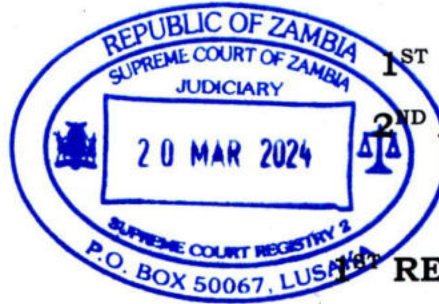
IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 1/2021**
HOLDEN AT NDOLA
(CIVIL JURISDICTION)

BETWEEN:



KAUSA MWACHINDALO	**1ST APPELLANT**
FELIX KANDOLO	**2ND APPELLANT**
AND	
MATHEWS MUSONA	**1ST RESPONDENT**
LINGSON PATAMA	**2ND RESPONDENT**
JACKSON SHAKULYA NYANGU	**3RD RESPONDENT**

CORAM: MALILA CJ, MUSONDA DCJ AND WOOD JS;

On 10th January, 2023 and 20th March, 2023

For the Appellants :	**Mr. O. Ngoma, of Lungu Simwanza and Company and Mr. R. Musumali of SLM Legal Practitioners**
For the Respondents:	**Mr. M. Kasofu, of Tembo Ngulube and Associates**

JUDGMENT

WOOD, JS, delivered the majority Judgment of the Court.

CASES REFERRED TO:

1. **TWIMAHENE ADJEIBI KOJO II v OPANIN KWADWO BONSIE AND ANOTHER P.C. 4/1954**
2. **ATTORNEY GENERAL V MARCUS KAMPUMBA ACHIUME (1983) ZR 1**
3. **NKHATA AND FOUR OTHERS v THE ATTORNEY GENERAL (1966) ZR 124**
4. **BELL v LEVER BROTHERS (1932) AC 161**

5. **RODGERS CHAMA PONDE AND FOUR OTHERS v ZAMBIA STATE INSURANCE CORPORATION LIMITED (2004) ZR 151**
6. **R v FULHAM HAMMERSMITH AND KENSINGTON RENT TRIBUNAL EX PARTE ZEREK [1951] 1 ALL ER 482**
7. **GDC HAULIER ZAMBIA LIMITED v TRANS CARRIER LIMITED (2001) ZR 47**
8. **VICTOR KONI v THE ATTORNEY GENERAL APPEAL NO. 7 OF 1990**
9. **THE MINISTER OF HOME AFFAIRS AND ATTORNEY GENERAL v LEE HABASONDA (SUING ON HIS OWN BAHALF AND ON BEHALF OF SOUTHERN AFRICAN CENTRE FOR THE CONSTRUCTIVE RESOLUTION OF DISPUTES) (2007) ZR 207**
10. **CHIEF MPEPO (ALSO KNOWN AS ACKSON CHILUFYA MWAMBA) v SENIOR CHIEF MWAMBA (ALSO KNOWN AS PAISON CHILEKWA YAMBAYAMBA) SCZ JUDGMENT NO. 25 OF 2008**
11. **TED CHIANGA MUWOWO (ALIAS CHIEF DANGOLIPYA MUYAMBA) AND ANOTHER v ABRAHAM MUWOWO TEMWANI AND ANOTHER APPEAL NO. 115/2014**
12. **NATIONAL DRUG COMPANY AND ZAMBIA PRIVATISATION AGENCY V MARY KATONGO APPEAL NO. 79 OF 2001**
13. **KENMUIR v HATTINGH (1974) ZR 162**
14. **TSHISHONGA V MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT 2007 (4) SA 135 LC**
15. **HAONGA AND OTHERS v THE PEOPLE (1976) ZR 200**

LEGISLATION REFERRED TO:

a. **SUPREME COURT RULES, CHAPTER 25 OF THE LAWS OF ZAMBIA, RULES 58 AND 68**

INTRODUCTION

1.1 This appeal was initially heard by a Coram let by the late Hon. Mrs Justice Mambilima, CJ. Following the demise of the Chief Justice and the retirement of Justice Kajimanga it became necessary to form a new panel of Judges and for the appeal to be heard afresh.

1.2 The appeal emanates from a Court of Appeal decision dated 22nd April, 2020, nullifying the installation of the

1st Appellant as Chief Bundabunda, of the Soli Shamifwi clan in Rufunsa District and directing that a new chief should instead be chosen from among the Respondents' family.

2. BACKGROUND

2.1 The undisputed facts leading to this litigation are simple and straight forward. Patrick Mambo Chakalashi, the reigning Chief Bundabunda of the Soli Shamifwi clan, expired on 23rd February, 2013. A mourning period of six months was declared until 28th August, 2013 when a successor was expected to be chosen.

2.2 Succession proceedings commenced on 28th August, 2013 as scheduled and were to conclude with the installation of a new chief on 31st August, 2013. All the families and headmen converged at the palace for the selection process, which was presided over by Senior Chieftainess Nkomeshya Mukamambo II, of the Soli people.

2.3 On the second day of the deliberations, families of the Bundabunda royal establishment reached a deadlock. Six families emerged to contest the chieftaincy but after presentation of their respective family trees, the number of eligible royal families was narrowed down to three: the Mulonga, the Tubi-Kalifu (Appellants' family) and the Kashimbi (Respondents' family).

2.4 On 30th August, 2013, a decision was taken to convene an electoral college, comprising headmen and women in the Bundabunda chiefdom, to vote for a successor from among the three families. The election was to take place the following day, 31st August, 2013. Each family put forward a candidate. These were Kausa Mwachindalo (Tubi-Kalifu), David Musona (Kashimbi) and Fickson Chikweleti (Mulonga).

2.5 However, the voting process did not take place. Some members of the Mulonga royal family disrupted the proceedings, claiming that they were the sole heirs to the throne because the late Chief Bundabunda and those before him all came from their lineage. Chieftainess Nkomeshya Mukamambo II postponed the election indefinitely and directed the contesting families to come up with one candidate.

2.6 It turned out that the Mulonga royal family went ahead with their own meeting on 14th September, 2013 and endorsed Fickson Chikweleti as successor. He was subsequently installed as the new Chief Bundabunda on 28th September, 2013.

3. RESPONDENTS' CASE BEFORE THE HIGH COURT

3.1 Angered by the turn of events, the Respondents, on behalf of the Kashimbi royal family, brought an action before the High Court by way of writ of summons against Fickson Chikweleti and members of the Mulonga royal

family (who were 1st, 2nd, 3rd, 4th and 7th Defendants in the High Court) as well as against the Appellants.

3.2 The Respondents contended, in their amended statement of claim, that succession in the Bundabunda Soli Shamifwi custom was the preserve of the Kashimbi, Mulonga and Tubi-Kalifu royal families on a rotational basis. Also, that a nominee had to be installed under the supervision of government officials and in the presence of Senior Chieftainess Nkomeshya Mukamambo II of the Soli people.

3.3 The Respondents complained that after the demise of Patrick Mambo Chakalashi, who was from the Mulonga royal family, succession to the Bundabunda throne was supposed to rotate to the Kashimbi royal family. That instead of following the clan's customs and tradition of choosing an heir on a rotational basis, the Mulonga royal family and the Appellants proposed that selection be done by voting.

3.4 They alleged that voting did not even take place because the Mulonga royal family hired youths to disrupt the meeting for fear that their candidate would lose the election. That despite proceedings being postponed because of the confusion, the Mulonga royal family capriciously went ahead to install Fickson Chikweleti as the new Chief Bundabunda. That by disregarding and interfering with the Soli Shamifwi custom and tradition,

the actions of the two families were inimical to the continued existence of the Bundabunda chiefdom and had caused irreparable injury and prejudice to the Kashimbi royal family.

3.5 The Respondents prayed for the following reliefs -

a. **An order of mandatory injunction restraining the defendant by themselves or their agents from interfering with the process of installing the new Chief Bundabunda and from going ahead with the installation of a new Chief Bundabunda until the determination of this matter or until further order of the Court.**

b. **An order setting aside, the purported installation of Fickson Chikweleti as the new Chief Bundabunda for being contrary to and in disregard of the Soli Shamifwi tradition for ascendancy to the throne on rotational basis among the three eligible royal families being the Kashimbi royal family, Mulonga royal family and Tubi-Kalifu royal family under the supervision of government officials and in the presence of Senior Chieftainess Nkomeshya Mukamambo II of the Soli people.**

c. **A declaration that the installation of the new Chief Bundabunda must be in accordance with the Soli Shamifwi tradition on rotational basis among the three eligible royal families being the Kashimbi royal family, Mulonga royal family and Tubi-Kalifu royal family under the supervision of Government officials and in the resence of Senior Chieftainess Nkomeshya Mukamambo II of the Soli people.**

d. **An order that the new Chief Bundabunda must come from the Kashimbi royal family in accordance with the Soli Shamifwi tradition on rotational basis among the three eligible royal families since the last chief came from the Mulonga royal family.**

e. **An order that costs of and incidental to the proceedings be borne by the Defendants**

f. **Any other relief the Court may deem fit**.

3.6 To support their case, the Respondents called seven witnesses. PW1 narrated the history of the Bundabunda

chieftaincy, which dated as far back as the 17th century and came from the Kola people of the Luba Lunda Kingdom in the Democratic Republic of Congo. He stated that inheritance was by the nyangu clan. That a matriarch called Mukunkutiwa had a daughter named Lutangu who bore three daughters Tubi, Nyemba and Nsungwe, from whom the Tubi-Kalifu, Kashimbi and Mulonga royal families descended. That the Kashimbi family were from the matrilineal side through Nyemba who was the mother of Musowe. That the Bundabunda chieftaincy was on a rotational basis and that since the last chief was from the Mulonga family, the successor would have to come from the other two families and in this case, the Kashimbi.

