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LOCATING THE SCOPE AND APPLICATION OF THE RIGHT TO PRESUMPTION OF INNOCENCE IN TANZANIA

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Research Article

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ABSTRACT

This article is a result of a research conducted on the Right to Presumption of Innocence: its Scope and Application in the Legal System of Tanzania. One of the most important constitutional rights of the individual in the present liberal democratic and civilized states is the presumption of innocence. Tanzania is one of the democratic and civilized countries which contain the right to the presumption of innocence in her constitution. This article seeks to analyse the scope and application of the said right under the legal system of Tanzania with the view of identifying the problems and obstacles towards its effective enforcement and suggest solutions thereto. The Article explores the essence, meaning and historical development of the said right. It further discusses the ideal scope and application of the right to presumption of innocence as expounded by other writers, and then the author adopts the same approach in examining the constitutional provisions and the judicial approach in interpretation of the right to presumption of innocence in Tanzania. The Article reveals that among the obstacles towards full realization of the right to presumption of innocence are restrictions on the constitutional provision, presence of other laws which are inconsistent with the right to presumption of innocence and judicial conservatism in giving a liberal and broader interpretation to the right to presumption of innocence.

KEY WORDS: scope and application, right to presumption of innocence, Tanzania.

Introduction

This article is a result of a research conducted on the Right to Presumption of Innocence: its Scope and Application in the Legal System of Tanzania. One of the most important constitutional rights of the individual in the present liberal democratic and civilized states is the presumption of innocence which denotes that any accused or suspected person should not be considered or treated guilty unless proved guilty by due process of law.¹ Essentially, the rationale for the presumption of innocence is to protect individual liberties and freedoms against arbitrary arrests, punishments, imprisonment, confinement, detentions and deportation by the state.

Originally, the presumption of innocence was considered as a rule of evidence in criminal justice which meant to place the burden of proof on the prosecution, to prove beyond reasonable doubt the guilt of the accused person. However, as noted by *Ian Dennis*,² the presumption of innocence applies to any decision-maker; and it reflects moral and political values that are regarded as sufficient enough in liberal states to elevate the rule about the burden of

¹ Michael Clements (2005) Virtually Free from Punishment Until Proven Guilty: The Internet, Web-Cameras and the Compelling Necessity Standard, 12 RICH. J.L. & TECH. 4

² Ian Dennis (2007) the Law of Evidence, 3rd Ed, Sweet & Maxwell Ltd, p.443

proof to the status of a fundamental human right, and protection of individual's liberty, dignity and privacy. It therefore requires the state to justify fully its invasion of the individual's interests by proof that an individual has committed an offence, thereby abusing the freedom of action accorded to him or her by the liberal state.³ Therefore, for a country to claim to be in compliance with the right to the presumption of innocence, examination has to be made not only on the burden of proof in criminal trials, but also on other aspects, including: branches of law and processes that may affect the same, such as the law relating to the process of accusation, investigation, arrest, detention, preparation and tendering of evidence, prevention of crimes, reporting of crimes, and the law relating to hearing and decision making. In either way, any suspect or accused person should not suffer in any way as if he/she is guilty before being proved guilty by due process of law. In this view, the presumption of innocence goes further beyond public decision makers, to the public at large. It requires the public not to take the law into their hands to punish suspects, for doing so is the same as treating them guilty while that may not be the case unless proved otherwise by the courts of law or tribunals legally established by law. As such, the laws of the country that adhere to the right to the presumption of innocence should be harmonized to the effect that the presumption of innocence is fully observed.

Tanzania is one of the democratic and civilized countries which contain the right to the presumption of innocence in her constitution.⁴ Despite having the said constitutional right, its scope and application is not much clear. Therefore, this article seeks to analyse the scope and application of the said right in Tanzania with the view of identifying the problems and obstacles towards its effective enforcement and suggest solutions thereto.

Methodology

The findings in this article were gathered through qualitative research. By this approach, qualitative data was collected through documentary review, in-depth interviews and questionnaire survey. The researchers employed a cross-sectional survey design through which both primary and secondary documents were collected. Administration of questionnaires and Interviews were also conducted in two regions: Morogoro and Dar-es-Salaam. A total number of thirty (30) respondents, i.e. five ordinary citizens; five experts of criminal and constitutional law; five senior advocates of the High Court of Tanzania (two from Dar es Salaam and three from Morogoro); five accused persons released on bail; five prosecution and investigation police officers; and five senior resident magistrates were selected through purposive sampling.

The information gathered from documentary review and field respondents were processed and analyzed qualitatively. The qualitative analysis of data involved a process of preparing, organizing and categorizing the data collected in accordance with the objectives of the study and the research questions. Qualitative analysis of documentary data employed content analysis approach and logical scrutiny of the Constitutional and Statutory provisions upon which conclusions were drawn on the Right to Presumption of Innocence: its Scope and Application in the Legal System of Tanzania. The analysis of empirical data was also qualitative but with simple descriptive statistics through the aid of IBM-SPSS 20 soft ware. Responses which appeared common were coded and entered on the IBM-SPSS 20 package. The uncommon responses were also coded in the category of *any other* so as to simplify the analysis. After data screening and exploration by descriptive statistics the data were descriptively evaluated to draw inferences upon the objectives of the study and research questions. The next section analyses the key concepts of the study.

Meaning of the Presumption of Innocence

The term presumption on one hand means a conclusion or inference as to the truth of some fact in question drawn from other facts proved or admitted to be true.⁵ On the other hand, the term innocence means not guilty, harmless, or knowing nothing of evil or wrong.⁶ Thus the phrase presumption of innocence means a conclusion or inference as to the truth of a person being not guilty, harmless, or knowing nothing of evil or wrong.

Although it is termed 'presumption', the presumption of innocence is in fact a fundamental principle underlying the criminal law⁷ and enforceable under the Bill of Rights as enshrined in the Constitution of the United

³ Ibid

⁴ Provided for under Art.13 (6) (b).

⁵ Osborn's Concise Law Dictionary 8th Ed, 1993,p.258

⁶ A.S Hornsby, Oxford Advanced Learners Dictionary of Current English, 8th Ed, Oxford University Press, 2010.

⁷ Oxford Dictionary of Law, 5th Ed,2002,p.378

Republic of Tanzania. The basic proposition underlying this right is that a person is innocent until there is a judicial determination of guilt, and therefore, a person held in confinement as a pre-trial detainee cannot "be subjected to any form of punishment for the crime which he is charged with."⁸ The presumption of innocence only ends once a person is convicted of a crime or enters a plea of guilty and is sentenced.⁹

The origin and History of the Presumption of Innocence

The right to presumption of innocence (*Ei incumbit probatio qui dicit, non qui negat*) originates from the common law criminal jurisprudence. However, even in England, there is nobody who can exactly tell as to when the idea of presumption of innocence had originated. Some scholars have claimed that the maxim has been firmly embedded in English jurisprudence since earliest times in the Anglo-Saxon period.¹⁰ But the maxim can expressly be found in neither the Magna Carta, nor the English Bill of Rights of 1689,¹¹ save by implication it can be said to have been enshrined in the Habeas Corpus Act of 1679, which contained the principle that "*nobody may be arbitrarily detained without having his case heard in a court of law.*" On the other hand, the French, with their legal system based on Roman jurisprudence, included an article in the French Declaration of the Rights of Man and Citizen of 1789 stating that 'every man is presumed innocent until declared guilty'.¹²

In the case of *Coffin v. USA*¹³ the Supreme Court of USA traced this concept from the past England, the Ancient Greece and the Ancient Rome, but the Court could not exactly come up with sufficient evidence as to when exactly the concept had started. Despite lacking an exact starting point, by implication, the concept has been accepted even in religious books. For instance, the right to presumption of innocence is impliedly recognized in the story of Adam and Eve in Paradise.¹⁴ The same also may be found in the book of Deuteronomy.¹⁵ When Moses decreed that the truth could be found in the testimony of two or three witnesses, he pronounced a basic rule of evidence and confirmed the antiquity of a system of procedure accepted by God himself. This is evidently in the sense that if God must summon litigants to defend themselves mere human beings must also summon them and presume that every accused is innocent until proved guilty in court.¹⁶

The right to presumption of innocence became an absolute right and gained great momentum in the twentieth century when it found its way into various international and regional instruments. The United Nations incorporated the principle in its Declaration of Human Rights in 1948;¹⁷ and Europe enacted it in the European Convention for the Protection of Human Rights in 1953.¹⁸ It was further incorporated into the United Nations International Covenant on Civil and Political Rights, 1966¹⁹ and under Art.7 (1) of the African Charter on Human and Peoples' Rights, 1981.²⁰

In Tanzania, the presumption of innocence was first received as a common law principle in criminal Jurisprudence via the Tanganyika Order in Council, 1920, under Art.17 (2) which brought into Tanganyika the substance of the common Law. But since there was no Bill of rights, the presumption of innocence lacked

⁸ Michael Clements, op.cit, p.3

⁹ Ibid

¹⁰ Kenneth Pennington(1999) Innocent Until Proven Guilty: The Origins of a Legal Maxim, at <http://classes.maxwell.syr.edu/his381/InnocentuntilGuilty.htm>

¹¹ Ibid

¹² Ibid

¹³ Coffin v. United States of America, 156 U.S. 432.

