IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MAIN REGISTRY

AT DAR ES SALAAM

(CORAM: KAGOMBA, J., AGATHO, J., AND BWEGOGE, J.)

MISCELLANEOUS CIVIL CAUSE NO. 18 OF 2023

IN THE MATTER OF THE CONSTITUTION OF THE UNITED REUBLIC OF TANZANIA OF 1977 [CAP 2 R.E. 2002] AS AMENDED FROM TIME TO TIME

AND

IN THE MATTER OF THE BASIC RIGHTS AND DUTIES ENFORCEMENT ACT [CAP 3 R.E. 2019]

IN THE MATTER OF A PETITION TO CHALLENGE CONSTITUTIONALITY OF SECTIONS 8 (1)(2)(3), 11(1), 14(5), 19, 20, 22 (3), 23(3)(c) (d)(e), 25(2)(e)(f), 26, 30, 31(2), 33(2), 34 OF THE PERSONAL DATA PROTECTION ACT [CAP 44 OF 2023]

IN THE MATTER OF THE BASIC RIGHTS AND DUTIES ENFORCEMENT (PRACTICE AND PROCEDURE) RULES, 2014 [G.N. 304 OF 2014]

BETWEEN

TITO MAGOTI.....PETITIONER

VERSUS

HONOURABLE ATTORNEY GENERAL..... RESPONDENT

JUDGMENT

Date of last order:11/03/2024

Date of judgment:08/05/2024

AGATHO, J.:

For the first time the constitutionality of some provisions of the Personal Data Protection Act [CAP 44 OF 2023] (herein PDPA) is being put to test. The Petitioner is challenging the constitutionality of sections 8 (1)(2)(3), 11(1), 14(5), 19, 20, 22 (3), 23(3)(c) (d)(e), 25(2)(e)(f), 26, 30, 33(2) and 34 for violating the provisions of Article 12(1)(2), 13(1)(2)(6)(a), 16(1), 21(2) and 29(1) of the Constitution of the United Republic of Tanzania of 1977 as amended from time to time (herein CURT). The Respondent on her side has refuted the Petitioner's allegations and asked the court to dismiss the petition.

The Petitioner instituted the case by a way of a petition which was supported by his own affidavit. He seeks that:

(a) the court declare provisions of Sections 8 (1) (2) (3), 11 (1), 14 (5), 19, 20, 22 (3), 23 (c) (d) (e), 25 (e) (f), 26, 30, 33 (2), 34 of the PDPA, are unconstitutional for offending the provisions of Article 12 (1)(2),13 (1) (2) (6) (a), 16 (1), 21(2) and 29 (1) of the CURT.

(b) the provisions of Section 8 (1) (2) (3), 11(1), 14 (5), 19, 20, 22 (3), 23 (c) (d) (e), 25 (e) (f), 26, 30, 31 (2),33 (2), 34 of the PDPA, be declared unconstitutional and expunged from statute immediately without allowing the government to amend the same.

(c) The court grant any other order, relief, or directives as it will deem fit and justice to grant for the spirit of protecting fundamental human rights.

(d) Since this is a public interest matter each party to bear their own costs.

The Respondent on her side objected the Petition by filing a counter affidavit deponed by Morice Cyprian Sarara, Senior State Attorney. As for the reliefs, the Respondent invited the court to dismiss the Petition for want of merit.

In terms of legal representation, both parties enjoyed the services of learned counsel. While Mr. Jebra Kambole learned counsel, appeared for the Petitioner, Ms. Jacqueline Kinyasi, State Attorney represented the Respondent . The petition was heard by way of written submissions. We are grateful to the parties' counsel for their impeccable research work that enriched their submissions.

It is undisputed that privacy is a fundamental right recognised by the CURT as well as International treaties and conventions such as the Universal Declaration of Human Rights (UDHR), International Convention on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights (ACHPR). To implement the right to privacy as enshrined in Article 16 of the CURT, the PDPA was enacted. It is also clear that every person has the right to the protection of the law against interference of his privacy.

Besides that, there are other constitutional principles regulating constitutional petitions that have been briefly sketched by the Respondent's counsel in her submission. One, a statutory provision or the whole Act shall be presumed to be constitutional until the contrary is proved. That is the presumption of the constitutionality of the Act of Parliament as rightly held in **Francis Ishengoma Ndyanabo v. Attorney General** [2004] TLR 14. Two, any legislation falling in the ambit of Article 30 of the CURT is constitutionally valid notwithstanding that it may violate basic rights of individuals. This principle was stated in **Director of Public Prosecutions v. Daudi Pete** [1993] TLR 22. Lastly, and in accordance with **Rev. Christopher Mtikila v. Attorney General** [1995] TLR 31, a breach of constitution, is a grave and serious matter that cannot be arrived at by mere inference. As such and by virtue of Court of Appeal decision in **Attorney General v. Dickson Paulo Sanga** [2020] 1 TLR 61, it requires proof on the balance of probabilities.

In this petition, the parties have consensus that the rights granted by Article 16 of the CURT, like other fundamental rights and freedoms, is subject to limitation as provided for under Article 30 of the CURT. Limitations have been restated in several case laws including **Raymond Paul Kanegene and Bob Chacha Wangwe v. The Attorney General,** Consolidated Civil Cause No. 15 of 2019 and No. 5 of 2020 High Court of Tanzania, Main Registry at Dar es salaam**;** and **Ndyanabo** (supra). However, the said limitation or restrictions must abide with the three-step test as endorsed in various jurisdictions and courts, such as the East African Court of Justice (EACJ) in the case of **Media Council of Tanzania and Others v. Attorney General of Tanzania** (Reference No. 2 of 2017). The test has three elements: 1. The limitation must be prescribed by the law; 2. The limitation is necessary in democratic society; and 3. The measure taken is proportionate to the purpose sought to be achieved.

Having highlighted the three-step test, one ought to state the burden and standard of proof in constitutional petitions. Generally, as captured by Section 110 of the Evidence Act [Cap 6 R.E. 2022] the person who makes any allegation carries a burden of proof. As per the case of **Dickson Paulo Sanga** (supra), the standard of proof in constitutional petition is on the balance of probabilities. It is trite law that the Petitioner has a duty to establish a prima facie case. Once that is established then the burden shifts to the Respondent to prove that the limitations or the impugned law is constitutional or falls under the ambit of Article 30 of the CURT.

The PDPA was enacted on 2nd December 2022 and came into force on 1st May 2023. The objective of the Act, as revealed by its long title, is to provide for principles of protection of personal data so as to establish minimum requirement for the collection and processing of personal data; to provide for establishment of personal data protection commission (herein PDPC); to provide for improvement of protection of personal data processed by public and private bodies; and to provide for matters connected therewith.

The PDPA contains interpretation of several terminologies that are worth restating, such as personal data, sensitive data, data subject, and data controller. Below, we thus

extract the interpretation of these terms as set out under Section 3 of the PDPA. Personal data means any information that identifies or leads to identification of a person such as his name, address, DNA, et cetera.

"Sensitive personal data" includes-

(a) genetic data, data related to children, data related to offences, financial transactions of the individual, security measure or biometric data; if they are processed for what they reveal personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, affiliation, trade-union membership, gender, and data concerning health or sex life; and

(b) any personal data otherwise considered under the laws of the country as presenting a major risk to the rights and interests of the data subject."

Regarding a term data subject, that stands for a natural person whose personal data is subject of protection by the law (the PDPA). A data controller on the other hand is a natural person, legal person, or public body which alone or jointly with others determines the purpose and means of processing of personal data; and where the purpose and means of processing are determined by law; data controller is the natural person, legal person or public body designated as such by that law and it includes his representative.

