

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Appeal No. 004/2015

B E T W E E N :

DANIEL MWALE

AND



APPELLANT

NJOLOMOLE MTONGA (sued as Administrator of the
Estate of the late Gabriel Siwonamutenje Kapuma Mtonga)

1ST RESPONDENT

ATTORNEY-GENERAL

2ND RESPONDENT

AND IN THE MATTER OF
DANIEL MWALE (Contemnor):

Coram: Mwanamwambwa DCJ, Phiri, Muyovwe, Hamaundu, Malila,
Kaoma, Musonda, Mutuna and Kabuka JJS

On 23rd August 2018, 25th September 2018, 28th November
2018, and 15th March, 2019

For the Contemnor:

Mr. C. J. Musonda of Messrs P. M. Kamanga &
Associates

J U D G M E N T

MALILA, JS delivered the Judgment of the Court.

Cases referred to:

1. *Daniel Mwale v. Njolomole Mtonga* (Selected Judgment No. 25 of 2015)
2. *Moses Mwiba v. The People* (1971) ZR 131

3. *Leonard Banda and Dora Siliya v. Nevers Mumba* (Selected Judgment No. 20 of 2013)
4. *Savenda Management Services Limited v. Stanbic Bank Zambia Limited ex post Gregory Chifire* (Selected Judgment No. 47 of 2018)
5. *Republic v. Liberty Press Limited & Others* (1968) GLR 123
6. *Ambard v. Attorney General for Trinidad and Tobago* (1936) AC 322

Legislations referred to:

1. *Limitation Act 1939 (UK)*
2. *Rules of the Supreme Court, 1965 (1999 Edition) Or. 52/1/23*

The present contempt proceedings have their innocent origins in a judgment delivered by this court on the 19th August, 2015 cause named *Daniel Mwale v. Njolomole Mtonga*⁽¹⁾. In that judgment, we dismissed the appeal by Daniel Mwale, the contemnor herein. He had appealed to us following his unsuccessful attempt to persuade the High Court to declare that he was the sole owner of the property known as subdivision No. 20 of Farm 378a, Lusaka to the exclusion of Njolomole Mtonga who was reflected in the certificate of title relating to the property as a tenant in common with the contemnor.

The contemnor had also sought an order that the Chief Registrar of Lands and Deeds be directed to rectify the Lands Register by cancelling the certificate issued in respect of that property and to issue another certificate in its stead. For completeness, the existing certificate of title was issued in 1991.

The action in the High Court to rectify the said certificate of title was brought in January 2007, some sixteen years after its issuance. Njolomole Mtonga, quite legitimately, raised a preliminary issue in the High Court, seeking the court's direction as to whether the contemnor could proceed with that action in light of section 4(3) of the Limitation Act 1939 (UK) which bars actions for recovery of land after twelve years had elapsed.

The High Court agreed that the contemnor's action, coming as it did over twelve years after the cause of action had arisen, was statute barred. On appeal to us by the contemnor, we upheld the High Court decision in our judgment of 19th August, 2015 to which we referred in the opening paragraph of this judgment.

It is that judgment that so annoyed the contemnor that he went into a frenzy, attacking the judgment and its authors and using all manner of epithets and innuendos to denigrate Supreme Court judges and the Judiciary as a whole. A letter written by the contemnor on 26th October 2017, was copied widely to the Chief Justice, the Minister of Justice, the Minister of National Guidance and Religious Affairs, the Special Assistant to the Republican

President for Legal Affairs, the Director of the Anti-Corruption Commission, and Mr. Samuel Kachamba, former Commissioner of Lands. It is in that letter that the Supreme Court was said to be a conspirator in the perversion of justice.

It is significant that we reproduce the material parts of the letter in question which has occasioned considerable concern to us. It was addressed to the Honourable Mr. Justice M. S. Mwanamwambwa, Deputy Chief Justice and read as follows:

"If the Supreme Court bench headed by the Deputy Chief Justice can churn out this kind of questionable judgment to support the deeply infiltrated, and corrupt civil service, then, as my good friend observed, we are doomed as a Nation.

The questionable judgment shocked my family and many of my friends...