3.7 PW1 listed the past Bundabunda chiefs and their origins as follows: Mboshi (1st Chief) from the Mulonga family; Chimapepe (2nd) from the Kashimbi family; Shakanda (3rd) from Mulonga family; and Mubamba (4th) and Kacheta (5th) both from the Tubi-Kalifu family. He testified that from the 6th chief onwards, all the chiefs were from the Mulonga family. These were Selemani (6th), Lufwaneti (7th), Jackson Chipungu (8th), Bernard Chipungu (9th) and Patrick Chakalashi (10th).

3.8 PW2 and PW3 were from bena nkalamu, the shrine keepers who watch over the shrine and introduce its emblems to the new chief. They disclosed that the emblems were kept in two houses called intungu; one

shrine was a depository of 12 clay pots, representing graves for chiefs that had sat on the throne; the other shrine contained a bow and 10 arrows signifying dead chiefs of Bundabunda. It was explained that the disparity between the number of arrows and clay pots was because two chiefs died in an acting capacity. They went on to describe the rituals that took place at the shrine, which included invoking the spirits of the dead chiefs to welcome a newly installed chief.

3.9 PW4 was from the bene mpande clan, the tribal cousins of bene nyangu. Their role was to keep the body of the dead chief and to get "hold" of the new chief at the time of installation. That based on information received from his grandfather, there were 10 chiefs, among them, Chimapepe, who hailed from the Kashimbi royal family.

3.10 PW5 told the Court that he was appointed by chief Patrick Mambo Chakalashi, to chair a technical committee to analyse and identify families eligible to ascend to the Bundabunda throne. He stated that from the information gathered, orally, the Kashimbi, Mulonga and Tubi-Kalifu royal families were the only ones eligible to inherit the throne, having descended from Mukunkuntiwa, the mother of Lutangu. He produced a chart to show that the families inherited each other's names because of the shared ancestral roots.

3.11 PW5 testified further that his brother (PW6) and the 1st Appellant, representing the Kashimbi and the Tubi-Kalifu royal families respectively, signed a memorandum of understanding or joint report on 29th August, 2013, recognising the Kashimbi as one of the three families eligible to ascend to the Bundabunda throne. He asserted that the Mulongas had reigned seven times, the Tubi-Kalifus, twice and the Kashimbis, once, and that it was now time for his family to assume the chieftaincy, having been on the throne the least.

3.12 During cross examination, PW5 conceded that the technical committee sat on 29th June, 2013, long after Patrick Mambo Chakalashi had died, but insisted that the focus of the meeting was not to select a chief but to scrutinise the royal family tree and identify which families were eligible to ascend to the throne. He emphasised that the Appellants were in attendance and that the family tree which was drawn up after the meeting was universal and resonated with the other family trees, particularly on the aspect of rotation.

3.13 PW6 told the Court that he learnt, through oral tradition that the three families were eligible to ascend to the throne but that the Mulonga royal family had been dominating the chieftaincy using intimidation and violence. He stated that the purported installation of Fickson Chikweleti was void as tradition was not followed and that Senior Chieftainess Nkomeshya Mukamambo II,

other senior chiefs and all the families were not in attendance.

3.14 PW7 was a Chief Affairs Officer at Chongwe Municipal Council who recorded the Chief Bundabunda succession proceedings. He narrated the events that led to the postponement of the succession proceedings on 31st August, 2013. He testified that he had attended four succession meetings and that from the testimonies of the royal families, it was clear that there was rotation in the chieftaincy but this was later not adhered to. His observation, from the final report on the Bundabunda succession proceedings, was that the chiefdom lacked a documented family tree because there was no physical family tree and each family had its own narrative.

4. THE MULONGA ROYAL FAMILY'S DEFENCE

4.1 In their defence, the Mulonga royal family (who are not party to this appeal) denied that succession to the Bundabunda throne was the preserve of the three mentioned royal families or that it was rotational amongst them. They asserted that from time immemorial ascension to the Bundabunda throne had been from the Mulonga royal family. Further that traditionally, selection of Chief Bundabunda had never been through elections and as such, the Mulonga royal family could not have initiated any voting process. That besides, a new chief

had already been installed and that his installation was not inimical to the Soli Shamifwi people.

4.2 The Mulonga family called two witnesses, DW1 and DW2. DW1 was from the bene mpongo clan, who looked after the chief and oversaw activities at the palace and the shrines. His testimony was that only the Mulonga royal family could ascend to the throne and that rotation, if any, was only within that family. He labelled the Tubi-Kalifu and Kashimbi families as outsiders, and hence his family's refusal to participate in the 31st August, 2013 succession elections. He asserted that the only election ever conducted was between Patrick Mambo Chakalashi and his nephew, in which Chakalashi emerged victorious. He denied that there was ever a chief Chimapepe and that as far as he was concerned, Fickson Chikweleti's installation was correctly done despite the absence of senior chiefs and government officials.

4.3 DW2 was from bene mpande clan, whose duty was to install the chief and to teach the chief and his family the customs and tradition. He testified that his uncle, Nseme Chamakamba, installed Mboshi, Shakanda, Mubamba, Nkobama, Selemani and Lufwaneti and that he (DW2) personally installed Jackson Chipungu, Bernard Chipungu, Patrick Mambo Chakalashi and Fickson Chikweleti. He denied that there was ever a chief Chimapepe, adding that at no time did his uncle ever mention the Kashimbi or the Tubi-Kalifu families as

heirs. According to him, the 10 clay pots in the shrine represented all the Bundabunda chiefs including Fickson Chikweleti.

5. THE APPELLANTS' DEFENCE AND COUNTERCLAIM

5.1 The Appellants, in their defence and counterclaim, denied that the Kashimbi were part of the royal family. They asserted that, contrary to the Respondents' claims, succession in the Soli Shamifwi custom was among the Malunga, Tubi-Kalifu and Nyansenga-Mulonga royal families and that this time around, succession was supposed to rotate to the Tubi-Kalifu, the Appellants' family.

5.2 The Appellants averred that all the parties agreed to depart from past custom and tradition and vote for the new Chief Bundabunda as evidenced by the floating of candidates. The Appellants vehemently denied that they disregarded or interfered with the Soli Shamifwi custom and tradition or caused injury to the Respondents and the Kashimbi family. In the main the Appellants counterclaimed as follows -

> **"a. A declaration that the installation of the new Chief Bundabunda must be in accordance with the Soli Shamifwi tradition on rotation basis among the eligible royal families being the Malunga royal family, Tubi-Kalifu royal family and the Nyansenga royal family (Mulonga royal family)"**

5.3 The Appellants relied on their own testimonies and that of their two witnesses. They all denied that there was ever a chief Chimapepe from the Kashimbi family. Their

common evidence was that rotation was among the Malunga, Nyansenga and Tubi-Kalifu and that because the Kashimbi family was from the male side, they were not eligible to succeed the fallen chief.

5.4 DW3 (1st Appellant; in this Court) narrated that the Bundabunda Soli Shamifwi family tree began with Chitambo who gave birth to Malunga, Tubi and Nyansenga. That Malunga was the mother of Mboshi (1st chief) while Tubi was the mother of Mubamba (3rd chief) and Kacheta (4th chief). That Tubi also had a daughter called Chantola who had two girls, Chiteo and Mayupa. That Chiteo gave birth to Nyemba, the mother of Selemani (5th chief) while Mayupa produced two children, Lumina (male) and Kalifu (female). That Nyansenga bore Shakanda (2nd chief) and Nsungwe who gave birth to Nyamamao, the mother of Lufwaneti (6th chief). That Nsungwe had other children; namely Mulanga who had Sambwa, the mother of Jackson (7th chief) and Bernard (8th chief); and Mwanamsao, the mother of Patrick Chakalashi (9th chief). He explained that Lumina became the first headman Shangobeka and that his first grandchild, Chipungu married Musowe who bore Kashimbi. That it was through Lumina, who was from the male side, that the Kashimbi and the Tubi-Kalifu were related.

5.5 During cross examination, DW3 conceded that he signed the joint report, acknowledging the Kashimbi as one of

the eligible royal families but claimed that the document was merely a strategy to defeat the Mulonga royal family and to ensure rotation in the chieftaincy.

5.6 DW4 was a former Deputy Secretary of Chongwe Municipal Council. She explained the secretarial role played by the council during selection and recognition of a new chief. She produced two documents; the first one contained the Bundabunda family tree that was submitted to the Chongwe Municipal Council on 17th April, 1972; the second one was an updated family tree, which was filed in January 2017. According to her, the first family tree was validated while the 2017 document had no date stamp, meaning that it had not been validated by the council. The 1972 document showed three family trees of the Malunga, Nyansenga and Tubi, and made no reference to the Kashimbi royal family or to chief Chimapepe. The second chief was in fact Shakanda.

5.7 During cross examination, DW4 stated that she did not know who submitted the updated family tree. That the 1972 family tree was incomplete as it showed only six chiefs namely, Mboshi, Shakanda, Mubamba, Kacheta, Selemani and Musona. That the only other chief on the council records was Patrick Mambo Chakalashi, who was recognised as Chief Bundabunda in 2009.

