

5 June, 2006

Federal Supreme Court  
Cassation Bench  
Addis Ababa

Appellants (Applicants):

1. Daniel Bekele  
Policy Department Head, Action Aid Ethiopia
2. Netsanet Demissie  
Executive Director, Organization for Social Justice

Present Address: Kality Central Prison

Respondent: Federal Public Prosecutor (in absentia)  
Address: Addis Ababa

**Application to the Cassation Bench against the Decisions of the Federal High Court  
and Supreme Court Denying Bail to the Appellants**

This application is lodged against the final decision of the Criminal Bench of the Federal Supreme Court in Criminal File Number 22909 rendered on 10 March, 2006.

The Federal Supreme Court, in its appellate jurisdiction considered the appeal submitted by the present appellants against the decision of the Federal High Court given on January 4, 2006 under Criminal File Number 43246, and it has given a judgment denying the appeal and sustaining the decision of the High Court.

We now lodge this petition to the Cassation bench because the decisions of the Federal High Court and Supreme Court deny the appellants' constitutional right to bail by making a fundamental error of law. The error committed by the lower courts is partly a reflection of judges adopting a wrong customary practice contrary to the law. The present case of the appellants before this court, is a good example to demonstrate the errors of such wrong customary practices. In light of the constitutional recognition of the right to bail and the protection accorded to this right in international agreements ratified by Ethiopia, this cassation bench has the responsibility to correct such erroneous practices and ensure a correct and uniform interpretation of the law that ensures the right to bail is effectively put into practice. Indeed, we believe the issues raised in this case before the court are of paramount importance relating to the interpretation and application of the right to bail; above and beyond securing the bail of the appellants. We, therefore, plead the court to seriously consider our appeal and give us a chance to orally present our case.

Since the appeal submitted by the applicants to the Supreme Court was ordered to be considered in the absence of the respondent due to failure to appear in court, and further since the Court has denied the application of the respondent for waiver of the order, this

petition is to be considered in the absence of the respondent.

I. Facts of the Case and the decision given by the Lower Courts

1. In the criminal case, Federal prosecutor VS. Engineer Hailu Shawl and et al (131 persons including the leadership of the opposition party Coalition for Unity and democracy, journalists and others) charged of “an attempt to forcefully change the constitutional order”; the present appellants, who are members of civil society organizations, are listed as the 94<sup>th</sup> and 95<sup>th</sup> defendants respectively
2. The statement of the offence as described in the charges alleges violations of Articles 27 (1), 32(1) (a) and (b), 34, 38, 238 (2) and 258 of the Criminal Code. The alleged particulars of the offence referring to the present appellants states “...[the two defendants] have fully associated themselves with the principal defendants listed from No. 1 to 39 in the commission of the crime; and thereby incited, instigated and provided leadership to the youth and members of their associations to engage in violent and mutinous acts... [to overthrow the government].” The charges further state, “...[the two defendants] committed the said crime of incitement and instigation by passing and adopting resolutions and statements in the name of their associations; thereby using and operating the associations they represent for the commission and implementation of the criminal acts.” (The federal public Prosecutor statement of charges dated December 15, 2005 - Page 21 item No.4)
3. The public prosecutor has listed number of documents; video and audio evidence to corroborate the charges against the defendants and submitted the same with the record of evidence to the accused against whom the evidence is presented. However, no documentary, video, audio or other form of evidence has been submitted against the present applicants. Thus, we have only received the statement of charges without any evidence attached thereto or record of evidences, whatsoever.
4. After having received the charges the present appellants have submitted an application to the High Court enumerating in detail the reasons for the respect and grant of our bail right. However, the Court decided denying our bail right. (The appellants petition for bail submitted to the High Court on 28 December 2005 is attached to the file.)
5. The decision of the High Court can be summarized as follows: the mere fact that the public prosecutor charges an accused stating an alleged loss of life and invoking a provision of the law that may entail more than 15 years of imprisonment, would simply deny the bail right of the accused. (Reference is made to Article 63 of the criminal procedure code).
6. In the memorandum of appeal we submitted to the Supreme Court, we have explained the error on the part of the High Court, and elaborated in detail on the legal and factual reasons to respect the right of bail. The major points were:

- The right of an accused person to be released on bail is a matter to be considered and determined only by Courts and not in any way the discretion of the prosecutor.
  - Accordingly the Court should give its decision only after cautiously considering whether or not the alleged offence warrants denial of bail. Thus, the decision of the Court to deny the rights of the accused to be released on bail on the mere accounts of the charges alone is erroneous.
  - The court should have examined the matters of the case to the extent necessary to consider and determine the issue of bail.
  - If the petition of the appellants for the respect of their right to bail is not decided upon after cautious examination in this manner and if, in contrast, the right to bail is denied by unquestioningly accepting the charges brought by the Public prosecutor, it would completely do away with fundamental legal principles and constitutional provisions.
  - Moreover, the appeal memorandum explains that the specific charges brought by the prosecutor against the applicants do not in any way warrant denial of bail under Article 63 of the Criminal Procedure Code. (The applicants' statement of appeal submitted to the Supreme Court on 13 January, 2006 is in the file)
7. The federal prosecutor was summoned to respond to the appeal lodged by the present appellants before the Federal Supreme Court. However, the prosecutor failed to appear on the adjourned date. The present applicants requested the Supreme Court to proceed with the hearing of the case in the absence of the prosecutor. Although the federal prosecutor has subsequently petitioned the Court to reverse the in absentia hearing, the court has denied the petition of the prosecutor and sustained its order.
  8. However, in a context where public prosecutor was not present and did not challenge the particulars of the appeal, the Criminal Bench of the Supreme Court denied the appeal and affirmed the decision of the High Court, denying the bail right if the present appellants.
  9. The major points on which the Supreme Court based its decision can be summarized as follows:
    - The conditions for granting and denying bail are provided for under the Criminal Procedure Code; the right to bail does not imply that every suspect will be granted bail; the decision of the lower court to examine Article 63 of the Criminal Procedure Code to rule on the issue of bail and the Court's refusal to examine evidences is in accordance with the law;
    - Since the acts allegedly committed by the present appellants and other

accused persons have allegedly resulted in the death of numerous persons, and Article 238(2) under which they have been accused carries a penalty of more than 15 years, the cumulative conditions for denial of bail as per article 63 of the Criminal Procedure Code have been satisfied; and

- In order to rule on a matter of bail right, the procedural laws do not permit the examination and weighing of evidences beyond having regard to the statement of charge submitted by the prosecutor.

### **Details of the Fundamental Error of Law in the Decisions of the Lower Courts**

#### **1. Violation of Fundamental Principles of Law**

1.1. Both the High Court and the Federal Supreme Court, have committed grave violations of fundamental principles of law that are protected under the Ethiopian Constitution and binding international human rights agreements. These principles are:

- Presumption of innocence until proven guilty;
- Due process of law; and
- Rule of law. (See Articles 9, 13, 20 (3) of the FDRE Constitution; Articles 9 and 14 of the International Covenant on Civil and Political Rights; and Articles 8, 10, and 11 of the Universal Declaration of Human Rights)

1.2. Whether or not a given legal system meaningfully ensures citizens right for presumption of innocence is actually put into test in the administration of criminal justice, where criminal justice officials and judges are called upon to take decisions. It is evident that administrative measures such as arrest and interrogation by the police, prosecutors decision to file criminal charges,...etc are necessary limitations on the right of presumption of criminal justice needs to carefully and prudently balance the protection of the right of presumption innocence, on the one hand and the need to investigate and prosecute criminal acts on the other.