¹⁴ Genesis 3:1-24, when Adam and Eve sinned God, God afforded them an opportunity to be heard before punishing them. It is after having given them an opportunity to defend themselves that God punished them, and gave reasons for the punishment. It is arguable that throughout the period of the commission of the wrong until the Lord God punished them and drives them out of the garden, the presumption of innocence existed as God knew that they had wronged him, God still presumed them innocent and afforded them the right to be heard.

¹⁵ Deuteronomy 19:15.

¹⁶ Kenneth Pennington, loc.cit

¹⁷ Under Art.11(1)

¹⁸ Under Art.6(2)

¹⁹ Under Art.14(2)

²⁰ Adopted by the Organization of African Unity at the 18th Conference of Heads of state and Governments on 27 June 1981, Nairobi, Kenya; and entry into force on 21 October, 1986

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constitutional protection, hence its recognition and justiciability was so narrow and sometimes totally rejected.²¹ The absence of the Bill of Rights in the Constitution afforded the government an opportunity to enact a series of oppressive legislations²² which certainly curtailed the individual's right to presumption of innocence even after independence. For instance The *Preventive Detention Act*, 1962²³ which was enacted one year after independence gave the president power to detain any person for an indefinite duration when he is satisfied that such person is conducting himself in a manner dangerous to peace and good order or acting in a manner prejudicial to the defense or security of the state. Alongside the Preventive Detention Act was the *Economic Sabotage (Special Provisions) Act*, 1983, which was enacted specifically to deal with economic offences. It has been said that in March, 1983 over one thousand persons on the mainland had been arrested and detained under the said Act on suspicion of being economic saboteurs.²⁴ Pursuant to this Act, from 25th March, 1983, hundreds of people were arrested and detained for this hitherto unknown offence; and for several weeks their fate remained unknown, with no permission to be visited.²⁵ On 5th April 1983, the President announced publicly that they would not be sent to court as he distrusted the courts and their procedures. The arrested persons remained under detention with no reasons; and on 22nd the National assembly passed the said Act which was assented by the President much later, but made to operate retrospectively to encompass those accused of economic sabotage before the Act was enacted.²⁶ The Act also created special tribunals to deal with those offences and provided for no bail to the suspects and no advocates allowed before those tribunals, no appeal against their decision, hence throwing away the right of one being presumed innocent till proved Guilty.²⁷ This situation continued up to 1984 and 1987 when the Bill of rights was enacted into the constitution and became operational respectively. Thus, it was until 1984, when the right to presumption of innocence became a constitutional right in Tanzania under Art.13 (6) (b).²⁸

Scope and Application of the Presumption of Innocence

As previously noted, that the scope and application of right to presumption of innocence has been not much clear. In his Article based on a Research Conducted for the Irish Law Reform Commission on Bail Law, *Una Ni Raifeartaigh*²⁹ argues that the lack of clarity on the scope and application of the right to presumption of innocence leads to divergence of opinion in two basic questions: first is when does the principle of the presumption of innocence come into play; does it apply at the pre-trial stage or merely at the stage of trial? Second is what does the presumption of innocence prohibit? Does it prohibit punishment in any circumstance other than following upon a criminal conviction; or, alternatively, does it prohibit any restriction of the accused's liberty premised on the view that he is guilty of the offence charged, even if such restriction on liberty does not constitute punishment? If the former view is to prevail, it raises the question of distinguishing between punitive and non-punitive liberty-depriving measures. In his analysis, *Una Ni Raifeartaigh*³⁰ identifies three distinct approaches to the scope and application of the presumption of innocence: the narrowest approach, intermittent approach and the broadest approach.

In the narrowest view, the presumption of innocence has no application at the pre-trial stage but rather a rule which merely applies at the criminal trial in order to ensure that no conviction is reached unless the accused's guilt

²¹ A few cases decided during colonialism and even after independence recognized the presumption of innocence on the law of bail. For instance, see: *Patel v. R* [1971] H.C.D. No.391 and *Chumchua S/o Marwa v. Officer i/c of Musoma Prison and Another*, High Court of Tanzania in Mwanza, Misc. Crim. Cause No.2 of 1988.

²² Chris Maina Peter, *Selected Cases and Materials*, op.cit, p.4

²³ Cap 490 of the Revised Laws of Tanzania Mainland.

²⁴ Issa.G. Shivji (1990) *Preconditions for Popular Debate in Tanzania*, (unpublished)

²⁵ Jwan Timothy Mwaikusa: *Genesis of the Bill of Rights In Tanzania*; op.ci Mwaikusa J. T. (1991) *Genesis of the Bill of Rights in Tanzania*; Journal of the African Society of International and comparative Law Vol. III p. 689.

²⁶ Ibid

²⁷ Ibid

²⁸ CAP 2R.E. 2002. The Article provides that, "No person charged with a criminal offence shall be treated as guilty of the offence until proved guilty of the offence."

²⁹ *Una Ni Raifeartaigh* (1997) *Reconciling Bail Law with the Presumption of Innocence*, Oxford Journal of Legal Studies Vol. 17, No 1, Oxford University Press.

³⁰ *ibid*, p.4

has been proved beyond reasonable doubt.³¹ In this view, the presumption of innocence is of no relevance at the pre-trial stage. Thus there can be no objection to pre-trial arbitrary arrest, torture, preventive detention and denial of bail, basing on the presumption of innocence.

Unlike the narrowest approach, the intermediate view holds that the presumption of innocence applies at the pre-trial stage but merely prohibits punishment of the accused for alleged criminal conduct.³² However, the difficulty under this approach is the criteria that may be used to identify whether the action taken to pre-trial suspects or detainees is a punitive or not.

In the broadest view, the presumption of innocence applies at the pre-trial Stage and prohibits all restrictions on the accused's liberty and freedoms which are based on a view that he is guilty of criminal conduct.³³ Thus the presumption of innocence, in contrast, asserts that it is a perspective which should inform the entire criminal process from the commencement of proceedings to sentencing that the accused should in all respects be treated as innocent by the system until found otherwise by the court after a trial or upon his own plea of guilty.³⁴

In this Article, the author adopts the *Una Ni Raifeartaigh's* approach (the broadest view) in analyzing the scope and application of the said right under the legal system of Tanzania.

The Presumption of Innocence in Pre-trial Criminal Proceedings

The criminal pre-trial stage involves several processes; namely arrest, investigation, release of the accused on bail, and pre-trial detention. Most of these processes involve the police, even though in some instances the public is involved. The narrowest view as seen above does not accept the presumption of innocence in the criminal pre-trial processes, whereas the intermediate approach accepts its application but only with respect to punitive treatment or confinement only. The broadest view of the presumption of innocence in contrast maintains that the presumption of innocence applies in the pre-trial stage from the beginning of the criminal process. This calls upon the need to analyze in detail its application in every aspect of the criminal pre-trial stage.

The Presumption of Innocence in Arrest

Taking the broadest application of the presumption of innocence aboard, one of the most significant roles of the presumption of innocence becomes the protection of individual citizens against arbitrary or illegal arrest. A person should be arrested only where there are reasonable grounds to believe that s/he has committed a crime. While procuring the arrest, the police or any other person effecting the same should not use excessive force³⁵ and should not subject the suspect to torture such as beatings and other degrading or inhuman treatment since there is the presumption of innocence until there is a judicial determination of guilt. Before arrest, the suspected person should be told the grounds of his arrest³⁶ and be informed of his rights including the right to consult a lawyer of his own choice.³⁷ Furthermore, the right to privacy of the suspected person should be observed in as much as possible.³⁸ If the arrest has been made without a warrant, the arrested person should be brought before the court of law within 24hours or in any case as soon as practicable or be released on police bail;³⁹ or otherwise the police officer should report all arrests to a nearby magistrate within 24hours.⁴⁰

The Presumption of Innocence During Investigations

The presumption of innocence in the broadest view has an impact on the criminal investigation process. During the process of investigation, no person should be forced to incriminate himself by being forced to confess or answer questions. The accused person should not be subjected to physical or psychological torture; or any other form

³¹ Ibid.

