the offence committed is non-bailable.<sup>74</sup> Categorizing offences to bailable and non bailable was designed to make the public aware of what offences bail can be enjoyed as a matter of right.

However, the DPP's certificate operates in bailable offences where bail is a right. As observed earlier, the DPP certificate tends to deprive person liberty once filed in Court. The DPP certificate has made the categorization of bailable and non-bailable offences meaningless because the DPP, if he so desires, may curtail the right of bail for an accused person even though the offence committed is ordinarily bailable.

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<sup>71</sup> *Ibid.*

<sup>72</sup>Peter, C. M. *Amicus Curiae* Brief in the case of *Attorney General v. Jeremiah Mtobesya* Civil Appeal No. 65 of 2016 Court of Appeal of Tanzania at Dar es Salaam (unreported).

<sup>73</sup>Article 13 (6) (b) of the Constitution of the United Republic of Tanzania, 1977 and section 148 (1) of the Criminal Procedure Act Cap.20 [R.E 2019].

<sup>74</sup> Article 13 (6) (a) of the Constitution of the United Republic of Tanzania, 1977; and section 148 (1), (4) and (5) of the Criminal Procedure Act, Cap.20 [R.E 2019]. This is due to the reason that, the anatomy of the Criminal Procedure Act, Cap. 20 [R.E 20002] have categorized offences to bailable and non bailable offences; and *Freeman Aikael Mbowe & Another v. Republic*, High Court of Tanzania at Dar es Salaam, Criminal Appeal No. 344 of 2018 (unreported) at pp. 14-15.

## 6.6 The Certificate makes the DPP a custodian of Public Interest

The law empowers the DPP to order the Court to deny the accused person bail on the ground of public interest. When the DPP certifies the denial of bail in writing, no Court can admit the accused person to bail.<sup>75</sup> Limiting the Court's authority to grant bail by the DPP's certificate on the ground of public interest is to make the DPP a custodian of public interest instead of the Court. It is argued that the DPP's office cannot take care of the public interest.<sup>76</sup> Under the guidance of the Court of Appeal of Tanzania, the Courts of law are the real custodians of public interest.<sup>77</sup> Thus, the DPP should be barred from issuing these certificates to keep people in custody whose guilt has never been determined by the Court. In this regard, Peter argues that it is equally dangerous in a democratic State to entrust citizens' liberty to public officials with a vested interest in the regime in power<sup>78</sup>. There should be no room for individuals to determine the fate of others. Let us trust our Courts, and if the DPP has any burning case, it is easy to file it in court under a certificate of urgency.<sup>79</sup>

## 6.7 It leads to Prisons and remands Congestion

It is a practice that once the police arrest a person and is kept in police custody pending finalization of investigation or bail arrangement. After having prepared a charge, the accused person will be arraigned to the Court for trial. The Courts will put down the bail conditions where the offence committed attracts bail. Once the accused person fulfils the conditions set by the Court, the accused person will be discharged on bail. The discharge of the accused person on bail reduces the number of inmates. In the contrary, the DPP certificate is acting against the release of the accused person on bail pending trial or appeal. The DPP certificate favours keeping people in custody rather than discharging them.

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<sup>75</sup> Section 148 (4) of the Criminal Procedure Act, Cap. 20 [R.E 2019].

<sup>76</sup>Peter, C.M., Amicus Curiae Submission in the case of *Attorney General v. Jeremiah Mtobesya* Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 65 of 2016 at p. 7 (unpublished)

<sup>77</sup>*Ibid.*

<sup>78</sup> *Ibid*

<sup>79</sup>*Ibid.*

## **7. Conclusion and Recommendations**

### **7.1 Conclusion**

The application of the DPP's certificate on non-grant of bail has negatively affected the accused persons' right to bail, which is his fundamental right. Generally, it has been established that Courts do not have a mandate to grant bail where there is a DPP certificate objecting to the grant of bail to the accused person. In this regard, the certificate has made the DPP's certificate superior to the Court. The supremacy of the DPP's certificate over the Court violates the doctrine of court supremacy. The doctrine of court supremacy was aimed at making the Court paramount in administering justice.