5.8 On the procedure for lodging the family tree, DW4 explained that when the family tree is submitted by

members of the royal family, the council verifies the information with the respective families or documents the selection proceedings, and that a verification report which includes minutes of the proceedings and vital statistics of the new chief are then attached to record. That when the family tree is submitted by a sitting chief, the council simply stamps the document and attaches the verification report. DW4 stated that the verification report for the 1972 family tree was on the council records and she had not been asked to produce it. She could not recall who had prepared it. She stated that the 2017 family tree had not been verified because of the chieftainship wrangles. She added that the Chief Bundabunda file was in the custody of Chongwe Municipal Council and would only be released to Rufunsa District Council, under whose jurisdiction the chiefdom fell, upon conclusion of the present proceedings.

5.9 DW6 (2nd Appellant)'s version of the lineages was as follows: Mboshi (Malunga), Shakanda (Nyansenga-Mulonga), Mubamba (Tubi), Kacheta (Tubi), Selemani Chinyanseya (Tubi), Musona Bundabunda Lufwaneti (Nyansenga-Mulonga), Jackson Chipungu (Nyansenga-Mulonga), Bernard Chipungu (Nyansenga-Mulonga) and Patrick Mambo Chakalashi (Nyansenga-Mulonga). According to him, there were nine chiefs and, therefore, there could only be nine clay pots though he had never

entered the shrine. The updated family tree was submitted to the Council in 2012.

6. EVALUATION OF THE EVIDENCE AND DECISION OF THE HIGH COURT

6.1 Mulenga J, as she then was, considered the evidence and decided that the issues requiring determination were the following -

> 1. **which lineages or royal families fall under the Bundabunda chieftainship or nyangu clan and has there ever been rotation of chieftainship among the lineages;**
> 2. **of the lineages that fall under the Bundabunda royal family, which lineage is entitled to proffer a successor or ascend to the Bundabunda throne following the death of Chief Chakalashi in 2013; and**
> 3. **what is the status of the purported installation of the Fickson Chikweleti, the 7th Defendant?**

6.2 On the first question, the learned Judge observed that while the witnesses were in agreement that the Bundabunda chieftaincy had a matrilineal descent system, they all presented varying origins of their lineages. She thus reminded herself that the conflicting versions required her to determine which version, on a balance of probabilities, was more likely to be the truth considering that all the narrations were products of information passed on by way of oral tradition.

6.3 In resolving the issue, the learned Judge sought the guidance of the Privy Council in the Nigerian case of **TWIMAHENE ADJEIBI KOJO II v OPANIN KWADWO**

BONSIE AND ANOTHER[1] (hereinafter referred to as "**KOJO v BONSIE**") where they stated that -

> **"Where there is a conflict in traditional 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 belief. In such a case demeanour of 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."**

6.4 Applying the reasoning in this authority, the learned Judge found, from the evidence adduced, that the Bundabunda family tree, which was submitted to the Chongwe Municipal Council in 1972, was verified and it contained a true depiction of what it communicated. This was in contrast to the latter family tree which was filed in 2017. The uncontroverted evidence of DW4 was that the family tree filed in 2017 had not been verified or stamped.

6.5 In her view, although the 1972 family tree did not specifically state the ancestral matriarch of the Bundabunda family, it tabulated the mothers of the first three chiefs as Malunga, Nyansenga-Mulonga and Tubi. Further, that the 1972 family tree agreed materially with the Appellants' version as opposed to the versions advanced by the Respondents and the Mulonga royal family, which mentioned matriarchs some of whom did not appear on the family tree but that where they did, they appeared as mothers to later chiefs.

6.6 As regards the number of chiefs who had been on the throne, since the inception of the chieftaincy, the learned Judge found that the first six chiefs were Mboshi, Shakanda, Mubamba, Kacheta, Selemani Chanyabweya and Musona. She also found that Musona was on the throne at the time that the 1972 family tree was submitted to Chongwe Municipal Council. That the last three chiefs were Jackson Chipungu, who took over from Lufwaneti, Bernard Chipungu, and Patrick Mambo Chakalashi, bringing the total number of chiefs on the Bundabunda throne to nine.

6.7 The learned Judge noted that none of the witnesses mentioned Musona, but that when his name was added to the nine chiefs, the total number of chiefs was 10. She reasoned that this tallied with evidence on the 10 spears (arrows) and clay pots in the shrine. In this regard, she found the claims by the Mulonga royal family that the 10th clay pot represented Fickson Chikweleti untenable, because the general evidence was that the pots and spears in the shrine represented deceased chiefs.

6.8 On the lineages under Chief Bundabunda, the learned Judge ultimately found that the Respondents had not proved, to the required standard, their claim that Chimapepe was ever a chief or that he ever ascended to the throne or that the Kashimbi family was indeed eligible to ascend to the throne. She found, instead, that the Appellants had proved on a balance of probabilities, that

the lineages were the Nyansenga-Mulonga, Tubi-Kalifu and Malunga, which lineage had since expired.

6.9 Coming to the question as to whether there was rotation in the Bundabunda succession to the throne and as to which of the two existing lineages was entitled to succeed the throne; the learned trial Judge dismissed claims advanced by the Mulongas that rotation was the preserve of their family. She found, on the basis of the 1972 family tree, that the first chiefs hailed from three different matriarchs. She stated that ***'...having established that there were three lineages within the royal family and that there was rotation in the past as dictated by Soli tradition and custom, it follows that the succession to the throne be rotational between the two remaining or lineages that are eligible to ascend to the throne.'***

6.10 After noting that the three past successive chiefs had hailed from the Mulonga lineage, the Judge formed the view that the system of rotational succession now dictated that the successor ought to hail from the Tubi-Kalafa lineage.

6.11 As regards the third question relating to the status of Fickson Chikweleti, the learned trial Judge found that his installation was untenable; and, that having found that the successor should come from Tubi-Kalifu family, all

disputes concerning the purported installation became moot.

6.12 At the end of the day, the Respondents' claim that the new Chief Bundabunda must hail from the Kashimbi family was dismissed. The Court found that the Respondents' claim had succeeded only to the extent that ascendancy to the Bundabunda throne was on a rotational basis. The Court annulled the installation of Fickson Chikweleti as Chief Bundabunda and ordered, in line with the tradition and custom, that ascendancy to the throne was on rotational basis. The Judge ordered that Tubi-Kalifu lineage must convene and choose a successor to the throne.

7. THE GROUNDS OF APPEAL BEFORE THE COURT OF APPEAL

7.1 Displeased with the determination of the High Court, the Respondents and the Mulonga royal family separately escalated the matter to the Court of Appeal. The two appeals were filed under Causes No. CAZ/08/172/2018 and No. CAZ/08/181/2018. They were consolidated because emanated from the same High Court judgment that was delivered on 5th July, 2018. The Mulonga family, who were 4th, 5th, 6th, 7th and 8th Appellants in the lower Court of Appeal have not contested the judgment of that Court before us and are, therefore, not part of this appeal.

7.2 The three Respondents, who were the 1st, 2nd and 3rd advanced five grounds of appeal before that Court formulated as follows -

1. **The learned trial Judge in the Court below misdirected herself in law and fact when she disposed of the Appellants' (Respondents) entire claims in the suit, by wholly relying on the contents of the Bundabunda family tree dated 17th April, 1972, as a full and complete historical lineage of Chief Bundabunda chiefdom; when the same contained contradictory statements and its authenticity was discredited at trial.**

2. **The learned trial Judge in the Court below misdirected herself in law and fact when she failed, refused and/or neglected to take into account the Appellants' (Respondents') evidence relating to the historical origins of the Chief Bundabunda's matriarch, but instead conveniently opted to entirely rely on the Chief Bundabunda's family tress dated 17th April, 1972, which document was questioned and impugned at trial.**

3. **The learned trial Judge in the Court below misdirected herself in law and fact when she found that the Appellants' (Respondents') family lineage was patrilineal, and consequently could not ascend to the throne of Chief Bundabunda, contrary to the ample and sufficient evidence at trial proving such entitlement.**

4. **The learned trial Judge in the Court below completely misconstrued and misapplied the undisputable facts before her, when upon finding it correctly that the ten (10) clay pots in the shrine represented the past ten (10) dead chiefs, she proceeded to make a wrong conclusion by double counting Musona and chief Lufwaneti as separate and distinct, when in fact, it was one and the same person.**

5. **The learned trial Judge having made a wrong conclusion that Musona and Chief Lufwaneti were separate and distinct persons, the learned Judge fell into a complete grave error by finding that Chief Chimapepe did not exist and consequently could not have been the second Chief Bundabunda.**

8. THE RESPONDENTS' SUBMISSIONS IN SUPPORT OF THE APPEAL IN THE COURT OF APPEAL

8.1 In support of the first ground of appeal, the Respondents submitted that the 1972 family tree, on which the learned trial Judge relied, for making a finding, that the Kashimbi royal family were not entitled to ascend to the chief Bundabunda throne, was flawed. That contrary to the learned Judge's finding that the 1972 family tree was validated and was a true depiction of what it communicated, the family tree contained contradictory statements and its authenticity was discredited at trial. They asserted that the verification report which validates Chief Bundandabunda's family tree of 17th April 1972 was not produced and neither were the minutes taken during the verification. Further, that DW4, who claimed to have gone through the Report could not recall the name of the officer who prepared the Report.

8.2 The Respondents charged that the 1972 family tree indicated that Chief Musona had nominated successors, Thomo Maluku and Chimoto as first and second choice to succeed him. This was contrary to the evidence by the parties that a sitting chief in the Bundabunda chiefdom did not nominate his successor. Relying on our decision in the case of **ATTORNEY-GENERAL V MARCUS KAMPUMBA ACHIUME**[2] they submitted that the learned trial Judge arrived at her finding of fact in the absence of

relevant evidence, warranting interference by the Appellate Court. It was their submission that on a proper view of the evidence adduced, no trial court could have reasonably arrived at such a finding.