³² Ibid, p.6

³³ Ibid, p.5

³⁴ Ibid.

³⁵ S.21 of the Criminal Procedure Act, 1985 [Cap 20 R.E.2002]

³⁶ Ibid, S.23 (1)

³⁷ Ibid, S.53

³⁸ Ibid, S.19

³⁹ Ibid, S.32 (1)

⁴⁰ Ibid, S.33

of pressure so as to confess.⁴¹ In *Saunders v. United Kingdom*⁴² it was observed that the prosecution must prove its case without resort to evidence obtained through methods of coercion in defiance of the will of the accused. The court further recognized that the privilege against self-incrimination is part and parcel of the presumption of innocence. The time of investigation under police custody should not exceed four hours or if the time is to be extended it should not be more than eight hours and before such extension permission must be obtained from a magistrate.⁴³

The Presumption of Innocence in the Law of Bail

It has been observed by *Helen kijo- Bisimba and Chris Maina Peter*⁴⁴ that the right to bail and the presumption of innocence are complementary concepts. The rationale for the right to bail is the presumption of innocence which forms one of the pillars of the rule of law.⁴⁵ Therefore since every person is presumed innocent until proved otherwise by the court, accused persons should not be remanded in custody unless there are some compelling reasons to do so.⁴⁶ In as much as practicable the accused person should be released on bail, and no person should be denied bail as doing so is like treating the accused guilty while he is still being presumed innocent.⁴⁷ The conditions for bail should be reasonable and affordable so as not to deter others from being granted bail. In the same view *Helen kijo- Bisimba and Chris Maina Peter* state that it is improper for the executive and legislature to set out conditions under which the court cannot grant bail.⁴⁸ Bail should not be statutorily denied in some offences for no matter the nature of the offence that one is accused of; it does not take away that right of being presumed innocent until proved guilty.⁴⁹ This imperative significance of the presumption of innocence was also emphasized by **Sachs, J** in *State v. Coetzee*⁵⁰ when he said:

There is a paradox at the heart of all criminal procedure in that the more serious the crime and the greater the public interest in securing the convictions of the guilty, the more important do the constitutional protections of the accused become. The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring innocent persons are not convicted and subjected to ignominy and heavy sentences massively outweighs the public interest in ensuring that a particular criminal is brought to book...hence the presumption of innocence, which serves not only to protect a particular individual on trial, but to maintain public confidence in the enduring integrity and security of the legal system. Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the given, against which the presumption of innocence is pitted from the beginning, not a new element to be put into the scale as part of a justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jacking, housebreaking, drug-smuggling, corruption...the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases.⁵¹

The Presumption of Innocence in Preventive Detentions

⁴¹Ibid, S.10 (4-5).

⁴² [1997] 23 E.H.R.R. 313; [1996] E.C.H.R. 19187/91

⁴³ Ss. 50 & 51 CAP 20, op.cit

⁴⁴ op. cit, p.203

⁴⁵ Ibid

⁴⁶In *Patel v. R* [1971] H.C.D No.391 the court stated that a man whilst awaiting trial is as of a right entitled to bail, as there is a presumption of innocence until the contrary is proved; also in *R v. Masudi Mahugu* [1978] TLR.56 where Samatta, J.(as he then was) stated that a person should not be remanded in custody unless cogent and compelling reasons are disclosed.

⁴⁷ *Tito Douglas Lyno v. R* [1978] LRT.55 where Mwesiumo, J. (as he then was) said, among others things, that the court should not refuse bail to an accused person as a form of punishment; since doing so would be to punish the accused before the pronouncement of its verdict.

⁴⁸ Justice and Rule of Law in Tanzania, op.cit,p.203

⁴⁹ *Daudi Pete v. R*, High Court of Tanzania in Mwanza, Misc. Crim.Cause No. 80 of 1989 in which s.148 (5) (e) was declared unconstitutional because it contravened the doctrine of the presumption of innocence of the accused person.

⁵⁰[1997] 2L.R.C. 593, South African Constitutional Court as quoted in Ian Dennis, op.cit, p. 444

⁵¹ Ibid

Pre-trial detainees are “unconvicted individuals awaiting trial, held under police custody because they could not get bail.”⁵² Since the basic proposition of the presumption of innocence is that a person is innocent until there is a judicial determination of his guilt, a person held in confinement as a pre-trial detainee should not be subjected to any form of punishment for the crime for which he is charged with. A person while under police restraint or custody should be treated with humanity and with respect for human dignity. In no way should any person while under restraint be subjected to cruel, inhuman or degrading treatment.⁵³ The police officer under whose custody a person is restrained should provide reasonable facilities to enable the person restrained to communicate with a lawyer, a relative or friends of his choice.⁵⁴

The Presumption of Innocence and Mob Justice

The law of criminal procedure allows any member of the public to arrest any person who commits an offence in his presence, or any offence involving injury to property without a warrant. Such arrest may be effected by the owner of the property or his servants or persons authorized by the owner of the property.⁵⁵ But the law allows only an arrest which is lawful and not the taking the law into one's hands to punish the accused or suspected person. Since the presumption of innocence requires a person to be assumed innocent until there is a judicial determination of his guilt, subjecting a person to mob justice or violence is a violation of an individual's fundamental right to the presumption of innocence. This has also an impact on the media while reporting crimes or suspects. It is inconsistent with the presumption of innocence to report a person as a robber, murderer, thief or criminal, just because he has been arrested or suspected of committing a crime. The public through the media or anyhow should not negatively influence the court by personal judgments that the accused person is guilty or not of the alleged crime.

The presumption of Innocence during Trial

Apart from casting to the burden of proof upon the prosecution, the presumption of innocence ensures the accused person a fair hearing. The phrase fair hearing connotes many aspects including the burden of proof being cast on the prosecution save only where the accused person pleads the defense of insanity or where there is a statutory exception.⁵⁶ The duty of the prosecution with regard to the presumption of innocence was referred to as the ‘golden thread’ by **Lord Sankey** in *Wolmington v. DPP*⁵⁷ as he stated:

*Throughout the web of the English criminal law one golden thread is always to be seen - that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defense of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, the prosecution has not made out the case and the prisoner is entitled to acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.*⁵⁸

Besides the burden of proof, fair hearing further requires that the accused person be given adequate time and facilities for the preparation of his defense; as well as the right to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.⁵⁹ The criteria for the phrase *interest of justice* were stated in *Quaranta v. Switzerland*⁶⁰ to include: seriousness of the offence and the severity of the sentence risked, complexity of the case, and the nature of

⁵² Michael Clements, op.cit, p.3

⁵³ S. 55 (1&2), op.cit.

⁵⁴ Ibid, S.54 (1)

⁵⁵ Ibid, S.16(1 and 2)

⁵⁶ Ian Dennis, *The law of Evidence*, op.cit, pp146-147

⁵⁷ [1935] AC 462

⁵⁸ Ibid

⁵⁹ Paul Mahohoney (2001) The Right to Fair Criminal Trial under Art.6 of the European Court of Human Rights; a presentation made at the National Judicial Conference organized by the Judicial Studies Institute in Dublin on 10-11 November, Judicial Studies Institute Journal, p110

⁶⁰ [1991] E.C.H.R. 12744/87

the accused person. A more comprehensive meaning of 'interests of justice' was given in *Benham v. United*⁶¹ in which the court observed that where immediate deprivation of liberty is at stake, the interests of justice in principle call for legal representation.