*This highly questionable judgment whose bench was presided over by the Deputy Chief Justice, Mr. Mwanamwambwa is not only an assault on our constitution but a recipe for lawlessness. This is why Mr. Liyoka Liyoka can today serve my tenants with a notice which reads in part, **'this serves to inform you that Subdivision No. 20/378a is now the property of I Mr. Liyoka Liyoka as the legal title holder...'***

This questionable judgment clearly supports these white-collar criminals who are working in league with corrupt civil servants like the former Chief Registrar Mr. Kachamba and his successor Ms. Agatha Banda and her team.

What is even more repugnant about this questionable judgment is its deliberate glossing over the corrupt practices that prevent an ordinary poor Zambian from getting title to his or her property...The Supreme Court bench which was headed by the Deputy Supreme Court judge, Mr. Mwanamwambwa deliberately applied blind eye to this obvious fact because they were determined to apply the British Limitation Act (1939) in order to appease corrupt civil servants at the Ministry of Lands and the white collar criminals that work in league with senior officers like the former Chief Registrar Mr. Kachamba and his successor Ms. Agatha Banda. In a related development, rumor has it that Liyoka Liyoka is bragging that he is related to the Deputy Chief Justice and that he has been given title to my property No. 20/378a. Please admonish that wayward young man that the illegal title generated by Ms. Agatha Banda and her corrupt team will not work...

The said property was handed over to me on 30th December, 1995 by the Controlling Officer. This was after I had repaid my GRZ loan in full as decreed by the Parliamentary Public Accounts Committee chaired by Honourable Lavu Mulimba (law maker). This questionable judgment defies this decree.

Many people including our late beloved President Mr. Michael Chilufya Sata and the veteran politician Mr. Grey Zulu have correctly observed that all is not well in our Judiciary. The late President Mr. Michael Chilufya Sata wanted to carry out major reforms that would ensure that our Judiciary is effective and accountable and free from corruption. Mr. Grey Zulu said, **'I breathed with a sigh of relief when I read that the Law Association of Zambia has pledged to restore integrity in the Judiciary. Its better late than never.'** The former Vice-President Mr. Guy Scott, urged the judiciary to clean its house and join the fight against corruption...

In a letter dated 11th January, 2017 to the Minister of Justice and copied to Justice Sakala and the Attorney-General, LAZ President James Banda said the reforms the Association would be suggesting will include filling the Judiciary with forward thinking, credible, competent Judges and Magistrates with integrity operating under clear and transparent rules without impunity and with secure tenure.

A veteran lawyer and politician Dr. Ludwig Sondashi observed that the country's judicial system contains some **'rotten eggs which need to be weeded out'** through the provisions of the constitution. Dr. Sondashi said that he will stand by his earlier assertion that Zambia's Judiciary was corrupt and to restore sanity to the system those who are tarnishing its image and credibility should be purged...

Having said that, I wish to put it on record that I have very high regard for our Chief Justice of the Supreme Court, Mrs. Irene Mambilima for her continued selfless service to the people of Zambia.

I will conclude with a quote from the last paragraph of a letter dated 8th November, 1999 addressed to the Commissioner of Lands in which the former deputy Permanent Secretary (F) in the Ministry of Local Government and Housing, Mr. Chambanenge is pleading with the Commissioner of Lands on my behalf to instruct corrupt and failed civil servant Mr. Kachamba and his corrupt team to act on the lawful instructions from the Ministry of Local Government and Housing as decreed by the Parliamentary Public Accounts Committee (law makers)...

N.B: this letter is part of the bundle of pleadings which the entire Supreme Court bench headed by the Deputy Chief Justice refused to look at to ensure that they were not derailed from their premeditated course of action (The application of the British Limited Act (1939) in order to appease the former corrupt Chief Registrar Mr. Kachamba and his successor Ms. Agatha Banda."

We reflected and agonized long and hard over the contents of the contemnor's letter. We came to the conclusion that the letter was clearly insulting to the entire Supreme Court. Unfounded allegations of corruption, or collusion in wrong doing, bias and sheer

incompetence were brazenly levelled against us. We formed the view that the contents of the letter had the effect of scandalizing the court and undermining the administration of justice.

Realizing that the contemnor may well be an uninformed lay person, the learned Deputy Chief Justice took the trouble to write to the contemnor on 12th December 2017, explaining the procedure in the Supreme Court and how decisions are arrived at. More importantly, the Honourable Deputy Chief Justice explained how the decision in this particular case was made and the law that was applied.