Owing to its importance and multifarious nature of the subject matter, in analysing the case we benefitted from International Data Protection Law especially the European Union General Data Protection Regulations, 2016 (GDPR) and jurisprudence. The GDPR has recognised data protection law as a sector neutral law that applies to many fields. Understandably, each field has its specific features. This law has a general objective of protecting privacy of an individual against encroachment by the government and other individuals both natural and legal persons. To achieve its objective, the PDPA under Section 65 like Article 40 of the GDPR encourages data controllers to set codes of conduct

stipulating the procedures as to how they collect and process personal data while safeguarding data subject's privacy in their specific fields. That regulatory framework is useful for it appreciates the reality that data protection cuts across many fields/disciplines rendering it impossible to prescribe one size fits all procedures.

Instead, it sets the objective of the law and let each field such as healthcare service provider as a data controller to formulate its code of conduct containing procedures as to how they process and secure the individual's personal data. In so doing they implement the law in a bid to achieve its objective.

Another preliminary point revolves around the cases referred by the Petitioner. He has attached copies of the decision of **Joran Lwehabura Bashange v. Minister for Constitutional & Legal Affairs & Another** [2024] TZHC 774 to his submission. Intriguingly, he has not cited it anywhere in the submission. This may imply that the case is irrelevant or distinguished from the case at hand. The same applies to **Attorney General v. Rebeca Z. Gyumi**, Civil Appeal No. 204 of 2017 CAT at DSM.

That aside, the Petitioner claimed that he had the right to seek assistance of this court through a constitutional petition if his right under CURT is violated. This is a valid point that Respondent has conceded. However, the Respondent stated that in exercising his right to take legal action, the Petitioner must comply with the requirement to show how he was personally affected by the impugned Sections of the Act. In our view, we think that the Petitioner is required to establish a prima facie case. That was held in the **Centre for Strategic Litigation Limited & Another v. Attorney General & 2 Others,** Misc. Civil Cause No. 21 of 2019 (HC unreported)**; Dickson Paulo Sanga** (supra) and in **Bashange's case** (supra). Once prima facie case is made out, the burden of proof shifts to the Respondent to show how the impugned provisions of the Act conform to the CURT. This preliminary matter ought to have been determined as an issue regarding the competency of the petition. But then again, each citizen has a right to protect the CURT whenever it has been breached or it is likely to be breached by any law or action by any authority. That is the import of Article 26(1) and (2) of the CURT.

Having sketched the preliminaries, and turning to the crux of this case, the Petitioner alleges that provisions of Sections 8 (1)(2)(3), 11(1), 14(5), 19, 20, 22 (3), 23(3)(c) (d)(e), 25(2)(e)(f), 26, 30, 31(2), 33(2), 34 of the PDPA are unconstitutional for contravening Article 12(1)(2), 13(1)(2)(6)(a), 16(1), 21(2) and 29(1) of the CURT.

The Respondent's case as grasped from the counter affidavit of Morice Cyprian Sarara, Senior State Attorney and submissions of State Attorney, Ms. Kinyasi is that she is vehemently denying the allegations of the Petitioner. The Respondent's stand is that the PDPA is constitutional, and the impugned provisions are compatible with not only the CURT but also international legal instruments including the UDHR and ICCPR.

We now turn to the issues for determination. The parties acknowledge the following as the issues to be determined:

i. Whether the provisions of sections 8 (1)(2)(3), 11(1), 14(5), 19, 20, 22 (3), 23(3)(c) (d)(e), 25(2)(e)(f), 26, 30, 31(2), 33(2) and 34 of PDPA are unconstitutional for offending the provisions of Article 12(1)(2), 13(1)(2)(6)(a), 16(1), 21(2) and 29(1) of the CURT.
ii. What are the remedies of the Parties?

To begin with the issue whether the impugned provisions of PDPA are unconstitutional? This issue is divided into 12 sub-issues as discussed below. For clarity each impugned provision of the PDPA will be analysed separately.

To begin with attacks and criticisms directed to Section 8 (1)(2)(3) of the PDPA. The Petitioner claims that the provisions of Section 8(1) (2) (3) of the PDPA which provides the President of the United Republic of Tanzania (herein the President) with the powers to appoint the Chairman and Vice Chairman of the Board of the PDPC without any prescribed qualifications, procedures, and conditions relating to the manner of appointment contravenes the provision of Articles 12(1)(2), 13(1)(2)(6)(a), 16(1), 21(2) and 29(1) of CURT, hence unconstitutional. Along with that the provision granting the Minister with powers to appoint Board Members of PDPC was not spared. It was

attacked for lacking procedures in appointing the Members leaving a room for arbitrary decision making and undermining the principle of equality before the law.

The Petitioner in paragraph 5 of his affidavit asserts that the provisions of Section 8 (1) (2) (3) of the PDPA provides the President with powers to appoint the Chairman and Vice Chairman of the Board of the PDPC without any prescribing qualifications or procedural aspect and manner of appointment. The impugned Section further provides the Minister with discretion to appoint members of the board without clear procedures. This allegation was rejected by the Respondent as per paragraph 4 of counter affidavit. The Respondent states that the Act was enacted on 2nd December 2022 and came into force on 1st May 2023.

The petitioner submitted that the impugned Section is unconstitutional for failure to prescribe procedures and conditions to be followed by the President in appointing the Chairman and the Vice Chairman of the PDPC. Hence, subjecting the whole process to bias which undermines the power of the Board of the PDPC. The Respondent on her side rejected the allegations and argued that the Petitioner's views are based on mere possibility of what could happen in operation of the impugned Section. That is, a mere possibility of it being abused and he has failed to prove beyond reasonable doubt on how the absence of the said procedures and conditions led the President to have failed to consider factors such as gender and impartiality in the appointments. He has not shown or proved how the impugned provision of the law is discriminatory, how it has violated the right to privacy, right of equality and right to be heard. Truly, the constitutionality of the provision or statute is not found in what could happen in the operation. Where a provision is reasonable and valid the mere possibility of its being abused in its operation does not make it invalid. That was held in **Mtikila** (supra).

Save for the standard of proof which is on balance of probability as per **Paulo Dickson Sanga** (supra), we agree with the above submission of the Respondent's counsel on this point. In taking up this position, we are inspired by the principle of law enunciated in criminal proceedings that suspicion cannot ground conviction however

strong it may be. (see **Nathaniel Alphonce Mapunda and Benjamin Alphonce Mapunda v. R** [2006] TLR 395). Hence, by extension of this principle, we think it is the law that suspicion cannot be the basis of liability. In the same vein, we find that the Petitioner's allegations are based on suspicion.

The Petitioner yet contended that the impugned Section is unclear about the qualifications of the Chairman, hence left the appointment to the wisdom of the President without being guided by the law. It was the submission of the Respondent's State Attorney that the Petitioner has failed to show how absence of prescribed qualifications violates the right of equality and the right to be heard. This again reveals the fear that the Petitioner has on risk of the provision being abused in its operation. Relying on **Mtikila** (supra), we are firm that there is nothing concrete adduced by the Petitioner confirming that in the absence of prescribed qualifications an incompetent person was appointed or may be appointed as a Chairman or Vice Chairman. It is our view that the Petitioner has failed to prove the allegation on the balance of probability.

Furthermore, the Petitioner claims that the impugned provision of the PDPA violates the right to equality, the right to be heard, hence violating the CURT. This however is controversial because it is unclear against which specific individual the right to equality is violated. We hold so because the appointment of leaders like Chairman or Vice Chairman of the PDPC is not a normal recruitment process open to all citizens. It is unlike any other employment opportunities. That is an appointment by the President in exercise of powers under Article 36 of CURT. Nevertheless, it is our view that the President is expected when appointing the officers including the Chairman and Vice Chairman of the PDP Commission to consider Articles 9(g) and 12 of the CURT requiring gender equality and non-discrimination.