There can be no fair hearing without legal representation because not every person can stand before the court and defend himself against his accuser. As it was noted in *Lekasi Mesawarieki V Republic* (supra), an accused person cannot get a fair trial without legal assistance. The importance of legal assistance was also emphasized by Lord Denning M.R in *Pett v. Greyhound Racing Association Ltd*⁶² where he stated that,

*It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favor or the weakness in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A magistrate says to a man; you can ask any question you like!' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him. And who better than a lawyer who has been trained for the task? I should have thought, therefore, that when a man's reputation or livelihood is at stake, he not only has a right to speak by his own mouth. He also has a right to speak through counsel.*⁶³

The Supreme Court of the USA again once observed the importance of legal representation in criminal proceedings in the case of *Powell v. Alabama*⁶⁴ where the Court held that;-

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence; he lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the building hand of counsel at every step in the proceedings against him, without it, though he is not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

Tanzania recognizes the right to legal assistance in the Constitution vide Article 13 (6) (a). In criminal proceedings it is provided for under s.310 of the Criminal Procedure Act, which states that every man accused before any criminal court other than a primary court, may as of a right be defended by an advocate of the High Court. It is also provided for under s.3 of the Legal Aid (Criminal Proceedings) Act⁶⁵ which provides that;-

*Where in any proceedings it appears to the certifying authority that it is desirable, in the interest of justice, that an accused should have legal aid in the preparation and conduct of his defense or appeal, as the case may be, and that his means are insufficient to enable him obtain such aid, the certifying authority may certify that the accused ought to have such legal aid and upon such certificate being issued the Registrar shall, where it is practicable so to do, assign to the accused an advocate for the purpose of the preparation and conduct of his defense or appeal as the case may be.*⁶⁶

Besides legal representation, the presumption of innocence further requires the accused person not be forced to incriminate himself. Thus the presumption of innocence allows the accused person to remain silent. An accused person cannot be forced to testify in court. This right is an inherent facet of the presumption of innocence.⁶⁷ Not only that but also the presumption of innocence requires the accused to be afforded the right to examine witnesses testifying against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him and the right to counsel.

The Presumption of Innocence after Trial

The presumption of innocence ends upon sentence or conviction of the accused person. But in case the convicted person wishes to appeal against either sentence or conviction, the presumption of innocence should

⁶¹ [1996] 22 E.H.R.R. 293

⁶² [1969] 1 Q.B. 125

⁶³ Ibid

⁶⁴ [1932] 287 US 45

⁶⁵ CAP 21 R.E. 2002.

⁶⁶ S.3 CAP 21 R.E. 2002.

⁶⁷ In *Saunders v. United Kingdom* (supra) in which it was observed that the prosecution must prove its case without resort to evidence obtained through methods of coercion in defiance of the will of the accused.

continue until the finalization of proceedings by the appellate court or tribunal. Henceforth, the right to appeal against sentence or conviction should not be denied except in cases of personal plea of guilty in which appeal against conviction is not allowed but appeal against sentence only. Once one wishes to appeal, he continues holding the right to bail pending appeal and the right to legal representation until the final determination of his appeal.

The Presumption of Innocence and Administrative Justice

In the modern jurisprudence of administrative law, more than several times administrative authorities do adjudicate upon matters which affect individual's interests. These quasi-judicial bodies are not dealing with exclusively criminal matters but rather administrative matters which otherwise would be decided by courts of law. Since such cases involve individual interests, a substantial degree of fairness is required, henceforth, calling upon the right to be heard under the maxim *audi alteram partem*. Although the term 'presumption of innocence' is not used, in principle, it is applied in the sense that no person should be convicted unheard. The right to be heard essentially arises from the right to presumption of innocence that no person should be punished or be made to suffer in any way unless proved to be guilty by due process of law. That is why *Helen kijo- Bisimba and Chris Maina Peter*⁶⁸ have correctly observed that the presumption of innocence enshrines the principle of natural justice especially the one demanding that no person should be convicted unheard. Therefore, the right to the presumption of innocence has a very broad scope of application and indeed forms the bedrock and the basis of the protection of fundamental rights and freedoms. The basic question is whether the constitutional provision of the constitution of the united republic of Tanzania and its interpretation by the judiciary in the practical sense adhere to the broadest view of the scope and application of right to presumption of innocence. This discussion of this question forms part of the following section hereunder.

Judicial Interpretation of the Right to Presumption of Innocence under the Constitution of Tanzania

As noted above, in Tanzania, the right to the presumption of innocence is provided under Art.13 (6) (b) which as seen above is stated that, "*No person charged with a criminal offence shall be treated as guilty of the offence until proved guilty of the offence.*"

Giving an ordinary or literal meaning to the words of Art.13 (6) (b) the right to the presumption of innocence in Tanzania would be applicable to accused persons who are charged with a criminal offence. As such, it does not apply to suspects who are not yet charged such as pretrial detainees who are not yet charged before the court or suspected persons in the process of arrest. The constitution of Tanzania therefore, does not provide a broader scope of application of the right to the presumption of innocence.

However, in so far as judicial interpretation of the constitution on matters of fundamental rights and freedoms are concerned, the High Court of Tanzania in *Julius Ishengoma Francis Ndyabo v. the Attorney General*⁶⁹ observed that '*The provisions touching on fundamental rights have to be interpreted in broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights.*'

Since the right to presumption of innocence goes to the root of individual liberty, it is ought to be given a liberal and broader interpretation pursuant to the above judicial decision which is in line with *Una Ni Raifeartaigh*'s broadest interpretation and application of the right to presumption of innocence.

One of the most sensitive questions that has been extensively discussed by the judiciary in Tanzania is whether statutory denial of bail abrogates the constitutional right of the presumption of innocence. The high Court decision of Mwalusanya, J. in *Daudi Pete v. R*⁷⁰ marked the Beginning of Judicial activism in discussing this question since the Bill of Rights Came into full force. Justice Mwalusanya found section 148(5) of the Criminal procedure Act,⁷¹ unconstitutional as it conflicts with the right to presumption of innocence of an accused person guaranteed under Article 13(6) (b) of the constitution.

⁶⁸ op.cit.p.203

⁶⁹ Court of Appeal of Tanzania at Dar-es-salaam, Misc. Civil Cause of 2001, (unreported).

⁷⁰ High Court of Tanzania at Mwanza, Misc. Criminal Cause No.80 of 1989 (unreported)

⁷¹ Cap 20 R.E.2002

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Surprisingly enough, the DPP was aggrieved by the decision of the High Court, and appealed to the Court of Appeal. On appeal the Court of Appeal in *Director of Public Prosecutions v Daudi Pete*⁷² slashed out the case on technical and procedural grounds. The court reached a very narrow conclusion of no value in protection of individual rights and freedoms in Tanzania. The Court of Appeal found that, the trial judge was wrong to frame issues covering the whole of s.148 (4 and 5) of the Act; as the parties before the trial court had raised issues relating only to the provisions of paragraph (e) of sub-section (5) of s. 148 of the Act. The Appellate Court further held that Section 148(5) (e) does not violate Article 13(6) (b) of the Constitution, which prohibits treating an accused person like a convicted criminal, because denying bail to an accused person does not necessarily amount to treating such a person like a convicted criminal.

Unfortunately the Court of Appeal gave a very contradictory interpretation of the right to presumption of innocence as it held that under Article 15(2)(a) of the Constitution a person may be denied or deprived of personal liberty under certain circumstances and subject to a procedure prescribed by law but since s. 148(5)(e) of the Act does not contain the requisite prescribed procedure for denying bail to an accused person; section 148(5)(e) of the Act therefore violates Article 15(2) of the Constitution. The liberal approach in interpretation of the right to presumption of innocence should obviously include the liberty of the individual. It is therefore contradiction to hold a provision being repugnant to liberty and at the same time being in conformity with the right to presumption of innocence.

Although at the end the court concludes that the provisions of s. 148(5)(e) of the Act is unconstitutional and is therefore null and void, its substance was shifted by the legislature to sub-section 5(a) which placed the offence of armed robbery in the same category of Murder and treason, hence unbailable.⁷³ In that sense the Criminal Procedure Act, still violates the presumption of innocence in setting out certain offences which are unbailable.

Contradictions between the High court and the Court of Appeal on interpretation of the right to presumption of innocence in relation to statutory denial of bail happened in *DPP v. Angelina Ojare*.⁷⁴ This case involved a person accused of murder contrary to Ss. 196 and 197 of the penal code.⁷⁵ The trial magistrate granted bail to the accused person pending committal proceedings, without regard to s. 148(5) (a). The prosecution was aggrieved by this decision and appealed to the High Court but the High Court affirmed the decision of the trial magistrate. The DPP further appealed to the Court of Appeal. On appeal, the court of Appeal by applying literal approach quashed the decision of the High court on procedural grounds, and that the decision of the High Court was based on a null decision because the trial magistrate had no competence to hear and determine the constitutionality of s.48 (5) (a).

