

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

APPEAL NO. 006/2019

BETWEEN:

OGGIE MUYUNI MUDENDA

APPELLANT

AND

DICKSON MUYEEKA KAMAALA

RESPONDENT



Coram: Makungu, Chishimba and Ngulube JJA

On the 16th day of October, 2019 and the 18th day of November, 2019

For the Appellant: In person

*For the Respondent: Mr. M. Muchende and Ms. B. Musonda of Messrs M.
Associates*

JUDGMENT

Makungu, JA delivered the Judgment of the Court.

Cases referred to:

1. *Kojo v. Bonsie*(1975) WLR 1223 at 1226
2. *Miller v. Minister of Pensions* (1947) 2 ALL E.R 372
3. *Chief Mpepo (also known as Aexson Chilufya Mwamba) v. Senior Chief Mwamba (also known as Paison Chilekwa YambaYamba)* SCZ No. 25/2008
4. *Alice Mashamo v. Amos Mbulo and The Attorney General* CAZ Appeal No. 119/2017
5. *The Attorney General v. Marcus Kapumba Achiume* (1983) ZR 1

Legislation referred to:

1. *Chiefs Act Chapter 287 of the Laws of Zambia*
2. *The Constitution of Zambia (Amendment) Act No. 2 of 2016*

1.0 INTRODUCTION

1.1 This appeal is against the judgment passed on 24th August, 2018 in cause no. 2007/HP/472 by Mrs. Justice M.S. Mulenga. Initially Leonard S.S. Mudenda was the 1st plaintiff but he died and the suit remained in the names of Anderson Moonga Janza and Oggies Muyuni Mudenda were cited as 1st and 2nd plaintiff respectively. Choma Municipal Council, Bensa Maambo Chilemba, Bbindikila D. Mwiinga, The Attorney General and Dickson Muyeeka Kamaala were cited as 1st to 5th Defendants respectively. In this appeal, the 2nd plaintiff and 5th defendant are appellant and respondent respectively.

1.2 According to the writ of summons, the 1st plaintiff's claims were as stated in the writ as follows:

1. A declaration that Anderson Moonga Janza's name be forwarded to the President as the only legitimate candidate from the Badenda clan for the throne of Chief Hamaundu which has been vacant since 2003.
2. An injunction Order restraining the 1st defendant Choma Municipal Council, its servants or agents or whomsoever

from forwarding the name of the 2nd defendant as a sole candidate vying for the throne of Chief Hamaundu.

3. Any other relief the court may deem fit.

4. Costs.

1.3 The 2nd plaintiff's claim was as stated in the writ in cause no. 2011/HB/62 which action was consolidated with cause no. 2007/HP/472 before the said Judge Mulenga: The 2nd plaintiff's claims were as follows:

1. That the 2nd plaintiff was the rightful person to be enthroned as Chief Hamaundu of the Tonga people as opposed to the 2nd defendant who was from the Bakonka clan. Only the 4th defendant (The Attorney General) filed a defence denying the plaintiff's claims and alleging that in an effort to resolve a long standing succession dispute in Chief Hamaundu's area, a meeting was held in Pemba on 15th April, 2012. In attendance was a select committee comprising of Royal Highness Chief Monze, Chief Hanjalika, Chief Sinazongwe and Chief Chikanta as well as representatives from the Badenda and Bakonka clans.

A follow up meeting was held on 29th August, 2012 where it was announced that the Hamaundu Chieftainship belongs to the Badenda clan. Consequently, the Badenda clan selected the 5th defendant to be the new Chief Hamaundu. Accordingly, the Town Clerk for Choma and the Permanent Secretary for Southern Province both submitted recommendations for the recognition of Dickson Muyeeka Kamaala as Chief Hamaundu.

2.0 EVIDENCE BEFORE THE LOWER COURT

2.1 Trial took place in 2015. The plaintiff's case rested on the evidence of nine witnesses. PW1 was the 1st plaintiff Anderson Moonga Janza who was 75 years old at the time. PW2 was Samson Hamatowe Kwilee who was 70 years old, PW3 was Jessy Mudenda who was elderly but did not know her date of birth. PW4 was Marina Kuhula aged 50 years who is the mother to the 2nd plaintiff. PW5 was Benjamin Milambo, aged 83 years, PW6 was Merita Kuhula also an elderly person whose specific age was unknown. PW7 was Alfious Choongo aged 33 years. PW8 was 58 year old Sikwino Kabelenga. PW9 was the 2nd plaintiff Oggie Mundenda who was 38 years old.