Since some of the allegations put forward by the Petitioner relates to appointment of the Chairman and Board Member of the PDPC, it is worth to state the source of the of powers of the appointing authorities. As above stated, the President under Article 36 of the CURT has been granted power to constitute, establish and abolish office, as well as

power to appoint officers. These are discretionary powers. Moreover, the appointment of officers in exercise of powers under the foregoing Article is unlike ordinary recruitment of public servants under the Public Service Act. These positions of officers are not like employment of normal public servants. In contrast to appointment of officer under Article 36 of the CURT, other positions in public service are based on recruitment by the Public Service Recruitment Secretariat or as prescribed in the laws of public institutions. Such recruitment schemes are based on competitiveness, advertisement of posts, shortlisting, interviews, screening, etc. Where if the steps stated are not observed the recruitment process may be challenged for being discriminatory or lacking transparency. However, the said steps or procedures do not apply to appointment of officers by the President in exercising her powers under provisions of Article 36 of the CURT.

Also, the impugned provision provides the Minister with discretion to appoint members of the Board of the PDPC without clear procedures, leaving a leeway for arbitrary decision making and violating the principle of equality before the law, and the right to be heard as enshrined in the CURT. To determine whether a provision of the law is inconsistent with the CURT one must look at the provision of the Act and not merely the manner in which the power under the provision is actually exercised. Inconsistency is examined in the nature of the provision itself independent of the exercise of power under it. That was also held in **Bashange** (supra).

As for the Minister's powers to appoint members of the Board of the PDPC, that too is appointment which is not open to the public to apply. In such sense, we are of the view that there is no discrimination. Besides, the appointees are not invited to apply for the Board membership. The recruitment of board members is not an open process to which anybody can apply. Hence such appointment cannot be said to be discriminatory as the process of appointment is not open to the public to apply. Consequently, no right to be heard has been violated. We would have a different view if the law had offered opportunity to the public to apply for the positions/appointments, and the President of URT and the Minister decide to appoint the Chairman, Vice Chairman and Board Members

arbitrary. For instance, without there being applications or interviews while the law required the same to be done. In absence of such requirements in the law itself one cannot allege any discrimination or violation of the PDP Act or the CURT. It may sound as a bad practice but that is the law.

It is our view that these requirements stated by the Petitioner are found neither in PDP Act nor in the CURT. Rather they apply in recruitment of normal employees in both private and public institutions. That prompted us to venture briefly in the international labour law to see if we can get any inspiration. Workers' recruitment is covered in internation labour standards set by the International Labour Organisation (ILO). Despite that, the issue of recruitment is not legally regulated other than the general prohibition of discrimination found almost in all ILO Conventions. For instance, the Convention 100 of the ILO is on the International Labour standards requiring equality of opportunity and treatment. The standards prohibit non-discrimination in staff/workers' recruitment process. They require national laws of countries that ratified the ILO Convention to provide equal opportunity to all candidates applying for jobs. However, the appointment of Director General, Chairman, Vice Chairman and Board Members of the PDPC though codified is not open to application for all citizens. It is by appointment. This is a legitimate process because it is provided for in the law. Nevertheless, one may argue that it is against good practice found in the internationally recognised general practices for fair recruitment.

Advancing further, paragraph 4 of the Petitioner's affidavit states that the law establishes PDPC without creating its composition which makes it vague and subject to abuse. This is rightly denied by the Respondent as seen on paragraph 4 of counter affidavit. The Respondent's witness went on averring in paragraph 6 of his counter affidavit that Sections 8, 11 and 13 of the PDPA provide for composition of the PDPC. The court concurs with the respondent on this. The Petitioner has failed to prove his allegations against the Section 8(1)(2)(3) of PDPA. In the end, it is our finding that this impugned provision is constitutional.

Next is whether Section 11(1) of the PDPA is unconstitutional? According to the Petitioner, the provisions of Section 11 (1) of the PDPA, which provides for the power to the President to appoint the Director General of the PDPC without any interview, transparency, competition, or openness, without any security of tenure violates the right to equality, right to non-discrimination and the right to privacy, hence violates the CURT.

The Respondent rightly argued that the President's appointment of the Director General is by virtue of the exercise of powers under Article 36(2) of the CURT, which does not set a requirement for interview. The Petitioner to that extent has failed to show how the impugned provision violates the right to privacy. This court cannot declare the impugned provision unconstitutional based on speculation of possibility of being abused. The Petitioner was expected to prove his allegations. He has abdicated his duty to prove as required by Section 110 of the Evidence Act [Cap 6 R.E. 2019].

In paragraph 6 of the affidavit in support of the petition, the Petitioner states that the provisions of Section 11(1) of the PDPA provides the President with powers to appoint the Director General of the PDPC without any interview, transparency, competition, or openness, without any security of tenure. Interestingly, in the counter affidavit the Respondent's witness noted the averment in paragraph 6 of the affidavit. However, in the submission, the Respondent refuted the allegation of lack of security of tenure. According to her, the Director General has security of tenure provided for in Section 12 of the PDPA. The Director General shall serve for a period of 5 years. There is clear misconception as to what security of tenure is in the Petitioner's submission. Security of tenure as rightly put by the Respondent means that one cannot be terminated from service arbitrary and unfairly. There must be a just cause for termination to be lawful and fair. The Petitioner added another scathy allegation that impugned provision does not guarantee salary. We wonder how that is related to equality before the law, right to privacy and discrimination, leave alone security of tenure. This leads to a conclusion that the allegations are unfounded and that Section 11 (1) of the PDPA is constitution.

The third issue is whether Section 14(5) PDPA is unconstitutional? Under this issue, the Petitioner is of the view the provisions of Section 14 (5) of PDPA, which provides for the power to the PDPC to register or reject without specifying time for registration, rejection, and the time to inform the applicant is too wide and ambiguous thus susceptible to abuse which leads to the violation of the right to be heard and fair trial as the rights are within our CURT. This is supported by averments in paragraph 7 of the affidavit. This has been denied by the Respondent in paragraph 5 of the counter affidavit. And she stated that the Act is in line with the Constitution.

Upon scrutiny of the law particularly the PDP Regulations, GN No. 449 C of 2023, under regulations 5(1)(2) and 6 it was found that the time has been specified for registration, and rejection of the registration. They prescribe seven days for registration and 14 days for rejection of registration. It is elementary that the PDPA must be read together with its regulations.

Unpleasantly, we observed that while the Petitioner's claim was in respect of notification about the request for registration, the issue of request for certificate emerged in the submission by his counsel. We are compelled to disregard the issue of certificate as it was a statement from the bar and not found in the pleadings. It is the law that parties are bound by their pleadings as rightly held in **William Benjamin Kahale v. Attorney General**, Misc. Civil Cause No. 23 of 2019, High Court of Tanzania, Main Registry at Dar es salaam; and in **Barclays Bank T. Ltd vs Jacob Muro,** Civil Appeal 357 of 2019 [2020] TZCA 1875 (26 November 2020) at page 11-12 the Court of Appeal of Tanzania.

On allegation of the Minister's control of the Board of the PDPC, paragraph 12 of the counter affidavit denies the averments in paragraphs 13 and 14 of the petition and the Petitioner's Affidavit. The Respondents state that the Board of PDPC is the governing body of the PDPC hence it is the one in control of the PDPC and not the Minister. Furthermore, the Respondent stated that procedure for appeal and time has been

provided under regulation 14 of GN No. 449 C of 2023, as for time for determining an appeal shall resort to Section 62 of The Interpretation of Law Act [Cap 1 R.E. 2019].