1.3. The major institutions in the administration of criminal justice are the Police, the Public Prosecutor's Office, and Courts. These institutions commence and proceed with a criminal investigation based on an increasing belief in a person's guilt. This is determined by the relevance and weight of the evidences collected at various stages of the process. Thus, as the police is expected to gather sufficient and relevant evidence to initiate an investigation and arrest a suspect, the public prosecutor is as well expected to examine the relevance and competence of the evidences in deciding whether or not to prosecute and under which legal provision to institute charges. Once a person is charged, judges should similarly examine the charges; the type, competence and relevance of the evidence; the laws applicable to the case; and take into consideration the right of the accused to be

presumed innocent in determining the rights and duties of the accused. This is particularly important in examining and ruling on the constitutional rights of the accused. Courts being forums in which grievances and inappropriate treatment of the accused in the hands of the police or the prosecutor could be remedied, judges have special responsibilities towards ensuring the rights of the accused. Since the right to bail is one of the most fundamental of these rights, rulings on grant or denial of bail right should be given after serious and proper consideration of the matter.

- 1.4. If the issue of the right to bail is not seen from such a proper perspective and determined accordingly, the right to be presumed innocent, the principle of due process of law, and rule of law would be violated.

When the right to bail is denied solely on the basis of a mere request by the public prosecutor, without considering the charges against the accused, and weighing the kind, competence and relevance of the evidences submitted, all of the fundamental principles of law enumerated under 1.1. here in above would be abrogated. This is so because it would subject the accused to punishment prior to judgment. Moreover, the right to bail will become dependent on the discretion of the public prosecutor rather than a right to be determined by law through due process.

Accused persons are entitled not only to a trial but specifically to a fair trial. This right has been clearly stated under article 14 (1) of the International Covenant on Civil and Political Rights. An essential element of a fair trial is a meaningful interpretation of the right to be presumed innocent. Thus, unless legitimate and acceptable reasons and supporting evidences adequate enough to warrant the denial of bail are presented, judges should respect and protect the right of bail in a manner ensuring its practical implementation rather than subjecting the accused for punishment prior to judgment.

- 1.5. One of the provisions for protecting the liberty of a person suspected of a crime is the bail system whereby the person is released if in detention or is allowed to remain at liberty unless there are sufficient legal reasons and appropriate evidences to warrant a denial of bail. Notwithstanding the constitutional right to be released on bail and to be presumed innocent, there are legally provided conditions under which courts may refuse to grant bail. However, the general principle accepted in the laws of many countries and international agreements provides that; “the grant of bail is always the rule and denial is only the exception.” This general principle is recognized under Article 19 (6) of the FDRE Constitution and article 9 (3) of the International Covenant on Civil and Political Rights.

While the purpose of releasing a person on bail is to guarantee his/her liberty, the aim of the personal surety or the financial guarantee is to ensure that the accused will appear in court on an appointed date. This entitlement, which is always available as of right, could only be denied under special circumstances under

Ethiopian law.

- 1.6. One of the relevant provisions regarding the conditions for denial of bail is Article 63 of the Criminal Procedure Code. According to this provision the Court may not grant bail where the crime the accused is charged with carries a penalty of rigorous imprisonment for more than 15 years, and if the victim of the crime is dead or may possibly die as a result of the criminal act. The responsibility of the Court under this provision is to examine the charges submitted by the prosecutor to determine whether or not the accused could be sentenced to imprisonment for more than fifteen years based on the type, competence and relevance of the evidence; and, if the victim has died or may die as a result of harm inflicted by the accused. This does not mean that the Court needs to determine the guilt of the accused at this stage of determining a bail issue. Rather, the Court should cautiously examine the charges and the evidence to the extent necessary to rule on the issue of bail.
- 1.7. However, the lower courts have adopted rather a mechanical and simplistic interpretation of Article 63 of the Criminal Procedure Code and the corresponding responsibilities of the Court, thereby they have effectively put aside their responsibility stating that the Criminal Procedure Code does not permit examining the existence, kind, competence, and relevance of evidences. The Courts instead limited their role to one of merely accepting the charges as presented by the prosecutor. According to this interpretation, the role of the Court is nothing more than acting as an interpreter and telling the accused whether or not the public prosecutor has granted or denied him bail rather than examining and ruling on the petition of bail. This will allow the prosecutor to arbitrarily, negligently or intentionally keep a person in custody by simply bringing charges under a provision precluding bail. If the Courts, who have the mandate and responsibility to oversee and correct such inappropriate use of authority, turn a blind eye, justice will be disrupted and citizens will lose confidence in the judicial system.
- 1.8. The foregoing discussion is to expound on the proper processes and procedures courts should follow in the determination of bail issues. Accordingly, judges are not only required but also have a responsibility to carefully examine the nature, type and amount of evidences against the accused in order to determine the grant or denial of bail.

