



REPUBLIC OF ZAMBIA

THE JUDICIARY

REMARKS BY

**HIS LORDSHIP THE CHIEF JUSTICE OF THE REPUBLIC
OF ZAMBIA, HON. DR. MUMBA MALILA, SC**

**MADE AT THE CEREMONIAL OPENING OF THE KASAMA
HIGH COURT CRIMINAL SESSION ON MONDAY, 30TH
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I am tremendously honoured to take the floor on the occasion of the 2023 ceremonial opening of the criminal session here at Kasama. I thank the Judge-in-Charge for inviting me to be part of this event. In this connection, I would like to join the Honourable Judge-in-Charge in letting you know, distinguished invited guests, ladies and gentlemen, that we do not take your attendance of this event for granted. Your acceptance of the invitation and the subsequent suspension of your other activities to participate in this event, demonstrates your commitment to contributing to the smooth functioning of the Judiciary, not just here in Kasama, but countywide. The Judiciary is indeed honored by your presence here today.

This ceremonial opening of the criminal session, like all other such ceremonies that have taken place in High Court centers across the country, except Chinsali is an important annual event which focuses the attention of our local communities on the rule of law, the administration of criminal justice, and the central role played by the Judiciary in all this.

It gives players in the criminal justice sector an opportunity for introspection; to take stock of our successes and failures in the last

year; to dissect the challenges that stood in the path of progress and to reflect on our hopes and expectations in the New Year. It is an opportunity to rethink our criminal justice system generally and to devise ways, strategies and new approaches with a view to improving access to a sound and responsive Judiciary that protects the rights of all persons who are compelled by circumstances to interact with our judicial system; a justice system safe from unwarranted and unjustified attacks that potentially undermine the morale of the Courts and their staff while diluting the confidence of stakeholders.

The ceremonial opening is also an occasion to remind all stakeholders of the need to continue finding ways and means to consolidating our achievements, filling in the gaps, remedying weaknesses and correcting our failings. It's no time for accusations and finger-pointing.

I have chosen a very modest theme for my short address this morning: '***Nurturing useful public oversight of the role of the Judiciary in our society as the Supreme Court clocks 50 Years.***' Deliberately using the words 'public oversight' here to loosely refer to the expression by the public of their views on the way our courts discharge their constitutional function, this simple

and seemingly obvious topic is germane to the exigencies of today. It is important that as part of the greater responsibility of the Judiciary to account to the people for its exercise of judicial power, which as we know belongs to the people, the public must know how to hold the Judiciary accountable in the exercise of that power. We know that public complaints and comments regarding the exercise of judicial power could be a useful tool to engender accountability if properly used.

Yet, it emerges quite frequently that many of our people are not well informed about the role of the Judiciary, particularly in the dispensation of criminal justice. In my view, an accurate understanding of the Judiciary's role is a precondition for any constructive accountability engagement between the Judiciary and the society, for it forms a proper basis for intelligent public oversight and scrutiny of the work of our courts. I also would submit, unhesitatingly, that a citizen that hardly understands the role of the Judiciary or only superficially appreciates how the courts work, is often ill-equipped to demand accountability from the courts in a constructive manner.

What I mean is that a proper understanding of the role of the Judiciary and how it discharges that role not only informs meaningful public comments or views of court decisions; it also inspires, in the process, constructive suggestions that help to improve the work of the Judiciary. This in turn serves to enhance public confidence in the courts and the justice system. Ultimately, public belief in the rule of law is enhanced.

The converse is also undeniably true. An inaccurate, incomplete or misconceived understanding of the role of the Judiciary and how that role is discharged is often the reason for misplaced or inappropriate criticisms of court decisions, and in many cases, vicious and sometimes unfounded personal attacks against our adjudicators and court staff. More solemnly, misconceptions of the role of the Judiciary and how it discharges that role may lead to unrealistic expectations of the courts; expectations which cannot and should not in any case be met. This may unduly undermine the esteem in which our judicial system is held and to denigration of its efforts in upholding of the rule of law.

As part of the celebration of the Supreme Court's fiftieth anniversary this year, we in the Judiciary will work at demystifying judicial proceedings and educating the public on the judicial

process so as to make uninformed and inaccurate comments about judicial proceedings and decisions less likely. In this regard, a number of educational and information sharing activities will be undertaken, spearheaded by our information and public relations unit. All such activities aimed at enhancing transparency of court procedures and building public confidence in the judicial process will be done bearing in mind that the due administration of justice must always remain the primary and overriding consideration.

And so, as a starting point in this general quest, I wish to speak briefly to only three critical roles of the Judiciary which form a useful substratum for judicial accountability. Firstly, as we all may be aware, one role of the Judiciary is to uphold the rule of law and to administer justice in strict compliance with the law. This is probably the most important function of the Judiciary and our courts, at every level, cannot but discharge this function gracefully. It is a role that cannot be achieved without the Judiciary being independent, impartial, effective and more importantly adequately funded.