Fourth, whether Section 19 of the PDPA is unconstitutional? The Petitioner claims that Section 19 of PDPA establishing the offences relating to registration without *mens rea*, without a clear definition of the wording or scope of application is too wide, unclear and ambiguous, thus violative of the right to fair hearing, fair trial and the right to privacy which are constitutional rights in Tanzania.

The question of *mens rea* has been raised in paragraph 8 of the affidavit alleging that the provisions of Section 19 of the PDPA, provides for the offences relating to registration without *mens rea*, with no clear definition of the wording, as is too wide, unclear, and ambiguous. Para 11 of the counter affidavit contested the allegations. The Respondent correctly stated that, Section 19 of the PDPA does not establish an offence without *mens rea,* rather it creates an offence for any person who collect or process personal data without being registered as a data controller or a data processor. Also, whoever furnishes false or misleading information during registration or renewal, commits an offence. Moreover, the Respondent submitted that whoever is alleged to have committed that offence will be tried in Court and upon conviction (upon proving *actus reus* and *mens rea*) is when he will be liable for penalty. In respect of the foregoing issue, the Court while concurring with the Respondent's views rejects the Petitioner's claims. In addition, it is our observation that the impugned provision creates neither strict liability offence nor absolute liability. Therefore, the petitioner's supposition is misplaced and without merit. The application for registration is clearly provided for in regulation 4(1) of the Regulations, GN No. 449 C of 2023. Therefore, the impugned provision does not in any way violate the CURT.

Fifth, whether Section 20 of the PDPA is unconstitutional? The Petitioner attacked the provisions of Section 20 of the PDPA, which gives channel of appeal from PDPC to the Minister who is a member of the ruling political party, a person whom the PDPC is under his/her control, without prescribing procedures relating to appeals - the

time of appeal or determining the appeal, is in violation of the right to be heard and the right to fair trial which is provided under the CURT.

Paragraph 9 of the Petitioner's affidavit states that the provisions of Section 20 of the PDPA, gives channel of appeal from the PDPC to the Minister who is a member of a ruling political party, a person under whose control the PDPC is. The Respondent has disputed the allegations. Under the impugned provision of the law, appeal against PDPC's decision on registration lies to the Minister. We associate ourselves with the Respondent's view that there is no conflict of interest as the Minister is neither part of the PDPC nor the Board of the PDPC. Notably, the Minister's decision is subject to judicial review a legal process for control of maladministration. Thus, the impugned provision does not infringe upon principles of fairness and transparency because the procedure for registration is clearly stated in the law and the right of appeal is also available. The allegation that the Minister may control the PDPC is a mere fear devoid of substance. That is because the control over the PDPC is placed on the shoulders of the Board of PDPC not the Minister.

Interestingly, paragraph 10 of the affidavit articulates that the provision of Section 20 of the PDPA does not provide the timeframe for appeal or time for determining the appeals and with no prescribed procedure for the appeal. The Court found that this allegation is incorrect because appeal against the decision of the PDPC relating to registration lies to the Minister and the same has to be preferred within seven days from the date of the decision as per regulation 14 of the Regulations, GN No. 449 C of 2023. As for the time for determination of the appeal, though neither the PDPA nor Regulations provide for the said time, the same must be done with all convenient speed as per Section 62 of the Interpretation of Laws Act [Cap 1 R.E. 2019].

The Petitioner has also attacked the impugned provision for ousting the jurisdiction of the court. But this, in our view, is an unmerited allegation because even if the decision of the Minister is said to be final yet an individual can still challenge it through judicial review. That was held in **Tanzania Air Services Limited v. Minister for Labour,**

Attorney General and Commissioner of Labour [1996] TLR 217; and **Kahale** (supra).

Sixth, whether the provisions of Section 22 (3) of the PDPA is unconstitutional? In accordance with the Petitioner, paragraphs 10 and 11 of the affidavit challenges provisions of Section 22 (3) of the PDPA which provides for the prohibition of collecting personal data by unlawful means without creating an offence, while it is ambiguous and too wide without clear meaning. The Respondent through paragraph 10 of the counter affidavit, contested the allegations.

The impugned Section prohibits collection of personal data by unlawful means. In the Petitioner's view, the provision is ambiguous, too wide and lacks clear meaning. But it is difficult to grasp how that leads to violation of the petitioner's right to privacy. After all the provision like the overall object of the PDPA intends to safeguard the data subject's right to privacy. Additionally, the Petitioner alleged that the PDPA has not defined the words "unlawful means" or unlawful purposes" which makes it open to abuse. While we agree with the submission by Ms. Kinyasi, State Attorney, that the legislation cannot define every term, we are concerned with over broad provision of legislation that leads to vagueness and legal uncertainty. Much as we agree with Respondent's caution that the Act could be a bulky and incomprehensible which aligns with **Sir William Dale's complaint** in his seminal book **Legislative Drafting – A New Approach, 1977, London, Butterworths** that the English statutes are loaded with too many definitions, we find the petitioner's worries to have substance.

Understandably, the PDPA is a general law applicable to all sectors: health, education, finance, administration of justice, and others. It should be noted that in legislative drafting parlance, there are two ways of drafting legislation: detailed and non-detailed (**see Sir William Dale** (supra)**; see also Xanthaki, H., Thornton's Legislative Drafting, 5th Edition, 2013 London, Bloomsbury**). While detailed provisions are preferred for penal legislation, the non-detailed drafting style (broad provisions) is preferred for legislation that is of general application and requires

regulations and regulator to fill gaps. The regulator here may mean the Minister or the PDPC. The above stated non-detailed legislation is particularly useful when the regulated sector cuts across many fields, technical, and changes rapidly. The principal legislation is drafted in non-detailed way to allow the regulator to make regulations or guidelines to implement it. However, in the case at hand we noted that the PDPA creates offences too. Hence possessing elements of both detailed and non-detailed law. If the "unlawful means" mentioned in the PDPA were to be enlisted in the Regulations the legislature should have made that clear. Since the impugned provision creates an offence, it is our observation that the same should have been narrow and clear. Looking at Section 22(3) of PDPA, it is our view that the "unlawful means" for collecting and processing personal data ought to be enlisted in the Act because of the offence created even if the regulated fields are multifarious and change with technology changes. Clarity is thus lacking in the impugned provision. It ought to have stated what unlawful means are, and where are they to be found whether in the Act itself or in the Regulations. It is hard to tell if the listing of unlawful means has been left to the Minister to formulate in the Regulations. We therefore hold the impugned provision to be wide and vague.

It is noteworthy to remark here that means for collection of personal data cannot be unlawful if the data subject has consented to it. For instance, if one consented to use of a tag management system such as Google Tag Manager or mobile app user tracker, in his electronic communications offered by service provider, or Cookies' deposition in his electronic device, that cannot amount to unlawful means. Cookies are small files/blocks of data used by web servers to save browsing history in the user device to allow websites to remember it.

It was the Respondent's view that a word "unlawful" is a plain English word lacking any ambiguity. Hence there is no need to define it for it will be superfluous. She referred to the position in **Benjamin William Kahale** (supra) that the word "distort" is a plain English word that without being defined still cannot by itself make a provision of the law

invalid or unconstitutional. Although the Respondent's submission has sense, the mischief here is not on the meaning of the term unlawful rather on the word unlawful means.

The Petitioner further cited the **UN Human Rights Committee's guidance** that laws must contain rules that are sufficiently precise to enable individuals to understand what actions legitimately restricted and which ones are unduly restricted. One caveat is that the said guidance does not apply in all circumstances. If the law is regulating an area which changes fast or cuts across many sectors like the PDPA, the same may be drafted in broad terms to allow regulations to fill the details. However, that does not imply that, if the law or its provision creates offence then it can be ambiguous or vague. As rightly submitted by the Petitioner, the term unlawful means poses ambiguity. We find the impugned provision to be broad and unclear as to what are the unlawful means. Hence, creating legal uncertainty and posing difficulty in guiding behaviours of individuals.