Be that as it may, what is peculiar in the present case of the appellants is not an issue of the relevance and weight of evidences, but the total absence of any evidences what so ever.

Indeed we explained to the lower courts that our bail right could not have been denied in a case where the prosecution claims are not corroborated by any form of evidence. We understand the courts were cognizant of this fact, but they have chosen not address the matter squarely, thereby committing a fundamental error.

- 1.9. The High Court and Supreme Court, in explaining the basis of their decisions,

have reasoned that the Criminal Procedure Code does not allow them to examine the existence of evidence supporting charges brought by the public prosecutor.

This interpretation implies as if there is no mechanism for the Courts to control and correct the harm inflicted upon citizens through the arbitrary, negligent, or inappropriate actions of officials (especially the public prosecutor). Indeed, one of the responsibilities of judges is to examine such rights violations and serving justice. The provisions of the Constitution and Criminal Code not only allow this but also affirm that courts have a legal obligation to do so. If this is not put into practice, it will allow officials in the administration of justice to use their authority inappropriately and contrary to legitimate purposes.

- 1.10. Although there is a general presumption that officials in the administration of justice including the public prosecutor will use their authority appropriately, it is undeniable that citizens suffer innumerable violations and abuses as a result of arbitrary, negligent, and intentional abuse of power by these authorities.

Especially the yesteryear experiences of our county is not short of cases of individuals being arrested and imprisoned for a number of years by the police and the public prosecutor only to be found not guilty and released for lack of evidence or improper criminal charges. This inappropriate practice continues to date since a proper accountability system is not in place and measures are not taken against criminal justice officials who have abused their authority and filed improper criminal charges against innocent citizens.

- 1.11. The grievances of the present applicants are not different from this. We have suffered inexplicable abuse, harm and violation of our rights as a result of abuse of power by the concerned criminal justice administration officials. Though the violation of our rights ever since we were arrested by the police is an issue of fact the judges should know, for the purposes of this appeal we shall focus only on the statement of charge by the public prosecutor and the errors committed by the Courts in ruling on the bail issue.

- 1.12. The present applicants have been charged by a special group of prosecutors assembled and organized for the purpose of this specific case. This widely known fact was publicly confirmed to the Supreme Court by the lead prosecutor who stated in court that a special group of prosecutors recently established within the Ministry of Justice and one which is in the process of organizing its office is exclusively handling this case. The fact that a special group of prosecutors has been established exclusively for this case is quite noteworthy. This should at least give the judges cause to investigate the matters of the case with extra caution including proper security of the manner the charges are presented, and appropriate use of power. Whenever charges are instituted against a citizen in a special manner, judges are duty bound to cautiously examine the case to protect the rights and interests of the accused.

- 1.13. The charges brought by the prosecutor against the appellants states: "... the

accused (the present appellants) operated the associations they represent beyond their objectives and functions and used them for the implementation of this crime by adopting statements in the name of the associations, and instigated and supported the youth to participate in mutinous acts.”

However, no statement issued by the civil society organizations we work for or any single piece of evidence was presented for the court.

Under the circumstances one would have legitimately asked how the prosecution came about with such improper charges, let alone to deny the bail rights of defendants in such improper criminal charges.

- 1.14. The criminal charges of the prosecution is not only supported by any evidences against the present appellants, but also it refers to Article 238 (2) of the criminal code, which is wholly in appropriate and absolutely inconsistent with the statements and particulars of the charges. Thus, the prosecutor referred to Article 238 (2) of the criminal code either in gross negligence, at best or with malice intent to hinder the bail rights of the appellants, at worst. We will briefly explain the matter as follows for consideration of the Court.