Conservatism of the Court of appeal has not been without impact, for instance in *Geofrey Eliawony and Three others v. R*⁷⁶ the High Court took the same narrow view of the Court of appeal in determining the constitutionality of statutory provisions prohibiting grant of bail to accused persons. Nevertheless, the question of statutory denial of bail as being repugnant to the right to presumption of innocence arose again in the case of *Prof. Dr. Costa Ricky Maharu & Grace Alfred Martin V. AG*.⁷⁷ The High Court declared S.36 (4)(e) of the Economic and Organized Crime Control Act⁷⁸ not un constitutional in the sense that it abrogates the constitutional right of an accused person of being presumed innocent until proved otherwise, as provided for by Art.13(6)(b) of the Constitution. The High Court made reference to various decisions, including the case of *Edward D. Kambuga v. R*⁷⁹ and *Silvester Hillu Dawi v. the Director of Public Prosecutions*.⁸⁰ The Court found the impugned provision unconstitutional since it lays down harsh and unjust conditions because, once charged, a person who does not have the requisite amount will have no option but to be

⁷² [1993] TLR 22 CA

⁷³ Act No. 27 of 1991

⁷⁴ Court of Appeal of Tanzania, at Dar es salaam, Criminal Appeal No.21 of 1997 (unreported)

⁷⁵ Cap.16 R.E.2002

⁷⁶ [1998] TLR 191

⁷⁷ In the High Court of Tanzania at Dar Es Salaam, Misc. Civil Cause No.35 of 2007 (unreported)

⁷⁸ [Cap.200 RE.2002]

⁷⁹ (1990) TLR 84

⁸⁰ Criminal Appeal No. 250 of 2006

deprived of his liberty, not because the offence is not bailable but because he cannot meet the condition of depositing the requisite amount of money. But the court having regard to the decision of the Court of Appeal in *DPP v. Daudi Pete*⁸¹ concluded that impugned provision does not offend the right to presumption of innocence as provided for under Article 13(6) (b) of the constitution.

The broader interpretation of the presumption of innocence requires that nobody should be forced to incriminate himself; and therefore any evidence extracted through force should not be used against the accused. The High court and the Court of appeal of Tanzania have had certain opportunities to examine the effect of such confessions made as a result of torture and force contrary to the right to the presumption of innocence. Among such cases include the case of *Imerimaleva and Others v dima Nhorongo*⁸² which involved *Sungusungu* extracting evidence from a suspected person by torture. The plaintiff admitted making a confession that he had stolen cattle from the eight defendants, but claimed that he did so after experiencing extreme torture at the hands of *Sungusungu* and in order to save his life; and that the said confession was absolutely false. He was harassed and tortured for two days consecutively. On the first day he was forced to take off his clothes in full view of the crowd. Next he was hustled away to a place called *Kiwanda* where he was physically tortured and forced to admit that he had stolen cattle. He gave in and made a false confession. On the following day he was first roughed up and later shot on the head with an arrow. The Court of Appeal also considered the scope of license given to *sungusungu* by the *Sungusungu* legislation and held that *Sungusungu* legislation do not give and have never given license to such groups to dehumanize people or procure confessions by torture. Although the Court of Appeal did not specifically mention the presumption of innocence, yet the decision had an impact on the process of procuring evidence.

In contrast, in *Josephat Somisha Maziku V Republic*⁸³ the High Court observed that while it is trite law that the condition precedent for the admissibility of a confession is its voluntariness, a confession is not automatically inadmissible simply because it resulted from threats or promise. It is inadmissible only if the inducement or threat was of such a nature as was likely to cause an untrue admission of guilt; and that where a confession is, by reason of threat, involuntarily made, and is therefore inadmissible, a subsequent voluntary confession by the same maker is admissible, if the effect of the original torture, or threat, has before such subsequent confession, been dissipated and no longer the motive force behind such subsequent confession.

Examining this decision of the High Court critically, one can note that it has little impact in protecting individuals from unlawful torture and force incrimination provided that such torture results into true confession. This is typically contrary to the presumption of innocence and therefore the judiciary has not made progressive protection of individuals in criminal investigation.

With respect to the burden of proof, the presumption of innocence requires that the burden of proof should be on the prosecution. This principle was held by the High court of Tanzania in *Jonas Nkize V Republic*.⁸⁴ It was further held in *Maruzuku Hamisi V R*⁸⁵ that the accused's story did not have to be believed but only to raise reasonable doubt. It is the duty of the prosecution to prove beyond reasonable doubt on the guilt of the accused person.

However, the burden of proof goes hand in hand with the right to remain silence when interrogated. This position seems to be different in as far as the High Court and the Court's of appeal approach is concerned. In *Samuel Silanga V Republic*,⁸⁶ the appellant was convicted of murder and sentenced to suffer death. He appealed against both conviction and sentence on the ground that the burden of proof was improperly shifted to the defence. The appellant's palm was stained with blood at a time when murder involving stab wounds had just been committed in the neighborhood. When he was asked how he got it, he kept quiet. The Trial Court inferred guilt because the appellant kept quiet on how he got blood on his right palm. On appeal the Court of Appeal held the once it was shown that the appellant's palm was stained with blood at a time when murder involving stab wounds had just been committed in the neighborhood, and no doubt suspicion was mounting high all over the place, one would expect the appellant to

⁸¹ Loc.cit

⁸² [1991] TLR 1

⁸³ [1992] TLR 227

⁸⁴ [1992] TLR 213

⁸⁵ [1997] TLR 1

⁸⁶ [1993] TLR 149

explain how he got his palm stained with blood; certainly it was in his best interest to do so. The Trial Judge was perfectly entitled to draw the inference that the appellant's silence could not be consistent with his innocence. This decision therefore, poses a duty on the accused person to answer in certain circumstances so as to prove his innocence.

Presentation and Discussion of Findings on the Scope and Application of the Presumption of Innocence in Tanzania

This part presents the research findings obtained through documentary review and field responses on the scope and application of the right to presumption of innocence in the Tanzania.

Scope of the Right to Presumption of Innocence in Tanzania

The provision of the Constitution under Art.13(6) (b) just provides that to ensure equality before the law, the state authority shall make procedures which are appropriate or which take into account the principle that no person charged with a criminal offence shall be treated as guilty of the offence until proved guilty of the offence. The provision is general in such a way that it does not tell exactly what the scope is and what the components of this right to presumption of innocence are. As noted in previous chapters, the Constitution further does not specify as to what time in the process of criminal justice the said right comes into play, hence leaving it vague as to when and under what circumstances one can claim to have his right to presumption of innocence violated. Also the position of the court on the scope, components and application of this right is not that much clearly settled as observed in chapter four above.

In this research it has been discovered that the presumption of innocence applies in the whole process of criminal process, including the process of search and arrest, investigation, pre-trial detentions, trial and after trial in case of appeal. In conducting this research 30 respondents responded on the components of the right to presumption of innocence. It was discovered that the scope of the right to presumption of innocence is wide and include the following components: Release on bail of the accused person pending trial or pending appeal upon fulfillment of certain conditions; Reasonable and affordable conditions for bail to majority; protection against torture and excessive use of force during search, arrest, investigation and while under police custody; arrested person to be brought before the court within 24 hours after arrest; suspected person not to be subjected to mob justice; the media not to influence the public as to consider the accused guilty before court's decision; Fair hearing and right to legal representation by counsel of one's choice; provision of legal aid to the indigents; the burden of proof on the guilt of the accused upon the prosecution; right to silence or protection against self incrimination; speed conduct of trial; right to present defense and cross examine the witnesses of the prosecution under same conditions as for the prosecution upon the defense; the period that one has been in custody to be taken into account in case of conviction; and the right to appeal against conviction or sentence.

Since most of the respondents to this question were people trained and expertise in law, it is obvious that all of these components are relevant hence forming part of the presumption of innocence. Furthermore these aspects cover different facets of criminal process from the initiation of criminal process to finalization of criminal justice. Therefore this justifies that the scope and application of the right to presumption of innocence is broad and covers the entire criminal justice, namely, at pre-trial, at trial and post-trial.

Observance of the Presumption of Innocence in Tanzania

Basing on the above components on the scope and application of the right to presumption of innocence, this research has revealed that in Tanzania the right to presumption of innocence is ineffectively observed. In deferent facets of criminal justice it is either totally or partly not observed. Taking into consideration the areas of conformity and non conformity, the research revealed that it is partly observed as demonstrated under table 1 bellow that about 78.6% out of 100% of the 28 respondents responded that it is partly observed.

Table 1: A table showing the frequencies and percentages of Responses on Whether the Right to Presumption of Innocence is properly observed in Tanzania

Response Type	Frequencies	Percentage
Yes	2	7.1
No	4	14.3
Partly	22	78.6
Total	28	100.0

Source: field respondents

The above table shows a summary of frequency and percentages of responses to the question “whether the right to presumption of innocence is properly observed in Tanzania.” As noted above, the above table demonstrates that the highest percent of the responses of the respondents indicate that the presumption of innocence is partly observed. It is partly observed because there are several areas in the process of criminal justice where the right is denied or violated. Those areas where the presumption of innocence is not observed are discussed hereinafter.