Coming to the second and third grounds of appeal, it was submitted on behalf of the Respondents that the oral and documentary evidence they had adduced with regard to the historical origins of the Chief Bundabunda's matriarch was not discredited by the Appellants. That evidence was adduced that the Tubi-Kalifu family had entered into a memorandum of understanding with the Kashimbi family in which they acknowledged that the Kashimbi family was part of the three royal families in the Bundabunda lineage. That the evidence adduced in rebuttal of this testimony was contradictory and lacked credibility. In their view, the evaluation of the evidence by the trial Court was unbalanced, and as such, the Court's findings of fact should be reversed.

8.3 The Respondents contended that the memorandum of understanding signed between the Kashimbi and Tubi-Kalifu families constituted a legally binding agreement between the parties which the trial Court was duty bound to enforce even if it may not have been in favour of the Tubi-Kalifu family. To buttress this point, they relied on the case of **ROLAND LEON NORTON V NICHOLAS LASTON (2010) VOL 2 ZR 358** in which it was held that:-

"It is trite that a party to a contract is bound by it even though it may not have been in the interest of the party entering into the contract. Even a bad contract, if it is valid, is binding."

8.4 The Respondents further submitted that evidence was led, through PW5 depicting how the Kashimbi, Tubi-Kalifu and Mulonga families inherit names of their dead relatives. According to the Respondents, this evidence, which shows that the Kashimbi family are not patrilineal as claimed by the Appellants but matrilineal, was not discredited, but ignored by the trial Judge. They contended that the Kashimbi family were part of the Bundabunda royal family who were entitled to the chieftaincy.

8.5 The Respondents' submissions as regards the fourth and fifth grounds of appeal was that the trial Court correctly observed that the ten arrows and clay pots in the shrine represented the total number of Chiefs who had ascended to the Bundabunda throne. They pointed out the 1972 family tree indicates a contrary position of nine instead of ten. According to the Appellants, this disparity calls into question, the authenticity of the 1972 family tree and lends credence to the evidence by the Appellants that Musona and Lufwanieti were one and the same person and that the extra arrow and clay pot in the shrine belonged to Chimapepe through who the 1st or 3rd Respondent claim their entitlement to the throne of Chief Bundabunda.

8.6 The Respondents urged the Court of Appeal to interfere with the findings of the High Court because they were based on a misapprehension of facts. They further submitted that since the Kashimbi family had held the throne only once, through Chimapepe, based on the principle of rotation, the next Chief Bundabunda should come from the Kashimbi family.

9. THE APPELLANTS' HEADS OF ARGUMENT IN RESPONSE TO THE APPEAL

9.1 In response to the Respondents' submissions in the first ground of appeal, the Appellants submitted that the trial Judge was on firm ground when she held that the Bundabunda family tree of 17th April, 1972 was validated and through the evidence of DW 4, it was not discredited. That there was no evidence addressed to suggest that the document does not exist. They averred that since the parties presented different versions of the Bundabunda lineage, it was probable that the evidence adduced may not have contained the complete history. In their view, the Respondents had failed to establish that the case warranted a reversal of findings of fact. They relied on **NKHATA AND FOUR OTHERS v THE ATTORNEY GENERAL**[3].

9.2 Reacting to the Respondents' submissions on the second and third grounds of appeal, the Appellants reiterated that the parties presented three different origins of the

Bundabunda chiefdom, giving the trial Court the daunting task of determining which of the versions was more probable to the truth on a balance of probabilities. That the Respondents wanted the Court to believe their version on the basis of a handwritten chart, which could have been written by anyone and it was not corroborated by any other evidence. On the submission that the Court should have considered the memorandum of understanding, the Respondents submitted that DW3, who was a signatory to the document denounced it saying its contents were not true. That he signed it merely to defeat the aspirations of Amon Chkweleti and Headman Kabandi to ascend to the throne. That in any event, the memorandum of understanding could not alter a historical fact that the Respondents were not eligible to ascend to the throne.

9.3 In the alternative the Appellants argued that the memorandum of understanding was executed under a common mistaken belief by the parties that the Respondents were heirs to the throne. For this submission, they relied on a passage from the case of **BELL V LEVER BROTHERS**[4] which states: -

> **"A mutual mistake as to some fact which, by the common intention of the parties to a contract whether expressed or implied, constitutes the underlying assumption without which the parties would not have made the contract they did, and which, therefore, affects, the substance of the whole consideration is sufficient to render the contract void."**

9.4 It was submitted further that the 1972 family tree was produced by Chongwe District Council, which was an independent party. That the said family tree was verified well before the current dispute. That the trial Court rightly relied on the 1972 family tree because it was an official document from an independent party and in line with the case of **KOJO V BONSIE**[1], a lineage, dating as far back as the 17th century, was tested against the 1972 family tree and it was determined that the Appellants' version was more probable.

9.5 In response to the fourth and fifth grounds of appeal, it was submitted that the Respondents' assertion that Musona and Lufwaneti were one and the same person was not supported by any evidence. That the claypots which were referred to did not prove the existence of the alleged Chief Chimapepe as there were no names of chiefs etched on them.

10. CONSIDERATION AND DECISION OF THE COURT OF APPEAL

10.1 The Court of Appeal, upon considering the Judgment of the High Court, the evidence on record and submissions by Counsel, narrowed down the issues for determination to the following -

1. **whether or not the Bundabunda Chieftainship system of succession is rotational.**

2. **whether the Kashimbi family are heirs to the Bundabunda throne; and**

3. **which family lineage should ascend to the throne?**

10.2 On the first issue, as to whether the Bundabunda chieftaincy was rotational, the Court below noted, as the learned trial Judge did, that the parties presented divergent versions of the Bundabunda history. While the Kashimbi and the Tubi-kalifu families claimed that succession to the throne was rotational the Mulonga family claimed that it was not; and that they were the only heirs to the throne. The Court, however, found that the Memorandum of Understanding signed between PW6 and the 1st Appellant, on 29th August, 2013, clearly showed that succession was rotational among the three contending families. The Court below also found that the joint report expressly recognised the Kashimbi royal family as eligible heirs to the Bundabunda throne. That this position was confirmed at a subsequent family meeting held on 30th August, 2013 and that the dispute among the families only arose when the Mulonga royal family resisted the rotation of chiefs.

10.3 Commenting on the 1st Appellant's claim that he signed the joint report only as a strategy to defeat the Mulonga family, the Court below alluded to the law, that parol evidence is inadmissible and it cannot alter a written contract. To buttress this point, it referred to our decision

in the case of **RODGERS CHAMA PONDE AND FOUR OTHERS v ZAMBIA STATE INSURANCE CORPORATION LIMITED**[5] in which we restated the law when we held that:-

> **"Parol evidence is inadmissible because it tends to add, vary or contradict the terms of a written agreement validly concluded by the parties."**

10.4 The Court of Appeal upheld the trial Court's decision that succession to the Bundabunda throne was rotational but it set aside the holding by the Court that rotation was only between the Mulonga and Tubi-Kalifu royal families; It held instead, that the throne was rotational among all the eligible royal families, namely, the Mulonga, Tubi-Kalifu and Kashimbi families.

10.5 Coming to the second issue, as to whether the Kashimbi family were heirs to the throne, the Court below was of the view that the question could be resolved by the evidence of the clay pots. It found that there was consensus, among the three families that the clay pots represented deceased chiefs. That for this reason, the Court found the claim that the 10th clay pot represented Fickson Chikweleti was untenable because the said Chikweleti was still alive. From the history given by the Kashimbi family, the Court concluded that one of the 10 clay pots represented Chief Chimapepe.

10.6 The Court of Appeal faulted the trial Judge for finding that there was a chief Musona, as the 6th Chief on the

basis of the 1972 family tree. According to the Court, the trial Judge did not take into account, the following inconsistencies and contradictions;

1. **The family tree showed Musona was the 6th chief in contrast to the evidence from the parties that the 6th chief was Lufwaneti, who was succeeded by Jackson Chipungu and none of the parties mentioned Chief Musona in their oral evidence;**

2. **The verification report and the minutes of the meeting to prove that all the interested parties were consulted before the family tree was verified and stamped, were not produced before the trial Court; and,**

3. **The officer who prepared the verification report (if any) was not mentioned by name nor called as a witness.**

10.7 The Court below held, arising from the stated inconsistencies that it had been demonstrated that the trial Court, in evaluating the evidence, had misapprehended the facts and, therefore laying ground for the appellate Court to interfere with the findings of fact, in line with our decision in the **NKHATA**[3] case.

10.8 Coming to the third issue, as to which lineage should now take over the chieftaincy, the Court considered the number of times that each family had held the throne. It found that the Mulonga family had reigned six times; and had held on to the throne against the will of the other families; the Tubi-Kalifu had ruled twice and the Kashimbi, had held the throne only once.

10.9 Against this backdrop, the Court of Appeal upheld the nullification of Fickson Chikweleti's installation by the High Court. The Court then set aside the trial Court's

order that the successor should come from the Tubi-Kalifu royal family and ordered that the Bundabunda chieftaincy should now rotate to the Kashimbi family, and specifically to David Musona.