2.2 In summary, evidence from the nine plaintiff's witnesses was as follows:

According to the Tonga custom, the succession to the throne of the Chief is matrilineal in that it is the nephews of the late Chief on the mother's side who can be candidates. It is the clan that chooses the Chief and the people present at the meeting should belong to the Badenda royal family. Minutes of the meeting are recorded, to be passed on to the government authorities.

2.3 There had been five Chiefs on the throne since the 1800's. The first was Hamano who ruled up to 1914. The second was Jakalasi, who ruled from 1914 to 1967. The third was Hamusanje who resigned from 1968 to 1973. The fourth was William Mweene Hachusiya Mukonka who ruled from 1973 to 1983 when Hadezu took over until he passed away in 2003.

2.4 The two rival clans to the Hamaundu Chieftaincy are Badenda and Bakonka. Out of the said five chiefs, the first two were from the Badenda clan and the last three were from the Bakonka clan. The Bakonka clan started ruling due to political interventions.

- 2.5 The leadership wrangles started in 1968 after the death of the second Chief. From 1968, the Badenda clan tried to get the throne but officials from the government had been threatening them.
- 2.6 PW1 Anderson Janza of Siamaundu village hailed from the Badenda clan according to the family tree prepared by the clan as that is where his mother and grandmother hailed from. After the death of Chief Hamaundu (Hadezu) in 2003, PW1 led elders of the Badenda clan to Livingstone Government Offices to inquire about the succession issue and a meeting was called by the District Commissioner of Choma to discuss the matter but that meeting was fruitless and that is how he decided to commence this action.
- 2.7 In June, 2012 the Ministry of Chiefs and Traditional Affairs selected four Tonga chiefs, namely Chief Chikanta, Chief Hanjalika and Chief Sinazongwe to help resolve the issue of the Hamaundu Chieftaincy. On 15th August, 2018 a meeting was held at Pemba Catholic Hall which was chaired by the Town Clerk. At the meeting the rival clans were also represented. During the meeting, PW1 was the only one from

the Badenda clan who claimed to be the rightful successor as he was the great grandson of the late Chief. From the Bakonka clan, there were three contenders. After the deliberations, the meeting was postponed for the Chiefs to first look at the records and determine to which clan the Chieftainship belongs. Two weeks later, another meeting was held involving all parties concerned. At that meeting, the Town Clerk announced the decision of the chiefs to the effect that the Chieftainship belongs to the Badenda clan. Thereafter, the Badenda's were requested to go outside and choose a candidate. PW9 Oggie Mudenda who had been selected by the Badenda clan as the successor instead of Anderson Janza complained about that saying he had already been selected by the clan. However, they went ahead and chose the 5th defendant, (now respondent) as the next Chief Hamaundu.

- 2.8 It was averred by all the plaintiff's witnesses that the 5th defendant was not from the ruling family but was born in the village and honoured as such. He was from the Buleya clan. The plaintiffs claimed that the 5th defendant was unlawfully enthroned after 2003 as the court proceedings were still

ongoing. The 2nd plaintiff was a Badenda as his mother was a Mudenda. His grandmother was a niece to Chief Hamano, the first chief Hamaundu. Further evidence by the plaintiff was that the 5th defendant grew up in the Chief's palace and was chosen as an advisor to the late Chief Jakalasi in 1958. He served in that capacity until the chief died. The Badenda clan then selected Isaiah Kanene from the Bakonka clan disregarding the late chief's choice as the 5th defendant was not from the Badenda clan. When Kanene died, the 5th defendant started acting as Chief Hamaundu awaiting the appointment of the rightful heir.

- 2.9 Following the meeting in 2011, the 2nd plaintiff Oggie Mudenda was chosen to be the successor to the throne by the Badenda Royal Establishment Committee and mandated to proceed with the court action because the 1st plaintiff had allowed for discussions for out of court settlement without the Badenda clans' approval. Further evidence was that in 2012, a meeting held at the Choma Catholic Hall where the council selected the 5th defendant to be the next Chief Hamaundu. Only a few members of the Badenda clan were present at the meeting and

the 5th defendant took advantage of the state of affairs and decided to declare his interest as a candidate when in fact he had not been chosen as such by the Badenda clan.