Although we viewed that the impugned provision as saving the interest of the Petition as a data subject because it bars the data controller from collecting personal data by unlawful means, these unlawful means will certainly vary from field to other, the PDPA therefore ought to have disclosed them. Undisputedly, the law allows collection of personal data with data subject's consent or under the exceptions. Thus, collection or processing of data may be for lawful purpose, but what happens if the said data was collected by the so-called unlawful means? What is the implication? Clarity is essential here. Indeed, ambiguity arises because the unlawful means are unknown. For the foregoing reason, we find merit in the allegation that the absence of definition for unlawful means creates ambiguity, vagueness and open for abuse.

The seventh issue is whether the provisions of Section 23 (3) (c) (d) (e) of the PDPA is unconstitutional? The petitioner contends that the provisions of Section 23 (3) (c) (d) (e) of the PDPA, which provides for circumstances in which a data controller is not obliged to comply with requirement of collecting data from data subject in a wider term, ambiguous, unclear and without prescribed procedure is in violation of

the right to privacy. That is found in paragraph 12 of the affidavit. The Respondent has vehemently disputed the allegation.

There are several key points to be underscored. First, the impugned provision provides for exception to the requirement of consent of the data subject in collection and processing of personal data. Considering that the PDPA applies to different fields/sectors, services, etc., the exceptions have been crafted in general terms without providing the procedures as these were reserved for regulations and guidelines. As correctly submitted by the Respondent's State Attorney, the procedures are not one size fits all. They differ depending on the field to be applied. The procedure for education institutions cannot be like those prescribed for health care services. However, they are all gearing towards protecting data subjects' privacy. There are minimum standards set by the PDPA such as the data processing principles. See Section 5 of the PDPA.

Section 23(1) of PDPA stipulates that personal data cannot be processed without data subject's consent. However, the impugned provisions (Section 23(3)) state that a data controller is not obliged to comply with subsection (1) where:

> (c) compliance is not reasonably practicable in the circumstances of the particular case;
> (d)non-compliance is necessary for compliance with other written laws; or
> (e) compliance would prejudice the lawful purpose of the collection.

The above circumstances constitute limitations to the general rule to protection of privacy. It is in this understanding that the Petitioner challenged it. His attack though is based on their vagueness and ambiguous nature. But we understand that the impugned Section is saved by Article 30(2) of the CURT and other international conventions such as Article 19(2) and (3) of the ICCPR and Article 27 ACHPR that recognize limitations or restrictions against the fundamental rights. In our jurisdiction, the case of **Ndyanabo** (supra) recognized the application of limitations.

The limitations ought to comply with the three-step test:

(1) the limitation must be prescribed by the law.

(2) the limitation must be necessary.

(3) the means chosen is proportionate to intended objective.

If we subject the above test to the impugned provision, it becomes clear that the limitation is provided by the law, that is the PDPA. Moreover, as to the limitation to be necessary starting with Section 23(3)(c) illustration will suffice. The impugned provision provides that compliance is not reasonably practicable in the circumstances of the particular case. In our consideration, this provision does not disclose the circumstances under which compliance is not reasonably practicable. We are left to speculate about these circumstances. An example that comes close is in emergency situation where there is say a car accident, or fire outbreak. To rescue the victims by giving emergency assistance may be difficult if one must obtain their consent to process their personal data. A person may die in such a situation while first responders are searching or waiting for his or her consent. It may also be impractical if the person is unconscious and requires quick medical attention. It is unclear though why the PDPA did not clearly exemplify or enumerate even in general terms these circumstances.

Turning to Section 23(3)(d) of the Act, which states that non-compliance is necessary in compliance with other written laws, we found this to be unproblematic. That is the dictate of other written laws and conforms to international data protection regimes such as the EU GDPR. That said, and since the laws are many and change overtime and new ones are enacted, it may be difficult to list all of them in the PDPA. We thus find the Petitioner's challenge on Section 23(3)(d) of the PDPA to be without merit.

Regarding Section 23(3)(e) of the PDPA, again here the prescription is that compliance would prejudice the lawful purpose of the collection. We think this too is a vague provision as examples of law purposes are missing. We ask ourselves; does it mean where there is execution of a contract in which a data subject is a party? Another lawful purpose is, for instance, in compliance with tax administration law or criminal

investigation. But surprisingly these examples have not been mentioned in the law. Therefore, clarity is lacking in the impugned provision.

As to whether the means adopted is proportionate to the objective, that is controversial as herein above observed. However, the procedures of controlling data collection may vary from one field and another. It may be difficult to list or contemplate all the situations. Nevertheless, it is not impossible to do so. If the circumstances were clear in the law, there would not be any vagueness.

It is our considered view that if the envisioned circumstances could not be mentioned in the main Act, but they could be found in the regulations. And the Act should have made that clear. Frankly, the Act contains data processing principles. But the details of the circumstances envisioned may be found in the regulations or in the guidelines. Yet, and in totality, therefore, save for Section 23(3)(d) the impugned provisions, we hold that Section 23(3)(c)(e) of the Act is ambiguous, unclear and without prescribed procedures.

The eighth issue states whether Section 25 (e) (f) of the PDPA is unconstitutional. The Petitioner claimed that provisions of Section 25 (e) (f) of the PDPA, which provides for personal data to be used for intended purpose while around using personal data in an intended purpose and thus violates the right to privacy and data protection as provided under the Constitution of United Republic of Tanzania.

In paragraph 13 the Petitioner averred that Section 25 (2) (e) (f) of the PDPA, provides for personal data to be used for intended purpose while around using personal data in unintended purpose. While the limitation to fundamental rights have already been stated herein above, the same applies to Section 25(2), hence need not repeated here. That provision states that where a data controller holds personal data that was collected in connection with a particular purpose, he may use that personal data for other purpose if:

> (c) the data controller believes on reasonable grounds that use of the personal data for that other purpose is necessary to prevent or lessen a serious or imminent threat to the life or health of the

data subject or other person or to public health or safety; or

(d) use of personal data for that other purpose is necessary for compliance with the law.

The petitioner has submitted that first, Section 25 of the PDPA violates the right to privacy and dignity of a data subject as he consented to his personal data to be used for one purpose, but the data controller may use it for other purpose. We hold a contrary view because the use of personal data for other purposes has been restricted to circumstances under Section 25(2). The Petitioner agrees that the exceptions under section 25(2) (a)-(d) are lawful and legitimate. He has not attacked them. His attacks are directed to Section 25(2)(e) and (f) of the Act. To determine that these exceptions are lawful and legitimate, we use Article 30(2) of the CURT which allows restrictions to the fundamental rights. The yardstick for any restriction is that it must be lawful, necessary, and proportionate to the objective set to achieve. Curtailment of an individual's fundamental right for public health, safety, of himself or others and public generally are among legitimate restrictions found in Article 30(2) of the CURT. Now, looking at the exceptions under the impugned provision stating that on reasonable grounds the use of personal data for another purpose is necessary to prevent or lessen a serious or imminent threat to the life or health of the data subject or other person or to public health or safety that is compatible with the cited provision of the CURT limiting the application of fundamental rights including right to privacy.

The petitioner claimed that the words used when data controller "**believes on reasonable grounds**", to him these are ambiguous and unclear. It is our settled view that these words may sound ambiguous if they are used without considering the whole provision of the law. The words have been used to prohibit unwarranted use of personal data for purposes other than the intended one. It is our view that the provision is wide because the grounds cannot be listed as fields in which the law applies are many and one cannot foresee each circumstance. There can be no room for abusing the said exceptions

because the data subject is empowered to file complaint before the PDPC if he sees that his right to privacy is being violated. It looks clear to us that Section 25(2) (e) was intended to protect the safety or health of the data subject and the public generally. The petitioner claims without citing any authority that public safety and public health have been ruled to be words that are unclear and are used to violate human rights. Perhaps he is confusing with the words "public interest." The law under the impugned provision has specifically cited public health and safety which adds its clarity.