11. GROUNDS OF APPEAL BEFORE THE SUPREME COURT

11.1 Aggrieved by the decision of the Court of Appeal, the Appellants have now come to this Court, advancing four grounds of appeal, formulated as follows: -

1. **The Court below erred in law and fact when it held that the Kashimbi royal family was eligible to ascend to the Bundabunda chieftaincy based primarily on the contents of the joint report dated 29th August, 2013 which was contradicted by the factual evidence of the historical lineage.**

2. **The Court below erred in law and fact when it held that Chimapepe was one of the past chiefs of (the) Kashimbi family in the Bundabunda chiefdom, represented by one of 10 alleged clay pots when there was no corroborating evidence to support such finding.**

3. **The Court below erred in law and fact when it held that there were inconsistencies with the family tree dated 17th April, 1972 sufficient to warrant tampering with the finding of the trial court when the evidence on record shows that the said tree was properly validated.**

4. **The Court erred in law and fact when it concluded that a meeting of 30th August involving the three lineages confirmed that heirs to the throne hailed from the three lineages in total disregard of testimony from the Appellants rejecting the contents of the document.**

12. THE APPELLANTS' SUBMISSIONS IN SUPPORT OF THE APPEAL

12.1 When this appeal was first heard in Ndola on 1st December, 2020, the Appellants made an application,

which we granted, to withdraw the entire record of appeal and file a fresh one, in conformity with Rules 58 and 68 of the Supreme Court Rules, **CHAPTER 25 OF THE LAWS OF ZAMBIA**[a]. At the subsequent hearing held in Lusaka on 3rd March, 2021, Counsel for the Appellants, Mr. Ngoma, appearing with Mr. Musumali relied entirely on the written heads of argument, which were filed afresh with the record of appeal on 15th January, 2021. At the hearing held on 10th January, 2023, counsel for the appellants and respondents relied on the written heads of arguments which had been filed earlier.

12.2 The Appellants argued the grounds of appeal seriatim. In support of the first ground of appeal, Counsel submitted that the learned trial Judge made finding of fact that the Kashimbi family was not eligible to ascend to the Bundabunda throne. That in line with our decision in the case of **ATTORNEY GENERAL v MARCUS KAMPUMBA ACHIUME**[2] this Court cannot reverse the said finding of fact unless we are –

> **"Satisfied that the findings in question were either perverse, or made in the absence of any relevant evidence or upon a misapprehension of facts, or that they were findings which, on a proper view of the evidence, no trial Court acting correctly can reasonably make"**

12.3 Counsel argued that uncontroverted documentary evidence of the 1972 family tree and the list of chiefs as at that date, confirmed that only the Mulonga and Tubi-Kalifu royal families were eligible to inherit the

Bundabunda chieftaincy, because the Kashimbi family was not reflected as a separate family lineage. That Chief Chimapepe, who was said to have hailed from the Kashimbi family, never existed nor ascended to the throne.

12.4 Counsel argued further that unlike the updated record filed in 2017 which had not been verified, the 1972 family tree was an official document which was validated by the Chongwe Municipal Council, which the Court below was not entitled to disregard. To support this proposition, Counsel called in aid, the case of **R v FULHAM HAMMERSMITH AND KENSINGTON RENT TRIBUNAL EX PARTE ZEREK**[6] in which Humphreys J stated that -

> **"When the documentary evidence is clear and unambiguous the tribunal has no power, on the mere statement of a party that the document signed by him is a sham, to disregard the document."**

12.5 Coming to the second ground of appeal, Counsel submitted that the Court below erred when it held that one of the 10 clay pots represented Chimapepe, a chief from the Kashimbi family. According to Counsel, there was no corroborative evidence to support this finding. He argued that the Court below erred in law and in fact to rely solely on the evidence of the Respondents' family on the clay pots.

12.6 Counsel argued further that the trial Court made a finding of fact that 10 chiefs ascended to the Bundabunda throne and Chimapepe was not among

them. The trial Court also found that Musona was the chief in 1972 when the family tree was submitted to Chongwe Municipal Council. (?) That the inclusion of Musona, the number of chiefs who had ascended to the throne culminated to 10. These were represented by the 10 clay pots and arrows in the shrine. Counsel added that the evidence excluded the possibility of Chimapepe ever having ascended to the throne. He submitted that the trial Court's findings were materially based on the facts and the credibility of witnesses, whose demeanour the learned trial Judge had an opportunity to observe and should not have be interfered with. To support his argument, Counsel referred us to the case of **GDC HAULIERS ZAMBIA LIMITED v TRANS CARRIERS LIMITED**[7] where Ngulube CJ (as he then was), stated that findings of credibility cannot lightly be interfered with by an appellate court, which did not see and hear the witnesses first hand.

12.7 Counsel further submitted that unlike the Appellants, who presented the 1972 family tree to the Court which showed Chief Musona as part of the family tree and not Chamapepe, the Respondents failed to bring independent evidence to establish that the said Chimapepe was a chief. They argued that in the absence of such evidence, it was unsafe for the Court below to have relied only on the Respondents' evidence and to have disregarded the

trial court's findings which were based on documentary proof regarding ascension to the Bundabunda chiefdom.

12.8 As regards the third ground of appeal, Mr. Ngoma submitted that the Court of Appeal erred when it held that the 1972 family tree had inconsistencies. He argued that the family tree was validated and represented the correct family genealogy and succession as at 17th April, 1972. He asserted that unchallenged evidence, both in the 1972 family tree and the invalidated 2017 document, not only confirmed that Shakanda was the 2nd chief but also that there was never a chief Chimapepe. According to Counsel, the Court below, therefore, had no legal basis to depart from the 1972 family tree and hold that the Kashimbi family was entitled to ascend to the throne. He cited the case of **VICTOR KONI v THE ATTORNEY GENERAL**[8] where, according to Counsel, we stated that the Court ought to accept evidence that has not been seriously challenged.

12.9 On the fourth ground of appeal, Counsel submitted that the Court below erred when it relied on an *'ex-curia'* document that was signed on 29th August, 2013 to confirm the Bundabunda lineage. He submitted that the 1st Appellant had explained the circumstances which led to the signing of the joint report; one of which was that he involuntarily agreed to sign in order to forestall the imminent installation of Fickson Chikwelete as Chief

Bundabunda. That the 1st Appellant also stated that he had no authority to distort the Tubi-Kalifu family history.

12.10 Learned Counsel submitted that a trial Court ought to make a determination and finding of facts based on its analysis of the evidence and not on an *ex curea* document in total disregard of the evidence of witnesses. In this respect, he agreed with the learned trial Judge and stated that she was on firm ground to have adopted an approach to analyse the evidence on the Bundabunda ancestry and not rely on an out-of-court document signed by two individuals. To fortify his agreement, he relied on a passage in the case of **THE MINISTER OF HOME AFFAIRS AND ATTORNEY GENERAL v LEE HABASONDA (SUING ON HIS OWN BEHALF AND ON BEHALF OF THE SOUTHERN AFRICAN CENTRE FOR THE CONSTRUCTIVE RESOLUTION OF DISPUTES)**[9] where, in pronouncing ourselves on judgment writing, we stated that -

> **"Every Judgment must reveal a review of the evidence, where applicable, a summary of the arguments and submissions, if made, findings of fact, the reasoning of the court on the facts and the application of the law and authorities, if any, to the facts. Finally, a judgment must show the conclusion."**

12.11 According to Counsel, the import of this passage is that a Court is required to consider the case on its merit and therefore, a presidential *ex-curia* document should not substitute the trial Court's consideration of the evidence presented before it. He contended that the Court of

Appeal ought to have looked at the evidence holistically and the circumstances the 2013 document was signed before concluding that the joint report confirmed the position that there were three lineages who were eligible heirs to the Bundabunda throne. That the Court below had a duty to examine the historical facts and analyse the custom and traditions of the Soli people in terms of succession to the Bundabunda throne instead of relying on a single document of 29th August, 2013. According to Counsel, this would have been in line with the guidance of this Court in the case of **CHIEF MPEPO (ALSO KNOWN AS ACKSON CHILUFYA MWAMBA) v SENIOR CHIEF MWAMBA (ALSO KNOWN AS PAISON CHILEKWA YAMBAYAMBA)**[10] where we stated that -

> **"a chief is elected or appointed as such by the community the chief is to superintend over, in accordance with the customs and traditions of the community."**

12.12 Counsel referred to the evidence of DW6 who stated that the joint report was rejected and annulled during a meeting attended by all the parties, senior chiefs and government officials on 30th August, 2013. That according to this witness, the rejection was in fact what led to the standoff at the meeting and the request for elections. The elections did not take place as it was not the custom of the Bundabunda Soli Shamifwi clan to appoint a Chief through elections. As he concluded, Counsel urged us to uphold the appeal with costs.

13. THE RESPONDENTS' HEADS OF ARGUMENT IN OPPOSITION TO THE APPEAL

13.1 In response the Respondents relied on their heads of opposition, which were re-filed on 22nd February, 2021. They also argued the grounds of appeal in seriatim.

13.2 Responding to the Appellants' submissions on the first ground of appeal, the learned Counsel for the Respondent, argued that while the joint report significantly influenced the decision of the Court below, there were other crucial pieces of evidence on record which were of equal significance, which the Court considered before arriving at its decision. That the first was the issue to do with the number of clay pots and spears in the shrine. He submitted that the Court below indicated in its judgment that the issue, as to whether or not, the Kashimbi family was entitled to ascend to the throne, could best be resolved by the evidence of the clay pots and arrows in the shrine. That in this regard, there was common evidence that the 10 clay pots in the shrine represented dead chiefs, which evidence was confirmed by PW2, the shrine keeper. That the significance of the pots and arrows was also affirmed by PW3, Secretary of the Soli Cultural Association. This is the man who had a duty to monitor and oversee the culture and traditions of the Soli people. Another witness to the pots was DW2. His testimony corroborated the evidence of other witnesses that there were ten clay pots in the shrine

representing chiefs who had died. Counsel argued that pots since the pots in the shrine represented the number of chiefs who had died on the throne, it followed that the number of clay pots invariably relayed the number of chiefs who had ascended to the throne.