The contemnor did not appear to be immediately moved by that letter from the Honourable Deputy Chief Justice. He instead wrote another letter on 20th June 2018, showing that he was unwilling or unable to pay heed. We, therefore, some nine months later, on 13th August 2018, took out summons to an accused person under the inherent jurisdiction of the court as well as under Order 52/1/23 of the Rules of the Supreme Court, 1965 (1999 Edition) directed at the contemnor to attend before us and show cause why he should not be cited for contempt of court.

The matter was scheduled for hearing on 22nd August 2018. On that day, the contemnor did not appear. We issued a warrant for his arrest. We came to learn later that he had allegedly travelled to Ndola as the caption on the summons had erroneously reflected Ndola as the seat of the court. We rescheduled the matter to the following day, the 23rd August 2018.

On the 23rd August 2018, the contemnor appeared without a lawyer. He explained that his counsel was attending to another matter in Livingstone. We accepted the explanation, cancelled the Bench Warrant and directed that the matter comes up for hearing on 25th September 2018, at 09:00 hours. Meanwhile, on 18th September 2018, the contemnor appeared to have partly regained his composure and wrote a letter to the learned Deputy Chief Justice which read as follows:

“RE: APOLOGY LETTER

*I write to you honourable Judge Mwanamwambwa Deputy Chief Justice of the Supreme Court. I **unreservedly apologize** to you for the letter I wrote 26th October 2017. In the Judgement Appeal No. 004, 201SCZ/8/312/2014. I wish to **withdraw my letter in its entirety and state that I am very remorseful** for the content there in which I wrote in a state of emotional trauma*

arising from the demolition of my retirement house as a senior citizen.

Your Lordship, you can note that the letter I wrote to you lacks logic and is so uncoordinated as I was fishing in the sea for anything. I fully take responsibility and withdraw that letter and its content in full. I further state my Lord that I ask for your forgiveness in the manner my letter could have been perceived by some people especially those to whom it was copied, and wish to state that this apology is hereby copied to all that in my opinion were copied by virtue of their position in the Government.

My references in my letter that I have decided to take this matter to the Republican President is completely misdirected and please consider those sentiments as the rantings of a confused man! I take responsibility of the grievous words which poured scorn on the wisdom of your Court your Lordship.

My assertion that I have a constitutional right to protect my property was misdirected completely; I was venting my anger to the wrong Institution. The choice of my words I used against Honourable Madam Lengalenga was unnecessary and lacked merit! My unbridled ranting my lord was totally unnecessary and must be looked upon as illogical and contradictory.

My Lord, I do not need to further explain, the contents are wrong and I beg for your forgiveness at my careless words against the integrity of your Court. As mentioned above, my letter and anger

*was directed at the innocent Institution, **my mind was full of confusion and without rational thought began to write,** which after reflection I find the contents wrong and loudly ask for your forgiveness. I further extend my apology to the entire judiciary for the ridicule my letter may have caused and do state that I attacked the Institution unfairly and promise to accord the Judiciary the honour and respect it deserves.*

Lastly, I have taken further steps to copy every office that came across my letter and withdraw the sentiments of that letter in its entirety. I throw myself at the mercy of the court, just like in Bible times in the Old Testament when a person error they would run to the same Temple of God where laws were interpreted and get hold of the Altar horns as the last resort for mercy! In similar manner your lordship, I run to your court as the highest Institution of Justice in our land and ask for mercy!

I remain

Your Humble Servant

(signed)

Rev. Daniel Mwale”

When the matter came up on the 25th September 2018, Mr. Musonda, learned counsel for the contemnor, informed us that the contemnor was not present in court as he had been taken ill. His

blood pressure had allegedly shot up suddenly and he had to be rushed to a medical facility for attention. We thus adjourned the matter to 28th November 2018, in the fervent hope that his condition will have improved by then.

On the 28th November 2018, the contemnor and his counsel turned up in court. His counsel indicated that the instruction he had was that the contemnor admitted the charge he was facing before us. Having admitted the charge of contempt against him, we found him guilty on his own admission. The contemnor then proceeded to read his purging statement. While attempting to do so, a very unfortunate incident occurred. The contemnor collapsed within the witness box, supposedly on account of his raised blood pressure. He was conveyed out of the court room as we proceeded to adjourn the matter. The next scheduled date was the 31st January 2019.

However, on the 30th January 2019, the Advocates for the contemnor filed a notice to adjourn on grounds that the contemnor could not attend on account of ill health. We, once again, adjourned the matter. This time to the 19th February 2019.