Violation of the Right to Presumption of Innocence by the Public

The presumption of innocence has also an impact on the public. It requires that the public to follow due process of law in handling suspects. In that sense the public should not take the law into their hands to punish or subject the suspected persons to mob violence. Likewise the media upon reporting crimes should not influence the public to consider the accused person as guilty of the offence before the court pronounces sentence. In this research, the data collected directly from the field reveal that the right to presumption of innocence is somehow observed as majority of respondents responded that suspected persons are not subjected to mob justice as indicated in table 2 below.

Table 2: A Table showing percentage of Responses on the level of compliance with the requirement that suspected persons should not be subjected to mob justice

Response Type	Frequencies	Percent
Very Good	2	9.5
Good	8	38.1
Poor	6	28.6
Very poor	5	23.8
Total	21	100.0

Source: field respondents

From the data displayed in Table 2 above the highest frequency and percentage show that the level of compliance is good. However by looking at the percentage of responses of good and poor have a very slight difference. Likewise the percentage of responses representing very poor is higher than that representing very good. This can lead to a conclusion that the right to presumption of innocence in respect to mob violence is partly observed by the public. Although many respondents have observed that the situation is good, it is neither very good nor is it excellent. Therefore on average the observance of the said facet of the right to presumption of innocence is poor.

Besides the data collected directly from the field, the data collected from various Human Rights Reports in Tanzania indicate that majority of individuals are still being subjected to mob violence. The victims of mob violence normally experience injuries, pains, loss of properties or even life. It also includes killings on witch craft beliefs. In some instances mob violence aggravated by lack of confidence and dissatisfaction of people to the law enforcement mechanism which is in place that is blamed to be too much corrupt; remoteness of police stations; citizen's ignorance of the law; anger; and others.⁸⁷ For instance, in 2005 there were 206 incidents of mob justice; and in 2006, 103 incidents.⁸⁸ Between January and October 2007 a total of 307 people died because of mob violence.⁸⁹

Police statistics on deaths of old women killed due to witchcraft beliefs between five years up to February, 2009, show a number of deaths that has occurred due to mob justice on witchcraft suspects as follows: Mwanza 698, Shinyanga 522, Tabora 508, Iringa 256, Mbeya 192, Kagera 186, Singida 120 and Rukwa 103.⁹⁰ This makes a total of 2585 of reported death resulting from mob justice in respect of only suspicion on witch craft leave alone other incidents that involve mob violence and illegal assumption of judicial power by the public. All these show that because of mob justice and violence the right to presumption of innocence is still seriously being violated in Tanzania.

With respect to the media, it has been revealed that, the media is to a large extent not neutral in reporting crimes. It was found that out of 21 respondents who responded on the media's compliance with the right to

⁸⁷ LHRC, Human Rights Report of Tanzania 2007, p.19

⁸⁸ LHRC, Human Rights Report of Tanzania 2007, P.19

⁸⁹ Ibid

⁹⁰ ⁹⁰ Legal and Human Rights Centre: *Tanzania Human Rights Reports* 2009, p 18

presumption of innocence, 19% said it is very good, 28.6% said it is good; 42.9% said it is poor; and 9% percent said it is very poor. Some respondents said that the said right is not infringed by negative influence of the media. However, the majority of the respondents were of the view that the media has a negative influence to the public.

Presumption of Innocence in Search, Arrest and Investigation

This is one of the criminal facets where the right to presumption of innocence is frequently and highly violated. In this research majority of the respondents of about 60% said that right to presumption of innocence in the process of arrest is partly observed, whereas 26.7% said that it is totally not observed; and only 13.3% said that it is observed as shown in table 3 below.

Table 3: A Table Showing Percentage of Responses on Compliance with the Presumption of Innocence in Search, Arrest and Investigation

Response Type	Frequencies	Percentage
Very Good	2	8.3
Good	3	12.5
Poor	12	50.0
Very poor	7	29.2
Total	24	100.0

Source: Field Respondents

Taking into account the total number of those who said that it is partly and completely not observed compared to those who were of the view that the right is observed in table 3 above, one can observe that the former exceeds the latter to a large extent, hence drawing the inference that the right to presumption of innocence in search, arrest and criminal investigation is highly violated.

As already noted in the previous sections above, the presumption of innocence requires that in the process of search, arrest and criminal investigation, there should be no excessive use of force; no torture and degrading punishment of the accused persons by police officers during arrest and while under police custody; soon before or after arrest, the arrested persons must be told the grounds of their arrest; arrested persons clearly informed about their rights; Arrested person brought before the court in a period not more than 24 hours after arrest arrested persons given an opportunity to communicate with counsel of their choice.

However, majority of the respondents in this research said that these components are not effectively observed. Among the components which are poorly observed are: excessive use of force during arrest and investigation, right to privacy during search, use of torture and degrading punishment in the process of arrest, investigation and while under police custody, and arrested person being brought before the court within 24 hours after arrest. On the other hand the components which are observed in average are: the arrested persons being informed of the grounds of their arrest, arrested persons informed of their rights, and allowed to communicate with lawyers and relatives.

Furthermore, from secondary sources of data, it has also been discovered that there have been several occasions reported in documents that involved Police brutality, illegal arrests and detentions of people in Tanzania; just to mention but a few. In 2000, a woman was arrested, detained, confined and prosecuted without probable or reasonable cause. She was sent to court after three days and then released after two months.⁹¹ In the spring of 2007, Mr. John Lawanda, a cameraman of Star TV in Arusha, alleged that police officers assaulted him after he parked his car. He was taken to Arusha Central Police Station and remanded without being taken to the hospital. He was then released two days later without charges.⁹² In February 2007, media outlets reported that a group of police officers in Arusha was allegedly extorting money from residents by threatening to arrest them on fabricated drug possession

⁹¹Nancy C. Masbala v. Regional Crimes Officer, in Caleb(2000) Police Brutality in Southern Africa: A Human rights Perspectives-Tanzania pp168-170; also The Police, the People, the Politics: Police Accountability in Tanzania, Commonwealth Human Rights Initiatives, 2006, p14

⁹² Tanzania Human Rights Report 2007, P.15

charges, unless the individuals pay a bribe of either cash or cellular telephones. Those who did not provide either were being arrested and sometimes subjected to violence at the police station.⁹³

Not only that but also it has been reported in 2008⁹⁴ that arbitrary arrests and detentions remained a common feature in Tanzania. The police have often failed to comply with the requirements of the law that persons should be apprehended openly with warrants based on sufficient evidence; and that persons arrested for a crime, other than a national security detainee, be charged before a magistrate within 24 hours of arrest.⁹⁵

It was further reported that the authorities at times denied the accused arrested persons the right to contact a lawyer or talk with family members. Access to counsel was often limited by the lack of lawyers in rural areas, poor communication systems and infrastructure, poverty of the accused persons and illiteracy.⁹⁶ Therefore these records support the inference drawn from primary sources that the right to presumption of innocence is poorly observed in the process of search, arrest, and investigation.

Presumption of Innocence in the Law of Bail

Bail means a temporary release of an accused person upon certain conditions pending the finalization of court proceedings. In this research, it has been observed that release on bail in Tanzania is observed on average. For instance, out of 29 respondents, the majority said that release on bail is good as shown under table 4 below.

Table 4: A Table showing Frequencies and Percentage of Responses on Compliance with the Presumption of Innocence in Law of Bail in Tanzania

Response Type	Frequencies	Percentage
Excellently	5	17.2
Very Good	2	6.9
Good	16	55.2
Poor	6	20.7
Total	29	100.0

Source: Field Respondents

However, although table 5 above shows that the release on bail is good; indeed it is not very good or excellent either as indicated demonstrated by percentage of responses. The highest percent shows that compliance with the right to presumption of innocence in the law of bail is good but neither very good nor excellently. Not only that but also the percentage that show that compliance to the right is poor is also high. All these infer that compliance with the right to presumption of innocence in the law of bail is still ineffective in Tanzania.

Besides all, there are still provisions of the law in the criminal procedure Act⁹⁷ and the Economic Crimes Control Act,⁹⁸ which specifically deny bail in some offences. Not only, that but also it has been discovered that the conditions for bail are not reasonable and affordable to majority especially the poor. In response to the question whether the conditions for bail in Tanzania are reasonable and affordable to the majority, a highest percentage of the respondents were of the view that the conditions are unreasonable and affordable to the majority as presented table 6 below.

Table 5: A Table showing Frequencies and Percentage of Responses on Conditions of Bail in Tanzania

Response Type	Frequencies	Percent
Very Good	2	7.4
Good	10	37.0
Poor	13	48.1
Very poor	2	7.4
Total	27	100.0

⁹³ Ibid

⁹⁴ Bureau Of Democracy, Human Rights, and Labour, 2008, Country Report on Human Rights Practices in Tanzania.