2.10 Fanny Chaambwa, the Chief Administrative Officer of Pemba District Council was the sole witness for the 1st defendant. Her evidence can be summarised as follows:

She was the one who took minutes of the meeting that took place in August, 2012 in Pemba between the Bakonka and Badenda clans over the contest for the Chieftainship. Her evidence about the meeting was in all material respects the same as that of the plaintiffs. She added that there was an electoral college that the Badenda clan constituted for purposes of selecting a chief. The Electoral College included Anderson Janza, his wife Kamaala Muyeeka, the 5th defendant and other Badendas. The Electoral College chose the 5th defendant as Chief and reported back to all the people present. It was then agreed that the Town Clerk would officially announce the decision and report to the government. The 5th defendant was not among the initial four candidates from the two clans. His selection was objected to by the 2nd plaintiff. The

role of the council at the meeting was to observe and take note of the conclusion. From the information gathered, the 5th defendant was a Badenda. The 5th defendant was later recognised as chief by the President of the Republic of Zambia.

2.11 The case for the 2nd defendant rested on the evidence of three witnesses including the 2nd defendant himself. The essence of it was that the 2nd defendant was 87 years old at the time he was testifying. He was from the Bakonka clan and a nephew of Joseph Mwanga Hadezu – Chief Hamaundu who died in 2003. He was born of Hadezu's sister Jessie Mwemba. He lived with Hadezu in the palace and still lives there. It was Hadezu who told him that the Hamaundu Chieftainship belonged to the Bakonka clan. The Hamaundu Chieftainship started from the grandmother Mwanachigodo who had the biological first born son Chilala the first Chief Hamaundu and he was a Mukonka. He ruled from 1800 to 1898. Chief Hamaundu Chilala had a wife from the Badenda clan who bore him a son named Hamano. When Chilala was old, he gave the Chieftainship to his son Hamano; a Mudenda to keep it for some time. This was based on the Tonga tradition that children of the late chief

do not succeed to the throne but can only be caretakers of the Chiefdom until the rightful heir is found. The rest of his evidence regarding the other successors to the throne was the same as the plaintiff's evidence. It was after the death of Hadezu in 2003, that the Bakonka clan chose him as successor. Choma District Council was informed of his selection on 17th November, 2004.

2.12 According to the 2nd defendant, in the Tonga custom, the siblings or nephews to the former chief can ascend to the throne. The 2nd defendant was present at the meeting held by all stakeholders in 2012 in Pemba and the council did not show partiality, neither did it influence the voting. The 2nd defendant alleged that the 5th defendant was not eligible to be chief but conceded that according to the family tree, the 5th defendant was in the same line as Jakalasi. The 5th defendant was currently holding the instruments of power since he was installed as Chief Hamaundu.

2.13 The 3rd defendant's case rested on the evidence of three witnesses. Overall, their evidence was that Hamano had four children, the first born was Hachilinya, the father to the 5th

defendant, the second born was Haboba, the father to Isaiah Kanene. The 5th defendant represented Chief Jakalasi from the Badenda clan between 1958 - 1967 because the Chief was very old but the Badenda later selected a different chief Hamusanje between 1968 and 1978. The 5th defendant, Isaiah Kanene and DW5 were all biological grandchildren of Hamano. That the recommendation made by the chief's committee that the Badendas were the rightful heirs was forced upon the Bakonka clan because Chilala of the Bakonka was the first Chief Hamaundu. Further evidence was that the 3rd defendant was selected as Chief Hamaundu by the Bakonka clan in 2005.

2.14 The 5th defendant aged 86 years testified as DW8 and called other witnesses aged 74 and 80 years. He was first nominated as chief in 1958 by Chief Hamaundu Jakalasi Monde as Jakalasi was too old to carry out his duties. He was given instruments of power: some books, a medallion, a spear and the National Registration Card for the late Chief Hamaundu Jakalasi and assigned the duties of the Chief which he carried out until Jakalasi died. At that time, the Badenda clan

confirmed his selection as chief. Some confusion over the throne was brought about by Isaiah Kanene who enlisted the help of the Bakonka in the fight for power. Samson Musanje Himusanje from the Bakonka clan ended up on the throne on the ground that the first chief Hamaundu was from the Bakonka clan. His evidence of how the succession disputes were dealt with after the death of Chief Hamaundu Hadezu was the same as the plaintiff's. The Badenda clan had proposed the 1st plaintiff and the 5th defendant as candidates for the Chieftainship at the meeting that took place in Pemba in 2012 at the Catholic Hall. The 5th defendant emerged the victor with 17 votes against 2 votes. The names of the plaintiff's did not appear on the family tree of the Badenda clan produced in evidence but they were both grand children of the late Chief from the Badenda clan.