13.3 He further submitted that the Court below also considered the meeting which was held on 30th August, 2013 presided over by Senior Chieftainess Nkomeshya Mukamambo II and Chieftainess Shikabeta. In his view, this meeting confirmed that the Mulonga, Kashimbi and Tubi-Kalifu royal families were heirs to the Bundabunda throne and that it lent credence to the joint report signed between the Tubi-Kalifu and Kashimbi families. He submitted that the Court below also reviewed the technical report dated 29th June, 2013, which affirmed that the Kashimbi family was entitled to ascend to the Bundabunda throne. According to Counsel, the Appellants were creating an impression that the 1972 family tree was the only impeccable and credible evidence before the trial Court which proved the names of the royal families entitled to ascend to the throne of Chief Bundabunda and yet, this document had been discredited and discounted for being inconsistent and unreliable.

13.4 Coming to the second ground of appeal, which was that the Court below erred when it held that Chimapepe was one of the chiefs represented by the clay pots without any

corroborating evidence, counsel submitted that the question that begged determination in this appeal was whether the Court below properly exercised its discretion to reverse the trial Court's findings of fact on the basis of the **MARCUS KAMPUMBA ACHIUME**[2] case, and the case of **NKHATA AND FOUR OTHERS V THE ATTORNEY GENERAL**[3] were we said that -

> **"A trial judge, sitting alone without a jury, can only be reversed on facts when it is positively demonstrated to the appellate court that:**
>
> **a. by reason of some non-direction or misdirection or otherwise the Judge erred in accepting the evidence which he did accept; or**
> **b. in assessing and evaluating the evidence the judge has taken into account some matter which he ought not to have taken into account, or failed to take into account some matter which he ought to have taken into account; or**
> **c. it unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or**
> **d. in so far as the judge has relied on the demeanour, there are other circumstances which indicate that the evidence of the witnesses which he accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer."**

13.5 According to Counsel, the Court below was entitled to reverse the trial Court because the finding that the 1972 family tree depicted the true picture of the families eligible to ascend to the Bundabunda throne and that one of the 10 clay pots represented a chief called Musona, were perverse and made upon a misapprehension of facts.

13.6 Counsel pointed out that there was common evidence by all the parties that there were 10 clay pots representing the chiefs who had been on the throne. Secondly, that the Tubi-Kalifu and the Mulonga Royal families said there were only 9 past chiefs and that Chimapepe never ascended to the throne. Counsel submitted that on the other hand, there was impeccable evidence, from the Kashimbi royal family that Chimapepe was from their own clan, was the second chief, and was one of these represented by the 10 clay pots. That the trial Judge arrived at the 10 past chiefs by counting Musona and Lufwaneti as distinct people when in fact it was one person going by the name of Musona Lufwaneti.

13.7 Learned Counsel submitted the trial Court's finding to the effect that there existed a chief Musona, who was separate and distinct from chief Lufwaneti, was a serious misapprehension of facts, given the common evidence that there were 10 clay pots in the shrine, representing chiefs who had been on the throne, one of whom was Chimapepe from the Kashimbi family. According to Counsel, since the other families counted nine past chiefs, it is probable that the extra clay pot represented Chimapepe.

13.8 Counsel disagreed with the Appellants' assertions that the Appellate Court interfered with findings of fact based on credibility. He submitted that historical facts, which are not well-documented and susceptible to distortion

over time could not be based on credibility of witnesses who were not there when the events took place. He referred to a passage from the case of KOJO **v BONSIE**[1] that:-

> **"Where there is a conflict in traditional 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 belief in such a case demeanour of witnesses is of little guide to the truth."**

13.9 As regards the joint report, counsel submitted that attempts by the 1st Appellant to disown a document, which he freely and voluntarily signed, spoke volumes about his character and credibility. He argued that an ex-curia agreement did not imply that it was incapable of being enforced as between parties. He added that the joint report lent credence to the Respondents' contention that succession to the Bundabunda chiefdom was rotational. Further that the Appellants, by insisting that the Respondents were part of the Tubi-Kalifu family, were in essence recognising the existence of the Kashimbi family as heirs to the throne.

13.10 Reacting to the third ground of appeal where the Appellants have taken issue with the holding by the Court below that the 1972 family tree was fraught with inconsistencies and contradictory statements to warrant the tampering of findings of fact of the trial Judge, Counsel submitted that the cardinal question for determination was whether, on the facts and

circumstances of this case, the family tree was properly validated so as to become the sole authority of historical lineage of chiefs. Counsel submitted that DW4, who was the Deputy Council Secretary for Chongwe, produced the 1972 family tree but failed to produce the minutes of the family tree and the verification report.

13.11 According to Counsel, the 1972 family tree raises a lot of doubt about its authenticity. He submitted that although the family tree was said to have been submitted in consultation with all the relevant families, it has inconsistencies as to which chief hailed from what family. Counsel also pointed out that while the common evidence on record was that ascension to the throne was rotational among the royal families, the family tree suggests that preferred candidates were handpicked by the serving chief. According to Counsel, this was contrary to the evidence on record. Counsel added that the inconsistencies only served to demonstrate that the 1972 family tree was not prepared in consultation with all the relevant families. Learned Counsel referred to the case of **TED CHIANGA MUWOWO (ALIAS CHIEF DANGOLIPYA MUYOMBA) AND ANOTHER v ABRAHAM MUWOWO TEMWANANI AND ANOTHER**[11] where this Court stated -

> **"We wish to add that where the tradition and custom of a group of people has a process that is to be followed for selection of a chief, that tradition and custom ought to be followed."**

13.12 Counsel added that the question of eligibility and ascension to the Bundabunda throne had been a thorny issue otherwise the Soli Shamifwi royal establishment would not have seen it fit to constitute a technical committee to interrogate and update the royal family tree. He argued that in the circumstances, it would have been unsafe for the trial Court to wholly rely on the contents of the 1972 family tree.

13.13 Moving to the fourth ground of appeal, which assails the holding by the Court below that the meeting of 30th August, 2013 confirmed the three lineages that are heirs to the Bundabunda throne, counsel re-stated that it was an error of law for the Appellants to insist that the joint report was ex-curia and, therefore, unenforceable. He submitted that the joint report, as between the two families, showed that the Appellants agreed and acknowledged that the Kashimbi were eligible to ascend to the Bundabunda throne and that succession was rotational. He submitted that the Tubi-Kalifu, through the 1st Appellant, their authorised representative, freely signed the joint report and they could not be heard to contradict its contents. To support his argument, counsel cited the **RODGERS CHAMA PANDO**[5] case on the inadmissibility of parol evidence and the case of **NATIONAL DRUG COMPANY AND PRIVATISATION AGENCY v MARY KATONGO**[12] in which it was stated:-

"It is trite law that once the parties have voluntarily and freely entered into a legal contract, they become bound to abide by the terms of the contract and that the role of the Court is to give efficacy to the contract when one party has breached it by respecting, upholding and enforcing the contract."

13.14 Counsel submitted that although the joint report was not a contract in the *stricto sensu*, the underlying principle was the same, adding that when parties freely and voluntarily sign an agreement, they cannot simply walk out on flimsy grounds as that it was against public policy. Borrowing from the **LEE HABASONDA**[9] case, cited by counsel for the appellants, counsel for the respondents, argued that the Court below was not precluded from considering all material evidence and that in this case, the joint report was material to the proper and satisfactory determination of the facts in issue.

13.15 Commenting on the Appellants' contention that the Court below, in accepting evidence of the 30th August, 2013 meeting disregarded the Tubi-Kalifu's historical lineage, counsel contended that this was an error of fact, given that oral historical accounts are at times unreliable. He argued that by referring to facts of recent years as established by evidence, the trial Court could not, in the circumstances of this case, restrict itself to only the 1972 family tree, but look to other relevant facts. Learned Counsel submitted that the other relevant facts included the technical committee meeting held on 29th June, 2013, the joint report and the 30th August, 2013 meeting, all of

which he said, had endorsed the three families as eligible to ascend to the Bundabunda throne.

13.16 Counsel added that in any event, neither the Tubi-Kalifu nor the Mulonga royal families protested over the presence and candidacy of the Respondents' family during the disrupted selection proceedings. That the Court below was required to review the appeal on the totality of the evidence on record and in light of the historical facts and events of recent years to dispense justice in the matter. In conclusion, learned Counsel urged us to dismiss the appeal as it was devoid of merit.

14. CONSIDERATION OF THE APPEAL BY THIS COURT

14.1 We have carefully considered the Judgment appealed against, the evidence on the record and the submissions of Counsel.

14.2 In this case, the main issue as we see it, is whether the Court below judiciously exercised its discretion in reversing findings of fact made by the trial Court within the context of the principles laid down in the **NKHATA**[3] and **MARCUS KAMPUMBA ACHIUME**[2] cases, among others. We will deal with the four grounds of appeal in seriatim.

14.3 In the first ground of appeal, the Appellants argued that the trial Court made a key finding of fact that the Kashimbi family was not eligible to ascend to the

Bundabunda throne, and Court of Appeal ought not to have disturbed this finding. Counsel for the appellants contended, on behalf of the Appellants, that in disturbing the finding, the Court below relied primarily, on the Respondents' evidence of a joint report and ignored uncontroverted historical evidence in the family tree filed in 1972.