In adjudicating cases, the courts' duty is, as we know already, to interpret and apply the law in accordance with the evidence placed before them. The courts are obliged to treat everyone that appears

before them equally, whether in litigation between private individuals or corporations, or in disputes involving the Government, and whether the case is civil, criminal, or public law inspired. Everyone is equal before the law. All accused persons in criminal proceedings are presumed innocent unless and until proven guilty, and everyone is entitled to all fair trial guarantees.

Members of the public will do well to remember always that the courts do not control what cases are brought before them. It is a matter for the parties in the dispute in civil cases and the prosecution authorities and law enforcement agencies in criminal cases. Courts are but only dispassionate arbiters. They do not carry out any criminal investigations. They have no choice who comes to court or who is indicted and prosecuted. Once a case is brought before a court, it must be dealt with by the court strictly in accordance with law.

In administering the law, adjudicators put aside their own personal views. Their role is not to re-make the law that they have to apply. Nor is it permissible for them to selectively apply those parts of the law which they personally agree with. Their oath of office requires them to apply the law faithfully. Their personal views and preferences are irrelevant and do not enter the justice equation. It

is, therefore, entirely proper for someone, if there are good grounds, to criticise the court or an adjudicator for misapplying the law. It is, however, wrong and probably mischievous to criticise an adjudicator simply for applying laws which one does not like or agree with. Laws are not enacted by adjudicators; they are simply applied by adjudicators as required of them by their judicial oath.

It is, therefore, appropriate for adjudicators not to be unduly bothered by criticism of the latter type and instead to continue discharging their judicial duties, unperturbed. In this regard, I offer my commendations to those of our adjudicators who have in the last couple of years handled with great professionalism, cases, some of them quite difficult and attracting public or even international attention, unmoved by negativity by some of our people. Most of our adjudicators have faithfully applied the law to the best of their ability, in accordance with the evidence presented before them. Those who have not done so have some homework to do.

Some views that have been publicly ventilated on some judicial decisions reflect an inadequate understanding of the judicial decision-making process. Judges administer justice by applying the relevant law to the facts and evidence placed before them. In all

court proceedings, there are well established rules of procedure and of evidence governing, for instance, the presentation of arguments, the burden and standard of proof, and the admissibility of evidence. These procedural and evidential requirements are as binding on the courts as the substantive laws.

In an adversarial system such as we have in this country, the parties to court proceedings owe it to themselves to present their case, the evidence and arguments as best as they can. The manner of presentation of one's case, especially the quality of the evidence adduced before the court, will obviously have an important impact on the outcome of a case. In criminal cases, some seemingly guilty people are acquitted while some seemingly innocent ones are sent to quod (jail). In civil cases, some defendants manage to carry the day in court while some anxious plaintiffs lose their claims. An uninformed onlooker may well imagine that justice has not been done. Yes, any outcome of judicial proceedings has to do with the evidence laid before the court, the manner in which the case has been handled and, above all, what the law says. The courts cannot take the blame for a bad job done by a party or its legal representative in this regard.

Additionally decisions of collegiate courts, namely, the Court of Appeal, the Constitutional Court and the Supreme Court are a product of collective work and are not owned by any individual judges or the panel. Appellate courts generally will not concern themselves with facts established by trial courts who have the privilege of listening to witnesses firsthand and assessing their demeanor. Yet we hear time and again members of the public expressing unfair sentiments that heap blame on appellate courts for factual findings and individual judges for collective decisions. In the absence of such basic knowledge, the lay public does a bad job in seeking to ensure judicial accountability.

A common source of criticism of court decisions is inspired by the failure to understand that in many disputes, more than one right or interest are at play. In a plural society, legal disputes in public law cases, particularly those involving underlying social, economic or political issues, often concern rights or interests that pull in opposite or even multiple directions. It is thus, the role of the judiciary to balance and moderate these competing interests. It is not infrequently the case that one party or the other, or even all the parties would deprecate the outcome of that interest balancing exercise. The outcome of any such interest balancing should not

justify the unleashing of venom on the court by the dissatisfied party or parties as we have sometimes witnessed. It does not necessarily mean that the court has failed in its function in administering justice fairly and equally, for by the dispute's own nature, presents diametrically opposed interests are involved.

Secondly, the Judiciary plays the pivotal role of protecting fundamental rights in society. It is the function of the courts to uphold basic/fundamental human rights as set out in Part III of our Constitution. This is an important facet of the rule of law. These important, fundamental rights must be jealously guarded by the courts. Whilst fundamental rights must be, and are given a generous interpretation by our courts, most fundamental rights are not absolute - they are liable to be proportionately restricted for the sake of others or for the public interest.

Any exercise of rights is exercised or sought to be enforced in our courts, the fundamental rights of others, where relevant, must equally be borne in mind and respected. In this regard, what is often termed as the public interest may simply be understood as the sum total of the fundamental or other rights and interests enjoyed by other members of society or a portion thereof. As explained, when different rights and interests pull in opposite or

different directions, as happens quite often, the court's task is to balance these competing rights and interests and arrive at a decision that best gives effect to them.