On the 19th February 2019, counsel for the contemnor was present, but the contemnor was not. We were informed that the contemnor's brother, who had been nursing him in readiness for his attending court, had reported that the contemnor's blood pressure had once again shot up just before he could start off to attend the proceedings. Mr. Musonda sought our indulgence and guidance to either allow another adjournment or to allow him to proceed in the absence of the contemnor. A sick report was produced to the court on this occasion.

It was in the circumstances narrated above that we ruled that we would adjourn the matter to the 1st March 2019, and that this would be the final adjournment. We also warned that on that day we would proceed with or without the contemnor being present (as he had already admitted the charge).

As we indeed suspected, came the 1st March 2019, the contemnor did not appear in court. The same reason of illness was advanced. Mr. Musonda, learned counsel, then stood up to mitigate on behalf of the contemnor. He reminded us of the letter of apology which had been written by the contemnor and that by the contents

of that letter the contemnor sought to withdraw the contemptuous material he had authored.

We assured Mr. Musonda that we would take the letter of apology into account. The learned counsel then began his mitigation on behalf of the contemnor. He submitted that the contemnor readily admitted the charge; has withdrawn the contemptuous material that he had sent to this court; and has through the letter of apology shown contrition. He regrets having authored the offensive letter and undertakes never to engage in similar conduct.

Counsel drew our attention to the case of *Moses Mwiba v. The People*⁽²⁾ regarding sentencing of convicts who readily admit the charge. The substance of that decision, according to counsel, is that in passing sentence, due allowance should be given to an accused person who pleads guilty and shows contrition. The learned counsel also cited the case of *Leonard Banda and Dora Siliya v. Nevers Mumba*⁽³⁾, where this court discharged the contemnor on account of having admitted the charge and withdrawn the contemptuous material. He ended by submitting that although the circumstances surrounding the contempt in the *Leonard Banda*⁽³⁾ case are slightly

different from those in the present case, those in the *Leonard Banda*⁽³⁾ case were more aggravating in that there the contemptuous substance was published to the media which was not the case here.

Scandalizing the court is an offence *sui generis* and not part of the ordinary criminal law. It may consist of conduct that does not relate to pending or ongoing legal proceedings. It exists in principle to protect the administration of justice. In *Savenda Management Services Limited v. Stanbic Bank Zambia Limited, Ex parte Gregory Chifire*⁽⁴⁾, we took time to explain the legal basis of our power to punish for contempt of court. We stated in that case that one of the factors which eat at the public confidence in the Judiciary as an important estate of government is the frequent and often unjustified assault on the integrity of the institution and its members. We also pointed out in that case that some attacks on the integrity of the Judiciary or individual members are often times unwarranted and made in wrong fora yet there are sufficient laws in this country to deal with many of the allegations that are levelled against individual judges. Allegations of corruption, for example, are properly in the domain of the Anti-Corruption Commission while those implicating

the perversion of the course of justice should properly be the preserve of either the Police or the Judicial Complaints Commission.

The recognition of the current species of contempt, that is to say, scandalizing the court, and its enforcement constitutes a permissible derogation from freedom of expression guaranteed under the Constitution of Zambia.

In the Ghanaian case of *Republic v. Liberty Press Limited & Others*⁽⁵⁾ from which we freely quoted with approval in *Savenda Management Services Limited v. Stanbic Bank (Z) Limited, Ex parte Gregory Chifire*⁽⁴⁾, the Supreme Court of Ghana had occasion to explain both the justification for the power of contempt as well as the significance of the position of the Judiciary in the body politic. A passage by Akuffo-Addo CJ, which resonates fully with our own situation reads as follows:

“[T]he important position of the judiciary in any democratic set- up must be fully appreciated. Performing as they are called upon to do, the sacred duty of holding the scales between the executive power of the State and the subjects and protecting the fundamental liberties of the individual, the courts must not only enjoy the respect and confidence of the people among whom they operate, but also must have the means to protect that respect and confidence in order to maintain their authority. For this reason, any conduct that tends to

bring the authority and administration of the law into disrespect or disregard or to interfere in any way with the course of justice becomes an offence not only against the court but against the entire community which the courts serve."