2.15 The 5th defendant's story was that Chilala was not a chief but Chief Hamaundu Hamano's father. The 5th defendant was not aware of the injunction restraining the Choma Municipal Council from recommending him to the Republican President for recognition pending the determination of the case. He was

recognized by the President in 2014 as Chief Hamaundu and later installed as such. The appointment was gazetted on 24th February, 2014. The 5th defendant is related to the 3rd defendant because their fathers were brothers. The plaintiffs were not eligible to ascend to the throne despite being part of the Badenda clan because they were grand children of the late Chief Hamano Mwiinga and Jakalasi. The 5th defendant's father was a Mulongo, his mother was Namwimbu, a daughter of Namaila who was the mother to the 2nd Chief Hamaundu.

3.0 LOWER COURT'S DECISION

3.1 The lower court noted that due to the nature of succession disputes, most of the evidence is hearsay in nature and therefore ought to be treated with circumspection. Further that most of the witnesses were advanced in age and the information they were tendering as evidence was acquired over a long period of time, therefore susceptible to lapses in certain aspects. The court applied the case of **Kojo v. Bonsie** ⁽¹⁾ where the Privy Council stated that:

“Where there is a conflict in tradition history, which has been handed down by word of mouth, one side or the

other must be mistaken, yet both may be honest in their beliefs. In such a case, demeanor of the witnesses is of little guide to the truth. The best way is to test the traditional history by reference to the facts in recent years as established by evidence, and by seeing which of the two competing histories is the more probable.”

3.2 The lower court found that the 2nd and 3rd defendants representing the Bakonka both agreed with the plaintiffs that the first person to be recognized as Chief Hamaundu and given instruments of power by the Colonial Government was Hamano, who was a Mudenda by virtue of his mother. She further found that at the meeting held on 15th August, 2012 involving members of the two clans and other Chiefs who were members of the committee mandated to resolve the succession disputes between the two clans, it was resolved that the Chieftainship belonged to the Badenda clan.

3.3 The Judge stated that the assertion that there was a line of Mukonka Chiefs prior to 1898 was not supported by documentary proof. The learned Judge referred to the earlier official report on the Hamaundu Chieftdom as produced by both the 2nd plaintiff and the 2nd defendant; The Mazabuka

Tour Report No. 5 of 1936 which showed the clan of Malangata to be the proper authority in the present Chief Siamaundu's area was investigated and found to be baseless. The report confirms that the most important man in the Mazabuka plateau would be given an area and called a Chief but real Chiefs were non-existent.

- 3.4 The lower court found that according to that report, Mangalata was before government stepped in only slightly less important than Siamaundu. His area of influence was smaller and therefore Siamaundu was made the Chief and Malangata put under him. Chief Monze endorsed his position as Chief. The Judge stated that the earliest account given by the Colonial Offices generally must carry more weight as opposed to the latter accounts unless clear supporting evidence is shown to the contrary. On the basis of the said report, she found that the claim by the 3rd defendant that Malangata, a Mukonka, was the first Chief Hamaundu who was succeeded by his nephew or brother Chilala was not proved. The said Chilala, a Mukonka could not have been Chief Hamaundu.

- 3.5 The Judge further found: The 1936 account has no mention of Chilala who was only first mentioned in the letter by Mr. Mwamba, the Acting District Secretary to the Private Secretary of State House dated 23/08/68. Hichaba, the father of Hamano was a Mukonka married to Namaila, a Mudenda and therefore Hamano was a Mudenda.
- 3.6 The Choma Tour Report No. 2 of 1958 produced by the 2nd plaintiff indicated that the 5th defendant was chosen by Chief Siamaundu's family, but the choice was opposed by two groups. The Choma Tour Report No 7 of 1958 by A.J.N. Daldy the District Assistant provided by the 2nd defendant shows that there was only one village in the Demu area with the high population of Bakonka from which opposition to Dickson on the grounds of lineage was expected. And that otherwise Dickson's approval from the other villages was definite.
- 3.7 The statement that there was lack of acknowledgement of Dickson Muyeeka by "the extreme minority clan" of Bakonka who were confined in their numbers in one village of Mulongo was also made by J.C. Stone in the Choma Tour Report No. 9 of 1959 produced by the 2nd Defendant. Dickson was

appointed as Deputy Chief and this upset the Bakonka clan. The Judge found that the Chieftainship moved to the Bakonka by virtue of elections between the two clans and thereafter, Simusanje and two other Mukonka Chiefs reigned until 2003 when the current dispute arose.