14.4 In response, the Respondents argued that while the joint report may have significantly influenced the decision of the Court below, there was other evidence on record of equal importance that the Appellate Court considered, such as the clay pots and arrows in the shrine, the technical committee meeting held on 29th June, 2013 as well as the events of the 29th and 30th August, 2013 leading up to the cancellation of the succession process on 31st August, 2013.

14.5 From the outset, it is trite that an appeal from a decision of a trial Court operates as a re-hearing on the record. Thus, an appellate court, be it the Supreme Court, the Court of Appeal or the High Court, in the exercise of its appellate jurisdiction, considers the whole evidence on the record, both oral and documentary, given in the trial Court as well as the Judgment appealed against.

14.6 There is caution however, and this is that an appellate court which has had no benefit of seeing and hearing the witnesses at first hand should not lightly interfere with

findings of fact by a trial Judge, unless it can be demonstrated that one or more of the conditions laid down in the **NKHATA**[3], **MARCUS KAMPUMBA ACHIUME**[2] and a host of other authorities, exist. In the **NKHATA**[3] case, the then Court of Appeal (now Supreme Court) spelt out the conditions as follows -

> **a. by reason of some non-direction or misdirection or otherwise the Judge erred in accepting the evidence which he did accept; or**
> **b. in assessing and evaluating the evidence the judge has taken into account some matter which he ought not to have taken into account, or failed to take into account some matter which he ought to have taken into account; or**
> **c. it unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or**
> **d. in so far as the judge has relied demeanour, there are other circumstances which indicate that the evidence of the witnesses which he accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer."**

In the **MARCUS KAMPUMBA ACHIUME**[2] case, Ngulube DCJ (as he then was) expounded on the principle in the following way: -

> **"The appeal Court will not reverse findings of fact made by a trial judge unless it is satisfied that the findings in question were either perverse, or made in the absence of any relevant evidence or upon a misapprehension of facts, or that they were findings which, on a proper view of the evidence, no trial Court acting correctly can reasonably make."**

14.7 Turning to the case in *casu*, it is evident that the Court of Appeal, in the exercise of its appellate jurisdiction,

considered all the evidence on the record as presented before the trial Court. It is clear that the Court determined the matters in issue on the totality of the evidence, of which the contentious joint report signed between representatives of the Tubi-Kalifu and the Kashimbi families, acknowledging the Kashimbi as one of the eligible families, was a part. It is, therefore, not correct for the Appellants to allege that the lower Court relied primarily on the joint report in arriving at its decision.

14.8 Upon perusal of the record, we find, on the other hand, that the trial Court, in evaluating the evidence before it, confined itself to the 1972 family tree which was produced by DW4. The trial Court, in its analysis, stated as follows -

> **"Her evidence was that the 1972 family tree was verified and a report to that effect was on the Council file. In the same vein DW4 stated that the latest family tree that was provided to the Council during the reign of Chakalashi was not yet verified and hence was not stamped and there was no verification report in support. This evidence by DW4 was not challenged. Thus, I find that the Bundabunda family tree dated 17th April, 1972 was so validated and a true depiction of what it communicates."**

14.9 The trial Court made this finding, notwithstanding the fact that it was unable to resolve inconsistencies noted in the document. The trial Court was unable to tell who Musona, said to be the sixth chief at the time the 1972 family tree was submitted to Chongwe Municipal Council, was. Oral evidence was consistent that the sixth chief

was Lufwaneti. In fact, DW5 referred to him as Musona Bundabunda Lufwaneti. This lends credence to the assertions that Musona and Lufwaneti were one and the same person. Furthermore, we observe that the trial Court was not able to conclude from which of the three lineages, that Kacheta, the 4th chief and Selemani Chanyabweya, the 5th chief, hailed, other than the fact Selemani was an offspring of Nyemba. The trial Court was also not able to resolve where the Tubi-Kalifu and Mulonga families belonged in terms of the second and third house.

14.10 We agree with the lower Court that it was unsafe for the trial Court to have attached considerable weight to documentary evidence that had so many inconsistencies and gaps. More so because the Appellants failed or omitted, as they advanced their counterclaim, to produce vital documents such as the verification report and minutes, which were said to be on the Council records. This failure or omission cast doubt as to whether the 1972 family tree had truly been verified by all the concerned families, in accordance with the elaborate procedure outlined in DW4's testimony.

14.11 In the circumstances, we find that the Court below was perfectly entitled to interfere with the findings of fact as it had been demonstrated that the trial Court misapprehended the facts. The Court below was also on firm ground when it made the necessary findings of fact

on the basis of what Baron DCJ (as he then was) in the case of **KENMUIR v HATTINGH**[13]: –

> **"An appeal from a decision of a judge sitting alone is by way of rehearing on the record and the appellate court can make the necessary findings of facts if the findings were conclusions based on facts which were common cause or on items of real evidence, when the appellate court is in as good a position as the trial court."**

14.12 In view of the above-stated authority, the Court below, was in as good a position as the trial Court to make the necessary findings of fact based on facts that were common cause or real evidence on the record before it. On this basis, the first ground of appeal, cannot succeed as it lacks merit. It is, therefore dismissed.

14.13 Coming to the second ground of appeal, the Appellants have taken issue with the finding that Chief Chimapepe was one of the past chiefs from the Kashimbi family and was represented by one of the clay pots in the shrine. In support of this ground, counsel for the appellants has argued that there was no corroborating evidence to support such a finding and that by making such a finding, the Court below interfered with findings made by the trial Court based on credibility.

14.14 Counsel for the respondents, on the other hand, argued that the issue in this case, was whether the trial Court exercised its discretion to interfere with findings of fact judiciously, given the common evidence that there were 10 clays pots in the shrine, that there were nine chiefs on

the throne and Chief Lufwaneti and Musona were one and the same person. He reasoned that the 10th clay pot must have belonged to Chimapepe. According to Counsel, the issue of credibility did not arise because evidence comprised stories handed down by word of mouth.

14.15 We noted, as did the trial Court and the Court below; that the royal families that are contesting the Bundabunda Soli Shamifwi throne presented varying versions of their lineages. Understandably so, for a chiefdom that has been in existence from as far back as 1650. It is possible that memories of its lineages may have faded or been distorted over time, as history was passed on from generation to generation through oral tradition.

14.16 The Privy Council, in the case of **KOJO V BONSIE**[1] offers useful guidance when it comes to oral tradition passed from generation to generation. The Court observed that:

> **"Where there is a conflict in traditional 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 belief in such a case demeanour of 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."**

14.17 In the present case, the Court was dealing with a conflict of traditional history. The best way to test that traditional history is by reference to the facts in recent years, as established by evidence, and by ascertaining which of the competing histories is the more probable.

14.18 Both sides have highlighted the issue of the clay pots. This was crucial to the resolution of the dispute. From the evidence on the record, both sides agree that the clay pots represented deceased chiefs who had sat on the throne. Some of the witnesses speculated that nine chiefs had sat on the throne. DW6 was one such witness who reckoned that since there were nine chiefs, there ought to be nine pots. His testimony was however, not cogent because he had not visited the shrine. The evidence of PW2 and PW3 (the shrine keepers) was that there were actually 10 clay pots in the shrine and this evidence was not impeached at trial. Their testimony was supported by DW2, who confirmed that there were 10 clay pots but he erroneously concluded that the 10th clay pot represented Fickson Chikweleti, who was living. The question that needed to be resolved then, is who was the 10th clay pot for?

14.19 The trial Court relied on the family tree dated 17th April, 1972 and it concluded that Musona was the 8th chief. The said family tree, appearing on page 737 of the record of appeal, mentions Mboshi, Shakanda, Mubamba, Kacheta and Selemani as the successive chiefs bundabunda. It ends with Musona, who was referred to as the sixth and present chief. The common evidence of the witnesses was that Lufwaneti was the sixth chief and DW5, who referred to the sixth chief as Musona Bundabunda Lufwaneti, it would appear that chief Musona and Lufwaneti were one

and the same person. Common evidence was also that the last chiefs were Jackson Chipungu, Bernard Chipungu and Patrick Mambo Chakalashi. They were all represented by nine clay pots, leaving a 10th clay pot, which signified an unknown dead chief. According to the joint report, the Kashimbi Royal Family traced their ascendancy to the throne through the lineage of Chimapepe. It is more probable therefore, that the 10th clay pot was for Chief Chimapepe. We say so because there is evidence on record, that before he died, Patrick Mambo Chakalashi constituted a technical committee in 2012, which was co-chaired by PW5 and Selina Kaswende (Headwoman Manchishi from the Mulonga family), to update the royal family tree. Evidently, the Bundabunda history as told in the 1972 family tree, some 40 years before, was not only contradictory and convoluted, but also incomplete. From the foregoing, the Court below cannot be faulted for finding that the history given by the Respondents that the 10th clay pot could have belonged to Chimapepe of the Kashimbi family was more probable than that of Appellants and the Mulonga family. Further, given the nature of evidence, which was mostly from oral or traditional history, issues of credibility and demeanour of witnesses were of little use in establishing the truth. The second ground of appeal also fails.

14.20 The third ground of appeal assails the finding of the learned Judge that the 1972 family tree was inconsistent. According counsel for the appellants, the 1972 family tree was validated by the Chongwe Municipal Council and bore the correct genealogy of the Bundabunda Soli Shamifwi clan, citing the case of **VICTOR KONI v THE ATTORNEY GENERAL**[8], to buttress his point.