The appellants are charged of an alleged crime of incitement and instigation aimed at changing the government. Under the criminal laws of Ethiopia, a crime of incitement or instigation is divided into two types. These are:

- a) The first is the crime of incitement provided for under Article 36 of the general part of the Criminal Code. This refers to persuading someone to commit a criminal act, for instance steal some property, by instigating, making promises, offering money or gifts, through threats or any other means.
- b) The second refers to cases that do not fall under Article 36 and are covered under the special part of the Criminal Code relating to crimes of instigation committed by the offender as a principal offender.

Examples of these crimes include instigating not to pay taxes under Article 350, incitement to disregard military orders under Article 332, and instigating crimes against the country like that under Article 257. More detailed explanations are found on the treatise on Ethiopian criminal law by Philippe Graven. (An Introduction to Ethiopian Penal Law; By Philippe Graven; Berhanena Selam Printing Enterprise 1996; pp. 99 - 104)

- 1.15. Since the charges instituted by the public prosecutor against the appellants and the other defendants refer to attempt to change the constitutional order, allegations of inciting and instigating this crime falls under the relevant provision of the special part of the Criminal Code rather than article 36 as described above.

Accordingly, an alleged crime of incitement in the commission of crimes against the country as enumerated under Articles 246 - 252, falls under Article 257 of the Criminal Code.

Thus, assuming the prosecutor had a legitimate reason to file the charges against the appellants, it could have only been filed under article 257 of the Criminal Code, and not at all under Article 238(2).

However, as described above, at best due to grave negligence or at the worst to limit the right of the appellants to be released on bail, the charges against us are brought under article 238 (2).

- 1.16. Hence, knowing that the charges against the appellants are not supported by any piece of evidence; that the provision under which the charge is brought is inappropriate; and knowing that these fundamental shortcomings are clear to anyone trained in the law and understanding that the judges were cognizant of them; how can the Courts ignore these shortcomings and deny the rights of the appellants to bail? How can the rights of citizens be protected with the very narrow interpretation of the law adopted by the Courts?

**2. Non-fulfillment of grounds to deny Bail even under the Charges as presented by the Public Prosecutor**

- 2.1. In addition to the arguments stated above, even if the charges are to be accepted as they are, the courts have committed a fundamental error of law by stating that the conditions for denial of bail have been fulfilled although the charges brought by the public prosecutor against the appellants does not fulfill the conditions stated under Article 63 of the Criminal Procedure Code.

Only the first of the seven charges (there are presently six charges since the public prosecutor has withdrawn the 4<sup>th</sup> charge) instituted by the public prosecutor is filed against the appellants. This charge is presented in seven sections detailing the alleged criminal participation of the 131 defendants.

The section referring to the appellants is indicated on page 21 of the statement of charge under item number 4. This section does not state the loss of life or that the appellants have caused loss of life.

Although all of the accused, including the appellants are charged under article 238 (2), the section describing the alleged details of the participation of each of the accused only states that the appellants are only accused of a crime if incitement in support of the riot and does not mention loss of life resulting from the actions of the appellants.

Thus, it was a serious error to find that the particulars relating to the loss of life concerns the appellants and further to the assert that the requirement (provided under article 63) has been fulfilled.

- 2.2. Without prejudice to the arguments here in above, the court has further committed another fundamental error in holding that the alleged loss of life falls within the meaning of Article 63 of the criminal procedure code.

One of the cumulative grounds for denial of bail under article 63 of the Criminal Procedure Code is the actual or possible death of a person victimized by the criminal acts of the accused. Thus, the issue to be considered and determined by the courts is whether or not the loss of life is a result of the alleged criminal actions of the accused in light of the evidence presented and the circumstances of the case. As explained under 1.6 herein above, this does not mean that the courts should examine and determine the guilt or innocence of the accused at this stage. The courts should rather take in to consideration the charges, the evidence presented and the circumstances of the case to the extent necessary to give a ruling on the issue of bail.

- 2.3. It is widely known that the loss of life indicated in the prosecution's statement of charges is related to the political instability created in our country following the May 2005 elections. It is also known that loss of life has occurred during conflicts between demonstrators and government security forces due to measures taken by the security forces in the instability prevailing at the time.