3.8 The trial Judge further found that the plaintiffs had proved that the Hamaundu Chieftainship belongs to the Badenda clan who are entitled to proffer a successor despite the fact that the last Chief who died in 2003 was a Mukonka. She therefore found the claims by the 2nd and 3rd defendants to be *otiose*.

3.9 As regards the degree of proof required in civil cases, the trial Judge referred to the case of **Miller v. Minister of Pensions** ⁽²⁾ where it was held:

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as required in criminal cases. If the evidence is such that the tribunal can say “we think it more probable than not” the burden is discharged, but if the probabilities are equal, it is not.”

3.10 She went on to find that the probabilities on the issue whether the 5th defendant was not a Mudenda were equal. She

therefore found that it was not proved that the 5th defendant was not a Mudenda.

3.11 The trial Judge further found that the 1st plaintiff was selected in 2003 while the 2nd plaintiff was selected in 2011 both by the Badendas. The 5th defendant was selected in 2012 and two of his sons who were actually not Badenda's were included in the electoral college of 19 people. The Judge opined that when the clans were invited for the meeting to convey the decision of the Select Committee of Chiefs, they were also told to come with members of the clan who constitute the electoral college as well as people to enable them sit and select a candidate afterwards. Thus, of the Badenda clan members present, the majority chose the 5th defendant and not the 1st plaintiff. The 2nd plaintiff did not declare his interest at that point. Even if the list of names of the electoral college is discounted on the basis that some non-Badenda were included while some Badenda who were present such as the 2nd plaintiff were omitted, the fact remains that the majority of the Badenda clan members who attended chose the 5th defendant.

3.12 The court further stated that it was common cause that the electoral college comprising members of the concerned royal family or clan is the one that is mandated to select a Chief. Therefore, it is not for the sitting Chief to select a successor, although he might have a preference, but for the members of the electoral college after the death of the Chief. The candidates come from the Royal Family or Clan. In this case, both plaintiffs were eligible candidates. However, the Badenda clan changed its selection twice to end up with the 5th defendant in 2012. At some point in 2003, the 1st plaintiff was selected to replace the 5th defendant as candidate and in 2011 the 2nd plaintiff was selected to replace the 1st plaintiff. Under the circumstances, she took the latest selection as the valid one. She found no basis to interfere with the status quo of the 5th defendant. Each party was ordered to bear its own costs.

4.0 THE APPEAL

The appellant has advanced 7 grounds of appeal which include narratives and arguments but they can simply be stated as follows:

1. *The trial court erred in law and fact by ignoring the Tonga custom and traditional succession rules and practices.*
2. *The trial court erred in law and fact by upholding the 5th defendant's fraudulent ascendancy to the throne based on the 1st defendant's default and malafide actions.*
3. *The trial court erred in law and fact when it found that the 2nd plaintiff did not contest the alleged Pemba election. He was already chosen by the Badenda Clan Royal Establishment Committee and did not have to participate in illegal elections at Pemba and he objected to that meeting.*
4. *There was no proof that the 5th defendant was a Mudenda by maternal descent.*
5. *The court erred to find that the plaintiff did not prove that the 5th defendant was not a Mudenda,*
6. *The trial court erred by ignoring the 2nd plaintiff's evidence and that of his witnesses on the 5th defendant's parentage that clearly showed he was a Muleya and not a Mudenda which he did not refute.*
7. *The court erred to find that both plaintiffs had proved the Chieftainship belonged to the Badenda. The correct position being that it was the 2nd plaintiff who had proved it.*

5.0 APPELLANT'S ARGUMENTS

5.1 The appellant filed heads of argument on 14th January, 2019 which he relied upon. Grounds 1, 4, 5 and 6 were argued collectively. Under these grounds, the appellant submitted that the court erred in law and fact by ignoring Tonga customs and traditional succession rules of practice. The trial Judge misdirected herself when she acknowledged the traditional procedure but refused that the appellant met the requirements. The proceedings at the Pemba meeting which was not organised by the Badenda Royal Establishment Committee contradicts Tonga tradition and therefore the Chief's Act. The family tree linking the appellant to the Hamaundu Royal Family which the trial court accepted, shows the respondent as the paternal grandson of Hamaundu being the son to the chief's son Hachilinya. The trial court ignored the family tree which confirms that the respondent is not eligible to the throne since succession is matrilineal according to the Tonga tradition and yet the respondent does not dispute that family tree. In fact, the respondent who is the paternal grandson to Hamaundu contradicted himself by stating that

his mother Namwimbu is a Mudenda when in fact his father Hachilinya is a Mulongo by clan. The appellant further argued that the appellant was born from Hachilinya's sister and if Hachilinya is a Mulongo by clan then even his sister Namwiimbu is a Mulongo and not a Mudenda.