A further point to note is that the ultimate duty of a court is to administer justice strictly in accordance with the law - this includes all laws that are binding on the court. When fundamental rights are restricted by law that is binding on the court, or law that is put beyond the court's jurisdiction to review, the court must take the law as it is and accept the limit of its jurisdiction, and administer justice accordingly.

Thirdly, although law making is the preserve of Parliament, courts have a limited lawmaking role under the common law system. Our courts, particularly the apex courts, do make laws from time to time on a case-by-case basis. When an entirely novel set of facts are encountered and for which there is no binding law or precedents, the court may, where appropriate, develop and extend the law by adopting and applying comparable precedents by analogy.

Moreover, while the highest court is bound by precedent it may from time to time regard a particular case law as no longer being

correct, making it necessary to restate or change the law. In this way, the common law which we apply to many situations before us evolves incrementally over time, whereby older and outdated authorities are gradually replaced by newer ones which suit the modern circumstances better.

Having thus outlined the three main functions of the Judiciary, it is perhaps also instructive to explain what is not the role of the Judiciary. Firstly, subject to the limited role they play in developing the common law which I have just mentioned, it is not the role or function of the courts to make laws. Rather, their responsibility is to apply them, including unpopular laws. In particular, the written laws in Zambia are made either by the Legislature or other bodies or persons vested with delegated legislative powers. The courts do not make the written laws, and indeed play no part in their enactment. The courts' role is to faithfully apply them.

Secondly, it is not the function of the courts to make public policy, or for that matter, political decisions. Public policy and political decisions is the preserve of the Executive. Where aspects of public policy are covered in legislation, such policy will be applied and enforced by the courts to the extent that it is law, not as policy per se.

The courts will also play a role when a particular policy or decision is challenged in court for its consistency with the Constitution or the Bill of Rights, or for its lawfulness or reasonableness in the public law sense. In all such litigations, the court's focus is invariably on the constitutionality or lawfulness of the policy or decision, as opposed to its merits or drawbacks of that policy decision.

A court decision may sometimes have a political impact. This does not necessarily mean the court has made a political decision, or made its decision on a political basis as opposed to a legal one when deciding the dispute. Still less does it mean that the court has involved itself politically in the making or unmaking of any government policy.

Underlying the two points that I have just made is a larger, more fundamental principle, that is, the courts must respect and indeed uphold the constitutional order of Zambia. Put shortly, the Judiciary is part of the constitutional setup of Zambia and its role is defined and governed strictly under that setup. Constitutionally, Article 118 provides that judicial authority vests in the courts. It is the duty of the courts to fully exercise that jurisdiction in cases

falling within it. However, it is equally important that they do not usurp the functions, powers or jurisdiction vested in other organs or bodies under the Constitution, or to purport to exercise judicial power that they have not been conferred with.

Before I end let me say something about changes and improvements in our justice system. There can be no dispute that our Judiciary must remain a modern one that moves with the times. This, too, is an important aspect in the maintenance of public confidence in the courts, for, as Foulek Ringelheim, late Belgian jurist, essayist and former President of the Commercial Court of Nivelles, appropriately once remarked:

Justice must not be considered as an administration frozen in its habits but as an institution in movement whose founding concepts must be re-evaluated, by shedding the prejudices that shackle thought, and by being wary of the obvious, which often prevent us from seeing things clearly.

In the last couple of months we have effected many administrative developments which are changing the way things are being done in the Judiciary. This is not the place to itemize them. Suffice it to

state that some of these administrative measures will require legislative and constitutional backing. In anticipation of a constitutional review process which will anchor the amendments to legislation affecting the Judiciary, we are moving right ahead to identify these laws and in what respects they should be amended to enhance the performance of the Judiciary.

There are other more urgent, if not, interesting developments. The passage of the Children's Code Act, Act No. 12 of 2022, which came into effect on 11 August 2022, for example, has created new obligations for the Judiciary which will require, among other things, realignment of our rules and practices in child Justice Administration.

It is with these, and other, considerations in mind that I have decided to appoint an Advisory Committee to be chaired by a senior judge, to advise on how best we can as the Judiciary consider the practicalities for fully implementing the Children's Code Act and make recommendations for constitutional reform which could feed into the constitution review process whenever it begins. To ensure that we do not lag behind the law on children's justice and to ameliorate the difficulties court users would encounter if they have to access the only children's court and family court in Lusaka,

Provincial Judges in the High Court have been directed to constitute themselves into the Children's Court for purposes of expeditious disposal of cases involving children and also to handle family related matters, including divorces and probate. This is an interim measure that will be revisited as and when the human resource situation improves.

It remains our hope that the Judiciary will remain on course with its reform agenda this year, so that it delivers an improved service to the people of Zambia.

I thank you for listening.