We are not unmindful that the line between a scandalizing comment and fair and legitimate criticism may sometimes not be easy to draw. Genuine criticism ought clearly to be regarded as an exercise of the right of free speech rather than as 'scandalous comment' falling within the ambit of contempt of court. And we have no misgiving whatsoever that every person has the right to make fair comments on matters of public interest including commenting upon what transpired in a court of law. After all, as Lord Atkins quite properly observed in *Ambard v. Attorney General for Trinidad and Tobago*⁽⁶⁾:

"No wrong is done by any member of the public who exercises the ordinary right of criticizing, in good faith, in public or private, the public act done in a seat of justice. The path of criticism is a public way: the wrong healed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice...they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken comments of ordinary men."

Those who exercise the right to criticize judicial decisions have, however, to bear in mind that from the nature of judicial office, those criticized are not able to reply owing to the dignity that goes with their office and the ethics surrounding them. We shall develop this point shortly.

Criticism of our judgments, however vigorous, would never amount to contempt of court, provided it remains within the limits of reasonable courtesy and good faith. However, peddling unfounded falsehoods and baseless insinuations of impropriety on the part of the Judiciary or individual judges brings the court into disrepute – unjustly so. It erodes people's confidence in the courts and its processes if people who lose cases on the basis of the law as interpreted by those who have the constitutional mandate to do so, routinely took to any available podium or anthill to insult and spew falsehoods and cast aspersions of incompetence and corruption on the part of adjudicators.

To revert to the point we made about the Judiciary being neither averse nor immune to criticism provided it is done within the bounds of provable facts and decency, we wish to say this, that it is grossly

unfair to make allegations of incompetence, bias, improper collusion and corruption against judgment makers because judges have no forum outside the judicial process to defend themselves for the positions they take in their judgments. They cannot speak one more word outside their judgment in defence of their decision. Let parties be slow in pouring venom on judges. It is a serious attack on judges, to say their judgments are questionable, procured through corruption or nepotism, or to allege that the judges are incompetent in the absence of justification.

The contemnor in this case chose to bravely attack the High Court judge who initially delivered the judgment that caused him offence. He equally insulted and scandalized the Supreme Court following its judgment on appeal. When we invited him to show cause why he should not be cited for contempt of court, his conduct did not show even a fraction of the bravery and courage he manifested when he penned the offending letter.

We have taken into account the mitigation made on his behalf by his learned counsel and the apology letter dated 18th September 2018. We think that taken in the round, the contemnor has shown

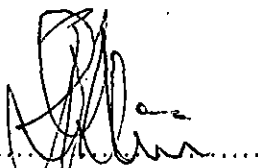
contrition. We understand that he is a Reverend of a Church Ministry. He is thus expected to be exemplary in his conduct and in his manner of speech. The language in his letter shows the very antithesis of the teachings of the Christian doctrine of which he holds himself to be an agent. He has failed to be a good example of a Shepherd of the flock. In the circumstances, we wish to make an example of him; to emphasise how thoughtlessness which is toxic to the proper administration of justice, can be expensive to their authors.

We do not think that the situation before us can be equated to that which obtained in the *Leonard Banda*⁽³⁾ case to which the learned counsel for the contemnor referred.

We fine the contemnor K20,000 to be paid within 7 days from today or in default nine months simple imprisonment.




M. S. Mwanamwambwa
DEPUTY CHIEF JUSTICE



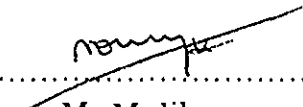
G. S. Phiri
SUPREME COURT JUDGE



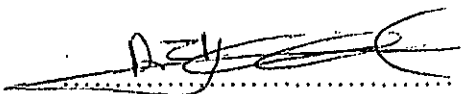
E. N. C. Muyovwe
SUPREME COURT JUDGE



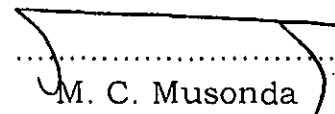
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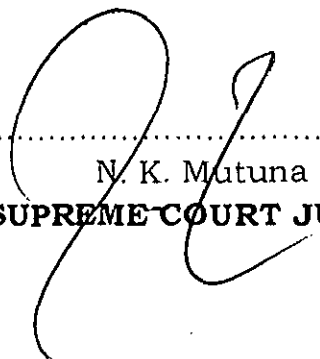
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SUPREME COURT JUDGE



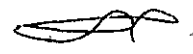
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R. M. C. Kaoma
SUPREME COURT JUDGE



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M. C. Musonda
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J. K. Kabuka
SUPREME COURT JUDGE