5.2 The appellant also submitted that PW3 and PW9 both denied that the respondent is a Mudenda. In addition, the family tree that the respondent produced shows Queen Mother Namaleya a Mukonka by clan and the wife to Hamaundu II. The respondent who claims to have maternal lineage to Namaleya a Mukonka by clan cannot be a Mudenda. He contends that the trial court deliberately overlooked this evidence and was therefore biased towards the respondent.

5.3 On the second ground of appeal, the appellant submitted that the lower court departed from its ruling dated 17th June, 2015 under cause 2007/HP/472 where it confirmed that the Choma Municipal Council could not rely on its default and malafide actions in forwarding the name of the respondent to the President for recognition knowing very well that the matter was in court. The trial court cannot therefore make a u-turn

as this would be a departure from principle, practice and consistency.

5.4 On the third ground of appeal, the appellant submitted that the trial court erred in law and fact when it found that the appellant did not contest the alleged elections in Pemba in 2012. It was submitted that the reason why the appellant did not contest was because he did not want to be party to an illegality. He had even produced a letter from his lawyer warning Choma Municipal Council not to proceed with the meeting whose agenda was subject matter of the ongoing litigation as that was contemptuous. Furthermore, the appellant had already been chosen as successor to Chief Hamaundu and as such it would be self demotion and against the decision of the traditional council to contest for succession.

5.5 In support of the seventh ground of appeal, the appellant submitted that the trial court erred in law and fact when it generalised that the plaintiffs had proven that the Chieftaincy belonged to Badenda clan. The established fact is that it was only the 2nd plaintiff (Appellant) who adduced that evidence.

He alleged that the respondent was given preferential treatment in that after he was joined to the proceedings, he was not coming to the court but his application to arrest the Judgment was still entertained.

5.6 Additionally, the trial court based its findings on evidence which the respondent never adduced before court. It was alleged that the trial court constructively made the respondent a Mudenda through deliberate misapprehension of facts, twisting and ignoring evidence from the appellant and his witnesses and exaggeration.

5.7 In conclusion, it was submitted that the trial Judge was not on firm ground to uphold the respondent's ascendancy to the throne. The appellant prayed that he be declared the duly enthroned Chief Hamaundu in accordance with the Tonga custom and traditional rules of practice effective from 27th March, 2011 when the Badenda Royal Establishment Committee chose him. He relied on **Section 3(2) (a) of the Chiefs Act** which provides that:

"No person shall be recognised under this section as the holder of an office unless

(a) The president is satisfied that such person is entitled to hold the office under African Customary Law..."

5.8 Counsel for the respondent did not make any submissions.

6.0 DECISION OF THIS COURT

6.1 We have considered the record of appeal and the written and oral arguments made by the appellant. Since the grounds of appeal are connected, we shall deal with them collectively.

The crucial questions that arise from this appeal are:

- 1. Whether the respondent who was recognised by the President pursuant to Statutory Instrument No. 21 of 2012 as Chief Hamaundu of the Tonga people of Pemba District in Southern province was chosen in accordance with the traditional custom of the Badenda clan.*
- 2. Whether the appellant is the rightful heir to the throne of Chief Hamaundu.*

6.2 These questions are also related and will be determined together. The following facts are undisputed: -

The successor to Chief Hamaundu is chosen from the Badenda clan by an electoral college constituted by the same clan. The succession pattern is matrilineal and it is the nephew of the former chief who should succeed him. In

deciding the lineages of the appellant and respondent, we shall test the traditional history by referring to the facts in recent years as established by the evidence and examine which of the two competing histories is more probable following the case of **Kojo v. Bonsie.** ⁽¹⁾

6.3 The appellant produced family trees as indicated on pages 195 to 200 and 402 of the record of appeal. On the other hand, the respondent produced the family tree on page 513 of the record. Both parties did not explain the family trees during the trial. Evidence on record from the appellant and his witnesses was to the effect that the respondent is not a Badenda by clan but a Muleya or Mulongo as his father Hachilinya was born of the late Chief Hamaundu (Hamano) who had a wife from the Mulongo clan. Therefore, the respondent is only a Badenda from his father's side (patrilineal) and from his mother's side, he is a Muleya or Mulongo. We have observed that Mulongo and Muleya or Buleya were being used interchangeably.