It is known that this unfortunate incident has led to disputes on the use of force by the security forces and concerns about the overall human rights situation at the time, which has prompted the government to establish a commission to investigate the matter. (Proclamation for the establishment of the Commission; no. 478/1998)

While the investigation of the commission is still pending, it is rather inconceivable how the prosecution has even filed criminal charges on the same issue. Even worse is how the deaths of this incident which is still under investigation by the commission is taken as one of the justifications for denying the bail rights of the appellants.

It is all wholly inconceivable in a proper administration of justice.

Assuming an independent investigation of the matter by the commission concludes that the loss of lives is caused by excessive use of force by security forces, one is left to wonder what to make of the present charges and all the resultant damages on the accused.

For any reasonable person, cognizant of the incidents that lead to the loss of life, the ensuing controversy on responsibility prompted by events, and the consequent initiation of investigation by the Commission established by the government, and being conscious of the overall situation of our country, it is hardly inconceivable to assume even a remote connection between the present appellants and the loss of life that resulted from the political unrest in the country. And how can this be used to deny the rights of the appellants to be released on bail?

Although the special prosecutors' team formed to institute these charges decided to submit such an improper charge, we honestly believe that judges should not

have allowed such improper charges as a basis for denying bail.

### **3. Conclusions**

- 3.1. Before concluding our appeal, we wish to draw the attention of the court to a brief and relevant account of our most recent roles and activities as members of the civil society sector.

In order for the court to take a comprehensive cognizance of the matter, we believe it is imperative for the court to be informed about our roles and activities only to the extent relevant for the purposes.

- 3.2. Both of the appellants are legal professionals and have participated in many activities in the civil society sector in our country. From our more recent roles, the appellants would like to elaborate on three activities in which we played leadership roles.

- a) The first is organizing the Global Call for Action Against Poverty (GCAP) among Ethiopian civil society organizations. The four major objectives of this international movement were:

- Fighting for the cancellation of all debts of poor countries;
- Struggling for sufficient and appropriate development assistance to poor countries.
- Struggle for a fair system of international trade; and
- Struggle for strengthening the accountability of nation states.

- b) The second is coordinating the Civil Society Election Monitoring Initiative to monitor the May 2005 national and regional elections. The objectives of this initiative were to encourage the participation of citizens on national issues, encourage citizens to participate in election monitoring, and enabling civil society organizations to contribute their part to a free and fair electoral process.

- c) The third is coordinating the Civil Society Peace Plan Initiative proposed by civil society organizations to peacefully resolve the political impasse following the May 2005 elections. The major points of the call for peace made by civil society organizations include:

- For all political parties to take the seats they have won according to the confirmed results issued by the National Electoral Board and establish a government to take over power in line with the constitutional order;
- In constituencies where electoral results have been disputed, political parties to resolve the dispute in accordance with the law

- For the establishment of an independent body to investigate the disturbance and loss of life that occurred after the elections;
- Taking measures necessary to build a democratic system (fair use of the media, revision of parliamentary procedures, etc ...)

The above initiatives and activities involved an active participation of youth, women's and professional associations, development organizations, and civil society organizations in general. The appellants were among the citizens who have had leadership roles in these activities.

- 3.3. Although it is known that these activities are traditionally undertaken by civil society organizations all over the world and the benefits of the activities conducted by civil society organizations in our country is undeniable; in retrospect we have come to realize that the activities we conducted in good-faith have either been wrongly understood or intentionally misconstrued by some as having an ulterior partisan political motives.

What we briefly explained above is meant to provide judges with brief but relevant information on the activities the appellants were involved in and to which we have reason to believe led to these charges.

- 3.4. In summary, since the decision of the criminal benches of the High Court and Supreme Court denying the appellants' right to bail involves a fundamental error of law, we petition the honorable Cassation Bench to reverse the decision, protect our right to bail and rule that we be released from detention on an amount of bail considered sufficient by the bench.

Daniel Bekele

Netsanet Demissie

N.B. This document is unofficial translation. Please refer to the original Amharic version of the document for clarity.