The impugned provision of Section 25(2)(e) and (f) of the Act are among the exceptions to requirement of data subject's consent. Meaning, if they constitute exceptions, then the data subject's consent will not be required in collection and processing of her personal data. Section 25(2) (e) on its side provides for collection of personal data without consent if the collection is for purposes of protection or preservation of life or health of the data subject or any other person or the public generally. It is our perspective that the law contemplated situations such as emergencies including motor vehicle accidents, fire, or where there is an outbreak of an infectious disease, and the data subject is the infected person. We are of the view that the exceptions are compatible with Article 16(2) of the CURT. These proceedings would have been quite enriched if the parties had taken initiative to examine the Hansard to see what the parliamentarians said when debating on the said provision. Reference to Hansard is allowed in the Common Law (see **Bashange)** (supra)).

Paragraph 15 of the counter affidavit rejected the contents of paragraph 18 of the Petitioner's Affidavit. The Respondents averred that under the Act personal data are gathered from different fields hence cannot have prescribed procedure under this Act because the procedure in the fields differs. We wish to add that the PDPA is a technology neutral law. It is intended to apply across various fields, medical, education, public administration, etc. It applies to existing technologies and will apply to even the emerging ones. For that reason, the provision is broad to extend its application to various fields and in a fast-changing technology environment as rightly stated in recital 15 to the European

Union General Data Protection Regulation (GDPR), 2016 which embraces the principle of technology neutrality. It requires the data protection law protecting natural persons to be technologically neutral. We would like to add that Section 26 of the PDPA prohibits the data controller to collect data subject's personal data other than in the manner or circumstances stated in Section 25. We find nothing wrong with such law.

Para 17 of counter affidavit denied the contents of paragraph 20 of the Petitioner's Affidavit. The Respondent argued that the exceptions are provided in clear terms and does not, in any way, provide more than one meaning. The Respondent further stated that under the Act personal data are gathered from different fields hence cannot have prescribed procedure under this Act since the procedure differs in different field.

As for Section 25(2) (f), it provides that personal data may be used for other purpose than the intended, if it is necessary, in compliance with the laws. The Petitioner speculates that the exception may be used for surveillance of individuals by government agencies or private companies under pretext of being necessary in compliance with the law(s). Apparently, the Petitioner is speculating the violations without any proof. We are of the view that the use of personal data for other purpose than the intended to ensuring compliance with other laws, is justifiable. It would be tedious that every time the data controller has to ask an individual to give his consent for use of his data for compliance with the other laws especially for routine compliance use. For instance, companies under the Companies Act [Cap 212] are required to file annual reports with the Business Registration and Licensing Agency (BRELA). These reports contain personal data of directors and shareholders of that company. What the impugned Section allows is that the same data may be used for other purpose to comply with the laws such as filing tax returns at the Tanzania Revenue Authority (TRA) under the Tax Administration Act or Income Tax Act. Another example is regarding universities. They are required by Tanzania Commission for Universities (TCU) under the Universities Act to submit personal data of all students admitted to certain programmes in the Universities. The same data may be used for processing health insurance from the National Health Insurance Fund (NHIF) for

these students or reporting to Higher Education Student Loans Board.

But as to how the procedures for collection of such data should be, we are of the view that that ought to be stated in the regulations or guidelines. They cannot be stated in the PDPA because the procedures differ from one sector or filed to another. Notably, Section 65 of the Act requires the institutions (data controllers) to draw code of ethics stating how they collect, process, and use personal data. The merit of the impugned provision is that it is technology and sector neutral. Understandably, data protection, cuts across many fields such as healthcare, education, etc. It is thus justifiably broad.

Therefore, with due respect, the Petitioner seems to have misunderstood the impugned provision of the Act. Section 25(f) provides that data may be collected for other purposes than intended one if such other purposes are necessary for compliance with the law(s). The illustration provided herein above suffices. In our view the impugned provision breaches neither the CURT nor international conventions.

Ninth, whether Section 26 of the PDPA is unconstitutional? The provisions of Section 26 of the PDPA provides for an exception in which the data controller may disclose personal data without providing for the prescribed procedure. And thus, it is in violation of the right to privacy and data protection as provided under the CURT.

Section 26 of the PDPA provides that where data controller holds personal data, he shall not disclose the personal data to a person, other than the data subject except in the circumstances specified under Section 25 of the Act. That the data can be disclosed with data subject's consent (Section 25(1)) or if the disclosure is done under circumstances states in Section 25(2) of the Act as explained here in above.

Yet, the Petitioner has challenged Section 26 of the PDPA through paragraph 14 of his affidavit that the Section provides for exception in which data controller may disclose personal data without providing for the prescribed procedure as how such exceptions may be exercised. However, paragraph 16 of the counter affidavit protests the contents of paragraph 19 of the Petitioner's affidavit. The Respondent stated that the exceptions are provided in clear terms and do not, in any way, provides more than one

meaning. The Respondent further stated that under the Act personal data are gathered from different fields hence we cannot have prescribed procedure under this Act since the procedure differs in different field. We find this averment to be correct. The Minister has promulgated the regulations, and guidelines will be drawn to guide data collection in each sector. Such details cannot be provided for in the principal legislation. The legislation will be too dense to be comprehended by laymen. That will be difficult for the citizens to comply with the law. Consequently, the purpose of the law will not be achieved. We are aware that the Minister has already promulgated the regulations.

Moreover, and in our view Section 26 is a general prohibition that data controller holding personal data cannot disclose the personal data to third parties without the consent of data subject except in the circumstances specified under Section 25. The Petitioner's argument lacks substance if we consider the importance of exceptions stated in Section 25(2) which is reproduced herein below:

> 25.-(1) Personal data collected under this Act shall be used for the intended purposes.
>
> (2) Where a data controller holds personal data that was collected in connection with a particular purpose, he may use that personal data for other purposes if-
>
> (a) the data subject authorises the use of the personal data for that other purpose;
>
> (b) use of the personal data for that other purpose is authorised or required by law;
>
> (c) the purpose for which the personal data is used is directly related to the purpose for which the personal data was collected;
>
> (d) the personal data is used:
>
> (i) in a form in which the data subject is not identified;

(ii) or for statistical or research purposes and shall not be published in a form that could reasonably be expected to identify the data subject;

(e)the data controller believes on reasonable grounds that use of the personal data for that other purpose is necessary to prevent or lessen a serious and imminent threat to the life or health of the data subject or other person, or to public health or safety; or

(f)use of personal data for that other purpose is necessary for compliance with the laws.

The Petitioner seems to have misread the impugned provision. That is because the challenged provision protects the data subject's personal data. The PDPA is a general law that cannot contain procedures for exercise of the exceptions. However, the circumstances constituting exceptions are known as they have been broadly stated in Article 30(2) of the CURT constituting limitations to the fundamental rights. They include safety, security, etc. In terms of Section 26 of the PDPA these exceptions aim at preventing, lessening a serious and imminent threat to life or health of the data subject or other person, or to public health or safety. It should be remembered that the provision of Section 26 of the PDPA is not only compatible with Article 30(2) of the CURT but also it was intended to balance the interest of an individual data subject against the interest of others or public. Therefore, besides the data subject's right to privacy, there are other overwhelming interests that the law must protect, for instance, public health, safety, security, and others. In that regard the impugned provision is constitutional.