6.4 According to the respondent and his witnesses, the respondent's mother was Namwiimbu who was one of the sisters of Hachilinya. The family trees produced by the

appellant do not indicate the name of the 5th defendant's mother as Namwiimbu. However, it shows that the first Chief Hamaundu Mwiinga Munamalambo Hamano was a descendent of Namaila a Mudenda by clan. The respondent's evidence was that Namaila and Namwiimbu were sisters of Hachilinya and yet the family tree he produced shows that Namaila's sisters did not include Namwiimbu; and that Namwiimbu was one of Mukamwiinga's children; Mukamwiinga was Namaila's sister. DW9 stated that the mother to the second Chief Hamaundu (Jakalasi) was Namaila who gave birth to Namwiimbu the mother to the respondent. DW9 suggested that the respondent is from the line of Namaila and yet the family tree produced by the 5th defendant shows that he is from the family of Mukamwiinga. It is clear to us that it was the respondent's father who was from the line of Namaila. DW9 gave evidence that Hachilinya married from his father's side and the name of his wife was Namwiimbu, a sister to Hachilinya. Our analysis of this evidence is that since the respondent did not rebut the appellant's evidence that Hachilinya was born of a Mulongo mother, it entails that

Hachilinya's sisters Namwiimbu were also born of a Mulongo mother, which makes them descendants of the Mulongo clan.

- 6.5 The appellant's evidence was more consistent on this aspect than that of the respondent. There was notable evidence from PW6 to the effect that her mother who was a Badenda told her that the respondent was born of a woman from the Buleya clan and that woman had gone to live at Chief Jakalasi Hamaundu's palace with her son the respondent. This evidence was also not rebutted by the respondent who said very little about where he hails from. PW6's evidence that the respondent was raised at the palace and regarded as a trustee by Jakalasi who eventually appointed him as his assistant or caretaker of the Chiefdom in 1958 was also not rebutted. The respondent's own evidence was that chief Hamaundu cannot appoint a caretaker or assistant Chief from the same clan confirms that the respondent was most likely not from the Badenda clan. If he were a Badenda, he would not have been appointed as a caretaker. There were a lot of inconsistencies in the evidence of the respondent as to his lineage, which we have pointed out.

- 6.6 In light of the foregoing, we find the history given by the appellant and his witnesses to be more probable than that given by the respondent and his witnesses. Therefore, it was proved on the balance of probabilities that the respondent is a Badenda on the father's side (patrilineal) and a Buleya or Mulongo on his mother's side. In actual fact he was a grandson and not a nephew of the late Chief.
- 6.7 Evidence of the appellant's lineage was very clearly established through PW4 Malina Kuhula his mother who stated in her evidence in chief that the mother of Hamano the first Chief Hamaundu was Namaila. Chinyama is the mother to Namwene who bore her mother Mutinta and therefore she is a Badenda by clan. She also stated that Chinyama and Namaila were sisters born of the same mother. The family tree on page 402 of the record confirms that the appellant was born of Malina and that he hails from the Badenda clan. However, it is clear that he is not a nephew to the late Jakalasi and Hamano but a great grandchild. The other appellants witnesses and the respondent himself also confirmed this.

6.8 We shall now tackle the issue of the selection procedure and then go to how the respondent and appellant were selected as successors to the throne. PW7's evidence was that the electoral college meets and selects a successor. Minutes of that meeting are written and sent to the District Council. He added that, that is what transpired as regards the appellant. This evidence was not challenged and it was supported by documentary evidence: On pages 187 – 189 of the record; Minutes of the Badenda Royal Establishment Convention held on 27th March, 2011 at Kachomba Basic School with 190 participants as shown on the list attached to the minutes on page 201; the letter dated 21st April, 2011 written to the Town Clerk of Choma Municipal Council by PW7 Alfioas Choongo the Secretary of the said Establishment Committee. The letter states among other things that Oggie Muyuni Mudenda was chosen by the Badenda Royal Establishment Committee as successor to the throne on 27th March, 2011. It is clear from these documents that the respondent was present at the Convention and that he supported the selection of the appellant. Minutes of the Badenda Royal Establishment

Executive Committee meeting that took place on 10th June, 2011 confirming the appointment of the appellant as successor to the throne are on pages 204 – 206 of the record. The respondent was present at that meeting.

6.9 On the other hand, the respondent was selected at a meeting held at the Catholic Hall in Pemba that took place on 15th August, 2012 with about 17 people from the Badenda clan in attendance. How the meeting was organised, the agenda and the attendees are as stated in the summary of evidence. The record indicates that the appellant learnt about that meeting from members of the public. He attended the meeting but objected to the proceedings as the matter was still in court and he had already been selected by the clan as the successor to chief Hamaundu.