⁹⁵ Ibid

⁹⁶ Ibid

⁹⁷ Op.cit

⁹⁸ Op.cit

Source: Field Responses

However, from table 5 above, it can be noted that despite the percentage of those who said the conditions of bail are unaffordable, the percentage of those who responded positively, that the conditions are affordable is also high. This indicates that the conditions for bail are on average good except on a few instances which involve expressly or impliedly denial of bail because the difference between those who said the conditions for bail are good and those who said are unaffordable is very slight.

Right to Presumption of Innocence with Respect to Fair Trial

In trial the presumption of innocence requires that in criminal trial the burden of proof to be on the prosecution; accused person to be given adequate time and facilities for the preparation of his defense; as well as the right to defend himself in person or through legal assistance of his own choice or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so requires; the accused person's right to remain silent; and the accused person being afforded the right to examine witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

It has been discovered in this research that some of the elements of fair hearing are properly observed as majority of the respondents have said that they are adequately observed specifically the rule on the burden of proof as 65.4% said that is highly observed, right to legal representation by counsel of accused's own choice; accused person freely afforded the right to present their defense and cross examine the witness of the prosecution; and the accused persons right against self incrimination. However on the other side majority of the respondents about 80% have said that the right to legal representation paid for by the government is poorly observed hence affecting the right to be heard or rather the accused's right to defence.

The Presumption of Innocence upon Conviction and Appeal

The presumption of innocence ends upon sentence or conviction. But in case the convicted person wishes to appeal against either sentence or conviction, the presumption of innocence continues till finalization of proceedings by the appellate court or tribunal. Henceforth, the right to appeal against sentence or conviction should not be denied except in cases of personal plea of guilty in which appeal against conviction is not allowed but appeal against sentence only.

Furthermore it is not only requirement of the right to presumption of innocence but a rule of prudence that if a person was not released on bail, and upon finalization of the criminal process is convicted, then the period that one has been under custody should be taken into account in assessing sentence. In this research majority of respondents said that the right to appeal against conviction or sentence is properly observed, but the period that one has been under custody being taken into account in assessing sentence is poorly observed.

Causes of Violation of the Right to Presumption of Innocence in Tanzania

So far from the preceding analysis and discussion of research findings, it is now clear that the right to presumption of innocence is partly observed in Tanzania as some of its facets are not properly complied with. The non-compliance with the right is caused by various obstacles or problems as discussed hereunder.

Corruption on either Judicial or Police Officers

In this research it has been found that the majority have said that corruption on either judicial or police officers is one of the causes and reasons for violation of the right to presumption of innocence in Tanzania as indicated by table 6.

Table 6: A table showing percentage of Responses on Relevance of Corruption among the Judicial or Police Officers as a Causative of Violation of the Right to Presumption of Innocence in Tanzania

Response Type	Frequencies	Percentage
Relevant	21	75.0
Not relevant	7	25.0
Total	28	100.0

Source: field respondents

It has also been observed from secondary sources that corruption on the police has made people lose confidence on the police hence taking the law into their hand to punish suspects through mob justice. For instance the

research conducted by LHRC in January, 2007, revealed that the opinion of most people who participated in the survey was that lack of confidence in the police is the cause of the mob violence.⁹⁹

Cruelty and Abuse of Power by State Coercive Instruments

With respect to cruelty and abuse of power by state coercive instruments, there have been several occasions reported in documents that involved Police brutality, illegal arrests and detentions of people. As discussed above in February 2007, media outlets reported that a group of police officers in Arusha was allegedly extorting money from residents by threatening to arrest them on fabricated drug possession charges, unless the individuals pay a bribe of either cash or cellular telephones. Those who did not provide either were being arrested and sometimes subjected to violence at the police station as admitted by the Arusha Regional Police Commander of existence of such occasions.¹⁰⁰ Sometimes violation of the right to presumption of innocence is caused by conducts made in response to the seniors' orders or ambiguous statements, which junior police officers make use of them irrationally. For example, in February, 2009 the Tanzania people's defence forces (TPDF) in execution of an order of the *district commissioner for Bukoba Rural in Kagera region* caned 31 school teachers, before their students, for tardiness and the poor performance of the students on the national standard seven exams.¹⁰¹

Public Ignorance of the Law and Remoteness of Some Areas

Among the reasons that the respondents have provided as a cause of violation of the right to presumption of innocence in Tanzania is the public being ignorant of the law and their rights. Thus even if they are innocent, once threatened they don't know exactly what course of action to take, and sometimes they do take power into their hands because of being unaware of the law and appropriate procedures to take. Table 7 below show the frequencies and percentages out of 28 respondents on relevance of public ignorance of the law and their rights as one of the reasons for violation of the right to presumption of innocence.

Table 7: A Table showing Frequencies and Percentage of Responses on Relevance of Public Ignorance of the Law and their Rights as a Causative of Violation of the Right to Presumption of Innocence in Tanzania

Response Type	Frequencies	Percentage
Relevant	25	89.3
Not relevant	3	10.7
Total	28	100.0

Source: Field Responses

It was also revealed by the LHRC their research conducted in January, 2007, that citizen's ignorance of the law is one of the causes of mob violence and remoteness of police centers and some areas.¹⁰² It has also been found in this research that geographical remoteness of some areas lead to violation of the right to presumption of innocence. This problem may contribute to mob justice and even the courts sometimes fail to grant bail to some accused persons because of being afraid of failure to trace them in case of default, since such person are from very remote areas and they are not registered or having no nearby relative who can be asked the where about such persons in case of default.

Belief on Witchcraft

Among the serious causes of individual's illegal assumption of judicial power are witchcrafts killing. Many old women are accused of witchcrafts in several regions and since it is difficult to prove such allegations before the court, several times such people have been victimized to death without being proved to be guilty by the court or following a decision of any due process of law. Table 8 bellow show Police statistics on deaths of old women killed due to witchcraft beliefs between five years up to February, 2009. As previously noted that, Police statistics on deaths of old women killed due to witchcraft beliefs between five years up to February, 2009, show a number of deaths that has

⁹⁹ Legal and Human Rights Centre, Human Rights Report, 2007, op.cit, p.19; also Legal and Human Rights Centre, Human Rights Report, 2009, op.cit, p.17

¹⁰⁰ Ibid, p.23

¹⁰¹ Legal and Human Rights Centre: Tanzania Human Rights Reports, 2009, op.cit, p. 29

¹⁰² Ibid, p.18

occurred due to mob justice are related with killings of witchcraft suspects. A total number of 2585 of reported deaths resulting from mob justice were suspects of witchcraft.

Table 8: A Table showing Police Statistics on Deaths due to Witchcraft Killings between Five Years Between 2004 and February, 2009

Region	Total No. of Deaths Between, 2005 and February, 2009
Mwanza	698
Shinyanga	522
Tabora	508
Iringa	256
Mbeya	192
Singida	120
Rukwa	103
Total	2,399

Source: Legal and Human Rights Report on Human Rights, 2009, p.21

The statistics above indicate that the killings on witchcraft beliefs are very high in Mwanza, Shinyanga, and Tabora regions. However the LHRC reported that there were no any records indicating or revealing how many murderers were convicted for committing such offence as the police failed to prosecute culprits because villagers and even relatives of the deceased were not ready to testify in court; and that many of the villagers are normally happy when a 'witch' is killed.¹⁰³

Statutory Denial of the Right to Presumption of Innocence

This research has revealed that among the causes of violation of the right to presumption of innocence is statutory denial such as denial of bail which is one of the central facets of the right to presumption of innocence. There are several laws and statutory provisions which in one way or other deny the right to presumption of innocence to accused persons. Among such are: the Criminal procedure Act¹⁰⁴ which sets out some offences like murder, treason and armed robbery as non-bailable offences and stiff conditions nearly impossible for the bailable offences; the Economic Crimes Control Act¹⁰⁵ particularly s.36 (4) which discriminates the poor from being granted bail as they may not afford to pay the amount specified once charged with economic offences; the Prevention of Terrorism Act, 2002;¹⁰⁶ and the Preventive Detention Act.¹⁰⁷ Not only that but also the Criminal Procedure Act under s.148 (4) confers very wide powers on the director of Public Prosecution to interfere with the power of the Court in granting Bail. The provision of S.148 (4) gives the DPP wide discretionary powers to interfere with this right.¹⁰⁸

The provision is very vague and does not specify as to what amounts to prejudice to safety or interests of the Republic and furthermore, the provision does not require the DPP to disclose the nature of public interest to be protected. In this way such provision may easily be arbitrarily evoked to prejudice the interest and right of individual citizens.