We have also noted inconsistency in the Petitioner's claims. While he has attacked Section 26 generally, for Section 25 he was only criticising sub-section (2)(e) and (f). This raises questions because the allegations against Section 26 appear to be in respect of the whole of exceptional circumstances in Section 25. This lack of consistency does go unnoticed. Moreover, we think that there cannot be risk of arbitrary or unjustifiable

intrusions into individual's privacy because Section 25(2)(a) –(f) of the PDPA has delimited the data controller's power to use data subject's personal data to the circumstances stated.

Further, Sections of PDPA are not read in isolation. Therefore, and as observed earlier, application of Sections 26 and 25 may be supported by Section 65 of the PDPA which requires the data controller to have in place code of ethics that provides for how data collection and processing is done in a particular institution or company. The code will state measures the data controller has set to safeguard the data subject's personal data. That supports the overarching purpose of the Act as revealed by its long title. That is to secure individual's privacy. And obligation has been placed on the data controller to ensure that objective of the Act is achieved through various procedures and measures including formulation of code of ethics for a particular organisation. Section 65 makes it mandatory for data controller to draw a code of ethics.

Tenth issue is whether Section 30 (5) of the PDPA is unconstitutional? In the petitioner's view the provisions of Section 30 (5) of the PDPA, which prohibit processing of sensitive personal data and yet provides for exceptions in a wider and ambiguous term and without prescribed procedure is in violation of the right to privacy and data protection as provided under the CURT.

Section 30 of the Act prohibits processing of sensitive personal data. For clarity we took liberty of reproducing relevant part of the Section.

> 30.-(1) A person shall not process sensitive personal data without obtaining prior written consent of the data subject…
>
> (5) Subsection (1) shall not apply where-
>
> (a) the processing is necessary for compliance with other written laws;
>
> (a) the processing is necessary to protect the vital interests of the data subject or of another person, where the data subject is

incapable of giving his consent or is not represented by his legal representative;

(b) the processing is necessary for the institution, trial or defence of legal claims;

(c) the processing relates to personal data which has apparently been made public by the data subject;

(d) the processing is necessary for the purposes of scientific research and the Commission has, by special guidelines, specified the circumstances under which such processing may be carried out; or

(e) the processing is necessary for the purposes of medical reasons in the interest of the data subject, and the sensitive personal data.

Paragraph 16 of the Petitioner's affidavit alleges that the provisions of Section 30 (5) of the PDPA prohibit processing of sensitive personal data and yet provides for exception in a wider and ambiguous term and without prescribed procedure. This has been denied by the Respondent through paragraph 13 of counter affidavit. On this, we concur with the Respondent that this is a standard legislative provision read together with "General Penalty" which in this case is provided under Section 63 of the Act.

Section 30 (5) provides for exceptions to a general protection of data subject's privacy in the circumstances which are important and critical. The law to avoid being wider and ambiguous it has listed the circumstances. These have been included in the law to cater for the interests of the data subject and others. They secure public health, public safety, and security. The same have been articulated in Article 30(2) of the CURT, which embodies the three-step test. Namely, (1) the limitation has been provided by the law, they are clear and accessible to the citizens to regulate their conduct; (2) the objective of the restriction is necessary in the society; and (3) that the restriction is

proportionate to its objective. Section 30(5) of the PDPA has enumerated the circumstances/restrictions. The items so stated are necessary in Tanzania. And they proportionate to the purpose set to be achieved. In that regard, impugned provision is compatible with Article 30(2) of the CURT.

Nevertheless, the Petitioner claims that the procedures for operation of the exceptions have not been prescribed. We have held that the detailed procedures are or ought to be in the regulations or guidelines which the Petitioner has not touched upon in his affidavit or submission. The exceptions are not broad as rightly submitted by the Respondent that the PDPA is a general law that applies across many sectors, in contracts, court proceedings, health care, tax, etc. Therefore, the provisions Section 30(5) of the PDPA is justifiable, not very wide, and unambiguous. We are of the view that the criticism is without merit as the regulations are in place, save for guidelines for specific fields that have not been put in place. These may include the code of conduct that fields must draw. These are not place yet, and if they are in place the Petitioner has not challenged them. We thus distance ourselves from the petitioner's views.

Generally, the exceptions in Section 30(5) of the PDPA constitute interference to the privacy of the data subject. That is why there is a three-step test to be applied when such interference is done otherwise it will amount to infringement of privacy. The three tests: whether interference is lawful, with legitimate purpose, and necessary in democratic society. And another added test is whether the exceptions are proportionate to their objective. The three-step test has been discussed in **Raymond Paul Kanegene and Bob Chacha Wangwe v. The Attorney General,** Consolidated Civil Cause No. 15 of 2019 and No. 5 of 2020 HCT at DSM**,** and in **Jebra Kambole v. The Attorney General** [2017] TLS LR 322**.** It is our firm view that the right to privacy is not absolute. That is why there is Article 30(2) of the CURT. Therefore, the exceptions in Section 30(5) of the PDPA are lawful, necessary, and proportionate. However, how the exceptions will be applied in actual situations to stay in the ambit of the law that will be determined basing on the facts of a particular case. We are saying so because even the concept of

sensitive data is broad, and its application awaits interpretation of the court where claims for violation of privacy relating disclosure of sensitive data will be filed. We cannot speculate.

The application of exceptions to data subject consent requirement was tested in Nigerian, a Common Law jurisdiction like ours in the case of **Incorporated Trustees of Laws and Rights Awareness Initiative v. Nigerian Communication Commission** FHC/ABJ/CS/217/2020. The case was specifically on the exemption of data subject's consent in collection of personal data by law enforcement agencies, which under the Tanzania PDPA would have fallen under Section 30(5)(a) and (c) and Section 33(2)(b). In **Incorporated Trustees of Laws and Rights Awareness Initiative** (supra) judgment delivered on 21/02/2024 the Federal High Court of Nigeria at Abuja held that the provision of the Nigerian Personal Data Regulations that provided for an exception to the law enforcement officer to collect basic information of Internet users without their consent does not contravene the Federal Constituon of Nigeria.

The eleventh issue reads as whether Section 33 (2) (a) and (b) of the PDPA is unconstitutional? The provisions of Section 33 (2) (a) and (b) of the PDPA, which provides for the rights to access personal data and circumstances under which data subject may not be informed in a wider, unclear, ambiguous manner and without any prescribed procedure is in violation of the right to privacy and data protection which are provided under the CURT.

To eliminate being sway away, Section 33 of the PDPA is reproduced.

Section 33. (1) Subject to the provisions of this Act, a data subject shall be entitled:

(a) to be informed by any data controller whether his personal data are being processed by or on behalf of that data controller;

(b) to be given by the data controller a description of:

(i) the personal data of which that individual is the data subject;

(ii) the purposes for which they are being processed; and

(iii) the recipients or classes of recipients to whom they are or may be disclosed;

(iv) where the processing of personal data by automatic means for the purpose of evaluating matters relating to him has constituted or is likely to constitute the sole basis for any decision significantly affecting him, to be informed by the data controller of the logic involved in that decision making.

(2) Notwithstanding subsection (1), a data controller is not obliged to inform the data subject where the personal data:

(a) **are not accurate**;

(b) **are involved in any investigation in accordance with the laws**; or

(c) have been prohibited by court order. (emphasis added)

The Petitioner in paragraph 16 of his affidavit avers that the provisions of Section 33 (2) (a) and (b) of the PDPA provides for the rights to access personal data and provide for circumstance on which data subject may not be informed in a wider, unclear, ambiguous manner and without any prescribed procedure. The Respondent's witness has disputed that allegation through paragraph 14 of his counter affidavit. The Respondent submitted that the impugned provisions are not too wide and unclear. She added that as stipulated in the said sections each case will be determined based on its circumstances.