6.10 The respondent showed interest as a candidate at that meeting and contested for the position against the 1st plaintiff. The appellant's evidence was that the respondent was not properly elected at that meeting because the electoral college that elected him was flawed as it included the respondent's two children who were not members of the Badenda clan. Further

that the selection was not in accordance with the Tonga traditions and customs as the duly constituted electoral college had already selected the appellant as the successor to the throne and he was following up the matter in court.

6.11 Our position is that the respondent, with full knowledge that the Badenda Royal Establishment committee had duly chosen the appellant, decided to stand as a candidate. Since he is not a Badenda, he was not eligible to be chief. The electoral college that elected him was also incompetent as its composition was unsatisfactory. Not all the members of the Royal Establishment who chose the appellant were there. The appellant was supported by more people from the Badenda clan than the respondent. It follows that the traditions and customs of the Tonga succession to the throne were breached. Furthermore, there was a lot of influence by the council for the elections to quickly take place at that meeting and yet the council knew fully well that the matter was yet to be determined by the court. We rely on the case of **Chief Mpepo (also known as Aexson Chilufya Mwamba) v. Senior Chief**

Mwamba (also known as Paison Chilekwa YambaYamba ⁽³⁾

where it was held *inter alia* that:

“A Chief is elected or appointed as such by the people of the community. The Chief is to superintend over, in accordance with the customs and traditions of the community.”

6.12 Since the council was aware that the appellant had already been selected, they should have not requested the Badenda clan to elect a successor to the throne. The council's representatives should have let the court decide the matter of the rightful heir to the throne after the select committee of chiefs had decided that the chieftaincy belonged to the Badenda. The facts of this case are similar to the facts of the case of **Alice Mashamo v. Amos Mbulo and the Attorney General**⁽⁴⁾ where we decided that the interference by the council in the selection of Alice Mashamo and the fact that her candidature was not supported by the elders from the three lineages, rendered her election as chief invalid as she was selected by an incompetent electoral college, contrary to the established traditions and customs of the Lala people of Mkushi District of the Central Province of Zambia.

6.13 Although the appellant is not a nephew of Jakalasi the second Chief, the Badenda Royal Establishment Committee had chosen him as successor instead of Anderson Moonga Janza as he belongs to the Badenda clan. The letter written to the Choma Municipal Council on 21st April, 2011 by PW7 states in part that, a number of firm decisions were taken which were being brought to the council's attention for the record. The decisions were effective immediately and these included enthroning someone younger and energetic. The Badenda clan strongly felt that the chieftdom would be better served by a person younger, educated, in good health and energetic enough to be able to face various throne challenges both mentally and physically. A person who would easily adapt and respond to the country's challenging social economic environment and needs so that the chieftdom is not left behind in terms of development. We take the view that the choice made by the clan was well justified in that letter and in the minutes of the meeting. **Articles 165 and 266 of the Constitution of Zambia (Amendment) Act No. 2 of 2016** provide as follows:

“165 (1) The institution of chieftaincy and traditional institutions are guaranteed and exist in accordance with the culture, customs and traditions of the people to whom they apply.”

“266 Chief means a person bestowed as chief and who derives allegiance from the fact of birth or descent, in accordance with the customs, traditions, usage or consent of the people in the Chieftdom.” (underlined for emphasis)

6.14 Applying Article 266 to the facts of this case, we are of the firm view that the selection of the appellant who was not a nephew of the late Chief was legitimate as the people in the Chieftdom – the Badenda clan especially, had consented to it. For the foregoing reasons, we are satisfied that the findings of the lower court in support of the respondent’s election and recognition as Chief Hamaundu were made upon a misapprehension of facts. The case of the **Attorney General v. Marcus Kapumba Achiume** ⁽⁵⁾ applies. We therefore set aside those findings.

6.15 According to Section 3 (2) (a) of the Chiefs Act, only a person entitled to hold office under African Customary Law should be recognised as a Chief by the President. Since the respondent was not such a person, we are of the view that he was erroneously recognised.

7.0 CONCLUSION

7.1 In closing, we accordingly uphold the appeal and annul the respondent's selection and recognition as Chief Hamaundu. Instead, we declare the appellant as the rightful heir to the throne of Chief Hamaundu. Since this is a matter of public interest, we order each party to bear his own costs.

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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F.M. CHISHIMBA
COURT OF APPEAL JUDGE

.....
P.C.M NGULUBE
COURT OF APPEAL JUDGE