Judicial Conservatism in Constitutional Interpretation

This research made a comprehensive analysis of judicial approach in constitutional interpretation and the role played by the High Court and Court of Appeal in interpreting and protecting the right to presumption of innocence

¹⁰³ Ibid, p22

¹⁰⁴ Op.cit, s.148 (5)

¹⁰⁵ Op.cit

¹⁰⁶ Act No. 21 of 2002

¹⁰⁷ Op.cit

¹⁰⁸ The said section provides that, 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 Tanzania. The High Court had a good start in *Daudi Pete V.R*¹⁰⁹ where the learned Mwalusanya J. found that the provisions of s.148 (5) were unconstitutional and contrary to the right to presumption of innocence. On the contrary, the Court of Appeal adopted a very narrow and conservative approach in constitutional interpretation and thus serving some provisions of the section on technical grounds. The Court of Appeal's conservatism and contradicting with the High Court's broad interpretation of Constitutional Provisions touching fundamental rights and freedoms; and more specifically occurred on interpretation of the right to presumption of innocence in relation to statutory denial of bail happened in *DPP v. Angelina Ojare*,¹¹⁰ in which the Court of Appeal on interpretation of the right to presumption of innocence in relation to statutory denial of bail happened in *DPP v. Angelina Ojare*.¹¹¹ The Court of Appeal quashed the Decision of the High Court that affirmed the decision of the trial magistrate and held that the provision of s.148 (5) (a) is unconstitutional as it offends Article 13(6) (b) and Article 15 (2) (a) on technical grounds and applying a literal approach of statutory interpretation.

Following the Court of Appeal's Conservatism, the High Court also, especially with the absence of bold stars like Mwalusanya and Lugakingira, J., has adopted the same conservatism. For instance in *Geofrey Eliawony and Three others v. R*¹¹² the High court took the same narrow view of the Court of appeal in determining the constitutionality of s. 35(3) (g) of the Economic and Organized Crimes Control Act¹¹³ which prohibited grant of bail to accused persons. Another decision which reflects the effects of the Court of Appeal's conservatism is the most recent case of Prof. Dr. *Costa Ricky Maharu & Grace Alfred Martin V. AG*¹¹⁴ in which the High Court declared S.36 (4)(e) of the Economic and Organized Crime Control Act [Cap.200 RE.2002] as not being unconstitutional; and does not abrogate the constitutional right of an accused person of being presumed innocent until proved otherwise, as provided for by Art.13(6) (b) of the Constitution." In arriving to this decision the High Court adopted the same reasoning and the principle laid down by the Court of Appeal in *DPP v. Daudi Pete*.¹¹⁵

Not only that but also the Judiciary has been referring to the Parliament to rectify the impugned provisions of law instead of declaring them null and void. For instance, the High Court in *Prof. Dr. Costa Ricky Maharu & Grace Alfred Martin V. AG*¹¹⁶ found the provision of S.36 (4)(e) of the Economic and Organized Crime Control Act unconstitutional as it is discriminatory and abrogates the noble principle of equality before the law because it enables those who are rich to pay and buy their freedom while those who are poor, and may be innocent, to remain languishing in prison until their cases are finally determined; and that it provides separate conditions for bail for specific accused persons under the Act as opposed to general conditions under the Criminal Procedure Act. One would have expected that the Court would nullify this provision but due to judicial conservatism, and avoiding conflicts with the other arms of the Government, the court instead of declaring the said provision as a nullity, it gave the government an opportunity to rectify the said provision.¹¹⁷

¹⁰⁹ Loc.cit

¹¹⁰ Loc.cit

¹¹¹ Court of Appeal of Tanzania, ate Dar es salaam, Criminal Appeal No.21 of 1997 (unreported)

¹¹² Loc.cit

¹¹³ Loc.cit

¹¹⁴ Loc.cit

¹¹⁵ Loc.cit

¹¹⁶ Loc.cit

¹¹⁷ The court in giving the government an opportunity to rectify the impugned provision stated, having found that the impugned provision is unconstitutional because of its discriminative nature; we next turn to consider what should be the appropriate remedy thereto. Under Article 30 (5) of the Constitution, where any provision of law is found to be unconstitutional, the court can declare that law void or may afford the Government or Parliament an opportunity to rectify the defect found in that law. In exercising the court's powers under this Article of the Constitution, we have considered the nature of the defects in the impugned provision. As has been found above, the provision does not make the relevant offence under the Act a non-bailable offence. It however discriminates against those who cannot afford to get the requisite amount of money to deposit in compliance with the mandatory condition stipulated in that provision. We find it appropriate therefore to order that such a defect be rectified so that the right to bail can be enjoyed equally by any person charged under the Act without any discrimination. The Government through the Attorney General is therefore hereby given opportunity to take, within one year from the date of this ruling, necessary steps to effect rectification by the Parliament, of section 36(4) (e) of the Act so as to remove the discriminative aspect in that

Unfortunately, not much can be said on this decision since as usual the government may appeal or ignore to make any change. It is however too early to make any judgment till when the time specified by the court expires. All in all it is pre-requisite and interest of justice that for effective enjoyment of the right to presumption of innocence the judiciary should strive to the principle of judicial independence and adopt a broader approach in constitutional interpretation in conformity with the principle of constitutional interpretation stated by Lugakingira, J. in *Julius Ishengoma Francis Ndyabo v. the Attorney General*,¹¹⁸ that the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, and develop the dimensions of those rights and ensure that our people enjoy their rights. Restrictions on fundamental rights must be strictly construed.

Constitutional Limitations on Fundamental Rights and Freedoms

The provision of Article 13(6) (b) is too general and thus does not specify the scope and application of the right to presumption of innocence. Furthermore the said right is subjected to state authority to make procedures which are appropriate or take into account the principle that no person charged with a criminal offence shall be treated as guilty of the offence until proved guilty of that offence. It is odd because subjecting the right to state authority to determine the appropriate procedures is in itself improper as it is not clear as to which authority. Rest it is the executive which is chief defaulter there can be no more presumption of innocence but rather presumption of guilty. Not only that but if it would be the legislature still the same would not be safe because the legislature is a political body which functions according the policy of the government in force. It would equally be unsafe to entrust the right only on the judicial body for in absence of determined judges, the same can be corrupt and more dangerous where there are judges who are not independent; and driven off by the executive.

Furthermore there is the general derogative clause under Article 30(2) which the court can apply it technically and serve a statute or statutory provision which offend the right to presumption of innocence as was the case in *DPP v. Angelina Ojare*.¹¹⁹ Furthermore the legislature may use the very article to enact any law which is offensive to the right to presumption of innocence provided that such law is purported to meet the purposes specified under Article 30(2) (a-f).

Concluding Remarks

The constitution of the united republic of Tanzania provides for a narrow scope of application of the right to presumption of innocence. The High Court has shown a positive trend in ensuring the said right is given a liberal and broad construction on one hand. However, the Court of Appeal on the other hand has been reluctant to take the view of the High Court, hence, narrowed the scope of the right to presumption of innocence. The stand of the Court of Appeal seem to have discouraged the High court's activism as was initiated by justice Mwalusanya in the case *Daudi Pete v. DPP*.

It is worth to stress here that the right to presumption of innocence is a constitutional right whose scope of application is supposed to be in the entire criminal process at all of its facets from the process of accusation, search, investigation, pre- trial detentions, hearing, conviction, sentencing and appeals thereto. Furthermore, the right should be observed by any decision maker and it is completely opposed to mob justice.

In order to make the right to presumption of innocence a reality the author recommends that all offence regardless of their severity should be bailable or the amount of bond to be deposited and conditions for bail should be reasonable and, the conditions for bail should not be statutorily provided but rather be determined by the courts depending on the circumstances of each case. It is further recommended that the Prosecution should not interfere with the court's discretion on granting or refusing bail. Constitutional limitations on the right to presumption of innocence and other fundamental rights and freedoms should be removed. All the laws which are inconsistent with the right to presumption of innocence should be amended or repealed. Lastly, the judiciary as the guardian of individual liberty and freedoms should adopt a liberal and broad approach in interpreting the constitutional provision

provision. In the event of failure to comply with this order, the provision shall as from the date of expiry of the said one year, become null and void.

¹¹⁸ Loc.cit

¹¹⁹ Loc.cit

of the right to presumption of innocence as well as other fundamental rights and freedoms that have same bearing with the right to presumption of innocence.

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