Furthermore, the Court is not empowered to reject the DPP's certificate on non-grant of bail. As a final arbiter in the administration of justice, the Court must have the power to reject the DPP's bail certificate if it appears to do so. The author does not opine that the Court should be free from the check and justifiable interference. The author submits that the check and interference to the Court should be those resulting in upholding justice and are prescribed by law.

### **7.2 Recommendations**

The author gives recommendations for curbing the stated difficulty. The relevant laws, particularly the Criminal Procedure Act, the National Security Act and the Economic and Organized Crime Control Act, should be amended to impact the following as far as the exercise of DPP's certificate on non-grant of bail is concerned;

Firstly it is recommended that the provision of Section 19 (1) and (2) of the National Security Act, Section 36 (2) and (3) of the Economic and Organized Crime Control Act and Section 148 (4) of the Criminal Procedure Act empowering the DPP to certify in writing the denial of bail should be repealed. These laws need to be repealed and replaced for the reason that they abrogate Articles 13 (6) (a) and 107 A (1) of the Constitution of the United Republic of Tanzania.

Secondly, in the alternative, it is also recommended that the provisions which empower the DPP to certify in writing the denial of bail need to be amended. The amendment should introduce a condition that the DPP must disclose the nature of the public interest, which will be affected if the accused person is released on bail. This is important because the way the laws stand now, the accused person is denied bail based on suspicion. While it is a position of the law, suspicion, whenever strong, should not form a base of denying someone his liberty.

Thirdly, it is recommended that the provision of Sections 19 (1) and (2) of the National Security Act, Sections 36 (2) and (3) of the Economic and Organized Crime Control Act and Section 148 (4) of the Criminal Procedure Act should be amended to make the Court over and above the DPP. The Court should control the DPP's power where its exercise is against the interest of justice. The certificate of the DPP operates as an order which need to be complied by the Court. The current position of the law on DPP's certificate makes the Court inferior to the DPP. Subjugating the Court to the DPP is improper. After all, constitutionally, the Court is the final authority in dispensing justice in the United Republic of Tanzania.

Fourthly, the provisions should be amended to afford an accused person a right to be heard. The right to be heard is pivotal in the administration of criminal justice. Before a person is deprived of his liberty or interest, he must be allowed to present his defence. The impugned provisions that empower the DPP to certify in writing the denial of bail do not prescribe any procedure, let alone which is reasonable, fair and appropriate to govern the issuance of the certificate. The impugned provisions do not afford the accused person an opportunity to be heard before his liberty is taken away by the operation of the DPP's certificate. That being the case, Sections 19 (1-2) of the National Security Act, 36 (2-3) of the Economic and Organized Crime Control Act, and 148 (4) of the Criminal Procedure Act violate Article 13 (6) (a) of the Constitution of the United Republic of Tanzania (1977), which guarantees the right to be heard. Thus, the proposed amendment will harmonize the laws on bail with the Constitution.

Lastly, the law should be amended to make the Court a custodian of public interest. This is because in the administration of criminal justice, public interest can be taken care of if it is placed in the hand of the neutral party, i.e., the Court of law. In a democratic state like Tanzania, it is not safe to place the public interest in the DPP who has an interest over the matter. As far as justice is concerned, even if the DPP's certificate will operate to safeguard public interest, since the same DPP has interest in the proceeding at hand, one may safely say that the DPP wants to punish the accused unfairly. There should be no room for individuals to determine the fate of others. Let us trust our Courts that they are more capable of taking care of the public interest than the DPP. If the DPP has any burning issue, he should not have the power to curtail the liberty of another, but he must make an application to the Court to impartially determine it.