The impugned provisions provide for limited circumstances under which data subject may not be informed when his data is being processed. These are if the data is inaccurate and when they are involved in any investigation in accordance with the laws. As rightly submitted by the Respondent's State Attorney these exceptions are not wide, unclear, and ambiguous. They have, contrary to the Petitioner's allegations been stated in a clear, narrow, and unambiguous language.

It would have been and illusion and impossible task to list all situations where personal data is inaccurate, or where the data is involved in investigation under all the laws in Tanzania. The law that requires the subject to do an impossible act is not law (**Fuller, The Morality of Law, Revised edition, 1964, Yale University, pages 33-93 at pages 36-37**). In our opinion, the law requiring an impossible act would include requiring the data controller to inform data subjects all situations and procedures in which his data will be inaccurate. Similarly, the whole purpose of criminal investigation and crime stopping will be defeated if the details of investigation must be disclosed to the data subject. That will make it hard for investigators to collect evidence for purposes of prosecuting criminal suspects. For that reason, the decision in Nigerian case of **Incorporated Trustees of Laws and Rights Awareness Initiative** (supra) makes sense. This decision is therefore inspiring.

It is our firm view that the impugned provision is neither too wide nor ambiguous. The law provides that the data subject will not be informed, or his consent required where his data is collected or processed for criminal investigation purposes. We are of the view that that provision of that law is crucial for purpose of crime prevention and detection. (See the case of **K.U. v. Finland, 2008** 2872/02 Decision by European Court of Human Rights). The court held that confidentiality and respect of private life of telecom and Internet access subscribers must be balanced with other interests such as crime prevention as well as protection of rights and freedoms of others. Certainly, that matches Article 30(2) of the CURT. Moreover, we are of the view that collection of personal data without data subject's consent may be useful in the preservation of evidence. The impugned provision is thus constitutional. We would have held otherwise if the law would have allowed publication of information of the suspects who is under investigation, or publication of such information prior to being charged. In the UK case of **ZXC v Bloomberg** [2022] UKSC 5 the UK Supreme Court upheld the Court of Appeal holding that a person under criminal investigation has, prior to being charged, a reasonable expectation of privacy in respect of investigation information.

Further, we are of the view that a need to consider the circumstances of a particular case means that the legislature may enact a broader legislation provision. That is referred to as non-detailed drafting style. Although the Respondent in her counter affidavit or submission has not covered the detailed and non-detailed legislative drafting styles. We find the cited works of prominent legislative drafting scholars (**Sir William Dale, and Thornton** (supra)) that detailed drafting style is acceptable in certain legislation especially in areas that are technical and changes rapidly. We consider data protection as one such area that is technical and changing. As long as no ambiguity or vagueness is occasioned, the laws may be drafted broadly to adapt to changes and enable the regulators to fill them with regulations. Such broad legislation offers flexibility to the regulators in formulating regulations for its implementation. We find Section 33 (2) (a) and (b) of the PDPA to be unambiguous. It is thus compatible with the CURT.

The twelfth, and last issue is, whether Section 34 (2) of the PDPA is unconstitutional? As per the Petitioner, the provisions of Section 34 (2) of the PDPA, which provides for the right to prevent processing likely to affect data subject with exception, which is too wide, ambiguous, and unclear thus violates the right to privacy and data protection as provided under the Constitution of United Republic of Tanzania. The challenged provision provides for a right to prevent processing likely to affect data subject. The impugned section states:

> 34.-(1) Subject to subsection (2), a data subject is entitled to require a data controller through procedures prescribed in the regulations, to suspend or not to begin, processing of any personal data in respect of which he is the data subject, if the processing of such personal data is likely to cause **substantial damage to him or to another person**.
>
> (2) Subsection (1) shall not apply in the exceptions provided under this Act.

The Petitioner avers in paragraph 17 of the affidavit that the provisions of Section

34 (2) of the PDPA provides for the right to prevent processing of personal data likely to affect data subject with exception, which is too wide, ambiguous, and unclear. Paragraph 24 of the counter affidavit rejects the allegation. The Respondent submitted that the impugned section provides for exceptions of the general rule that personal data is to be used for the intended purposes.

The Petitioner claims that the impugned provision supports exceptions while fails to afford that data subject right to deny, withdraw consent, or suspend the processing of his personal data. Although it is true that that the exceptions are numerous and provided for under separate provisions, that does not render the legislation incomprehensible. In fact, instead of dumping all exceptions in one Section, the legislature has put them under different Sections for clarity. We have also noted that the Petitioner has tried to repeat his attacks against exceptions which he has done already in the previous sections.

The impugned provision deals with situations that have not been stated in the Act itself as constituting exceptions. For instance, where the data controller is collecting data subject's personal data in purchase of goods at the supermarket, where one applies for a discount card in the supermarket personal data is collected. In such a situation the data subject may ask the data controller to stop collecting and processing of his personal data. We are settled in our view that the impugned provision is clear and unambiguous. Therefore, the exceptions are compatible with Article 16(2) of the CURT.

The Petitioner complained that the counter affidavit has not elucidated why individuals cannot withdraw consent in the so-called exceptions. In the first place under the exceptions the requirement for data subject's consent is dispensed with. Therefore, there is no room for withdrawing the consent which was not given. Second, even if consent was given for processing of personal data for particular purpose, the data may be used for other purpose as stated in the PDPA. Given the nature of circumstances stated in the law, consent cannot be withdrawn as that will jeopardize other interests for which exceptions were set e.g., public health or public safety. A good example where a data subject gave consent to processing his personal data for medical check-up. If the results

shows that he has infectious and notifiable disease which is contagious then the data may be shared to other public heath institutions to control the pandemic and protect the public. In such situation the data subject will not be allowed to withdrawal his consent as there will be monitoring of his health condition until when the threat is controlled or eliminated. If under the exceptions the data subject is allowed to withdrawal his consent that provision of the law will be self-defeating. Withdrawal of consent is allowed in all circumstances except under the exceptions provided for in the PDPA. It is important to emphasize that data subject's right to privacy like other fundamental rights is not absolute. It has limits as held in **Kanegene** (supra); and in **Ndyanabo** (supra). Unlike the Petitioner's claims, we found that the impugned provision does not violate the CURT.

It is our overall observation that the petition was prompted with fear or speculation without any actual proof of how most of the impugned provisions violate the provisions of the CURT. Liability cannot be based on mere suspicion as rightly held in **Nathaniel Alphonce Mapunda and Benjamin Alphonce Mapunda** (supra). It was also held in **Mtikila** (supra) that the decision as to whether a certain provision of the statute violates the constitution cannot be arrived by mere inference but rather the petitioner must prove that there is or there was actual violation. We agree with this stand and add on the basis of the CAT decision in **Dickson Paulo Sanga** (supra) that there must be proof on the balance of probability. The Petitioner has failed to discharge that burden of proof to large extent in some of his allegations. Hence the said burden of proof cannot be said to have been shifted to the Respondent. It is our finding that all the impugned provisions of PDPA are constitutional as they have not violated the CURT save for Section 22(3) and 23(3) (c) and (e) of the PDPA which we have found to be vague, ambiguous, and unclear and hence leading to legal uncertainty.

In the end and for reasons stated hereinabove, the petition partially succeeds. The respondent is ordered within one year starting from the date of this judgment to make necessary amendments on the provision of sections 22(3) and 23(3)(c)(e) of the PDPA with a view to providing certainty as to what acts or omission shall be regarded as

unlawful. Failure to do so these provisions will be struck out of the statute book. This is geared towards upholding fundamental rights and freedoms as enshrined under the Articles of the CURT.

This being a public interest litigation, each party shall bear its costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 8th Day of May 2024.

A.S. KAGOMBA, J

JUDGE

08/05/2024

U.J. AGATHO, J

JUDGE

08/05/2024

O.J. BWEGOGE

JUDGE

08/05/2024