14.21 In response, counsel for respondents submitted that failure to produce foundational documents, such as the minutes of the selection proceedings and the verification report raised doubts about the authenticity and credibility of the family tree. He argued further that the inconsistencies showed that the document was not prepared in consultation with the relevant families. In addition, that the family tree had been a thorny and unsettled issue, otherwise the late Chief Bundabunda, Patrick Mambo Chakalashi would not have constituted a technical committee to update it.

14.22 We have already alluded to the contradictions in the 1972 family tree. In our view, this was compounded by the Appellants failure, in their counterclaim, to produce the minutes and the verification report. It is trite that failure to produce evidence or a witness attracts an adverse inference against a party whose obligation it is to do so. In the case of **TSHISHONGA V MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT**[14] it was held that-

"An adverse inference must be drawn if a party fails to testify or place evidence of a witness who is available and able to elucidate the facts as this failure leads naturally to the inference that he fears such evidence will expose facts unfavourable to him and even damage his case."

14.23 In addition, the parties presented different versions. As we have stated in paragraph 14.19, it is clear that the Bundabunda Soli Shamifwi lineages were problematic. PW7, a Chief Affairs Officer who documented the succession proceedings, confirms this in his report dated 3rd September, 2013 at page 682 of the record of appeal. He stated that -

"The tension between the contending families is a threat to the peace and stability of (the) Bundabunda chiefdom. Some of the key factors that are fuelling the succession dispute are:

1. **Lack of a well-documented family tree;**
2. **There is no clear relationship of the contending families and how they relate to the previous chief; and**
3. **The former chief (9th chief) was selected through an election"**

14.24 When he was re-examined, PW7 explained that what he meant when he said that there was a lack of a documented family tree, was that "**there was no physical family tree as each family had different family trees."** This could explain why the late Chief Patrick Mambo Chakalashi appointed a technical committee to update and document the Royal family tree and this culminated in a meeting that was held on 29th June, 2013 to review the royal family tree and determine which families were eligible to ascend to the Bundabunda throne. The Appellants' assertion, that there were no inconsistencies

in the 1972 family tree and that there was no supporting evidence is not correct. We do not find the cases cited by counsel for the appellants to be helpful to the Appellants' appeal. The third ground of appeal lacks merit and it fails.

14.25 Coming to the fourth and last ground of appeal, counsel to the appellants submitted that the Court below erred by relying on an ex-curia document to find that the Kashimbi family were eligible to ascend to the Bundabunda throne. He argued that the joint report signed between representatives of the Kashimbi family and the 1st Appellant on behalf of the Tubi-Kalifu family, acknowledging the Kashimbi family as part of the Bundabunda royal family, had been discredited by the 1st Appellant. That the 1st Appellant testified that he signed involuntarily to forestall the installation of a candidate from the Mulonga family. Further that he had no authority to sign.

14.26 Counsel for the respondents, in rebuttal, submitted that it was an error of law, to describe the joint report as *ex-curia*. He argued that the 1st Appellant freely and wilfully signed the document and, therefore, cannot be heard to disown it for flimsy reasons. He relied on the **RODGERS CHAMA PONDE**[5] and the **NATIONAL DRUG COMPANY**[12] cases adding that the Court was not precluded from considering all the material evidence before it including the joint report.

14.27 We have examined the handwritten joint report at page 703 of the record of appeal, which was couched in the following terms-

> **"THE REPORT OF BENE KASHIMBI AND BENE KALIFU FAMILIES ON THE STALEMENT (SIC) CONCERNING NEW CHIEF BUNDABUNDA**
>
> **There are three families eligible for succession to Bundabunda throne. These are**
> 1. **Mulonga (Kabandi)**
> 2. **Kashimbi (Mununka)**
> 3. **Kalifu (Shangobeka)**
>
> **Succession is on rotational basis among the three royal families. This is the tradition of bene Shamifwi of Bundabunda. However, when the Mulonga family ascended to the throne after the Kashimbi family, they have persistently refused to rotate the chieftaincy. Since then, the Mulonga family have filled five Chiefs without giving chance to the other families. This time we want the chieftaincy to rotate to another family hence the stalemate.**
> **Signed**
> **David Musona**
> **For Kashimbi family**
>
> **Kausa Mwachindalo**
> **Kalifu (Tubi) Family**
>
> **29th August, 2013"**

14.28 There is another handwritten letter, issued on the same day, 29th August, 2013 from the Mulonga family at page 705 of the record of appeal. It stated that -

> **"Confidential**
> **REPORT FROM MULONGA FAMILY/WOMB**
> **Us as the Mulonga family do deny today that the two wombs who are contesting to ascend to the throne are not the rightful or eligible because they are not from the royal family. They have never ascended to the throne of Unda-unda chiefdom -ever- from the beginning of the chieftainship. Most of their assertions are from reading and hearing from us.**
> **From above points we hereby state that the new incoming chief should come from the Mulonga womb.**

Recorded 29-08-2013"

14.29 It is clear that the parties freely and voluntarily signed the respective documents in a bid to resolve the succession dispute. The joint report was the culmination of an agreement between two parties, the Tubi-Kalifu and Kashimbi, to defend their lineages in the Bundabunda chiefdom. In the case of **NATIONAL DRUG COMPANY AND PRIVATISATION AGENCY v MARY KATONGO**[12] we stated that-

> **"It is trite law that once the parties have voluntarily and freely entered into a legal contract, they become bound to abide by the terms of the contract and that the role of the Court is to give efficacy to the contract when one party has breached it by respecting, upholding and enforcing the contract."**

The agreement or whatever name the parties choose to call it was binding between them. Our role as a Court is to give effect to that agreement, whatever the intentions of the parties, as long as the agreement is not illegal or against public policy. The Appellants cannot now turn around and disown their own document.

14.30 More importantly, the joint report was not an isolated document. The joint report along with the report written by the Mulonga royal family consisted of part of an official report at page 699 of the record of appeal, which was submitted to Senior Chieftainess Nkomeshya Mukamambo II by the Rufunsa Council Secretary F. Chipili and Chief Affairs Officer B. Chikondi, seeking her intervention. For the 1st Appellant to claim that he lied or

that he did not have authority to sign the joint report on behalf of the Tubi-Kalifu family makes him an unreliable witness. To this end, we apply what we said in the case of **HAONGA AND OTHERS v THE PEOPLE**[15] that -

> **"Where a witness has been found to be untruthful on a material point, the weight to be attached to the remainder of his evidence is reduced.**

14.31 Our final comment on this ground is that if the Tubi-Kalifu family or indeed the Mulonga family were opposed to the Kashimbi's eligibility, they would have resisted their inclusion from the start of the selection proceedings on 28th August, 2013. As things stood at the time, the Kashimbi family were in contention when the six families emerged. They were in contention when the list was narrowed down to three families and when each family floated a candidate until 31st August, 2013 when the proceedings were disrupted. As we stated in the first ground of appeal, the Court below as an appellate court considered all the material evidence on the record when it concluded that the Kashimbi family was among the eligible families. In our view, the Court below was entitled to find for the Kashimbi family, who had been on the throne the least, to assume the chieftainship. We find no basis in the fourth ground of appeal.

14.32 On the totality of the evidence, we find that this entire appeal has no merit and accordingly it is dismissed. For the avoidance of doubt, the finding of the Court below, that the Tubi-Kalifu, Kashimbi and Mulonga royal

families are eligible to ascend to the Bundabunda Soli Shamifwi chieftaincy, and that the chieftaincy should rotate to the Kashimbi royal family, and in particular David Musona, is upheld. In addition, we order that the Bundabunda Soli Shamifwi clan should draw up a well - documented family tree and succession plan on a rotational basis among the Mulonga, Tubi-Kalifu and the Kashimbi royal families. Given the nature of the issues raised in this appeal, we order that each party shall bear their own costs.

M. MUSONDA
DEPUTY CHIEF JUSTICE

A. M. WOOD
SUPREME COURT JUDGE

DISSENTING JUDGMENT

Malila CJ, delivered the minority judgment.

Cases referred to:

1. *Mwiya v. Mwiya (1977) ZR 113*
2. *Chibwe v. Chibwe (1998) ZR 45*
3. *Kaniki v. Jairos (1977) ZR 67*
4. *Kilolo Ng'ambi v. Opa Kapijimpanga (Appeal No. 210 of 2015)*
5. *Netta Shimwambwa Shakumbila v. Patrick Chibamba (SCZ/8/248/2014)*
6. *Ted Chisavwa Muwowo alias Chief Dangoliya Muyombe v. Abraham Muwowo alias Temwanani Winston Muwowo (suing as Chairman of the Uyombe Royal Establishment) (Appeal No. 115/2014)*

7. *Oggie Muyuni Mudenda v. Dickson Muyeka Kamaala (Appeal No. 006/2019)*
8. *John Malokotela v. Majaliwa Sitolo Muwaya and Thaya Odemy Chiwela (1010) ZR 357*
9. *Kojo v. Bonsie (1975) 1WLR 1223*
10. *Makumba and Others v. Greytown Breweries Ltd and Others (Appeal No. 32 of 2012)*
11. *Attorney General v. Kakoma (1975) ZR 211*
12. *National Drug Co. and Privatisation Agency v. Mary Katongo (Appeal No. 79 of 2001)*
13. *Haonga & Others v. The People (1976) ZR 200*

Legislation referred to:

1. *Constitution of Zambia, Chapter 1 of the Laws of Zambia (Act No. 2 of 2016)*

I have read the majority judgment prepared by my learned brothers, dismissing the appeal. It runs into 61 folios. No less than 15 authorities and non-case law sources were consulted and cited or, at any rate, referred to in the judgment. Doubtless, much intellectual energy and thought went into composing the judgment which is in full agreement with that of the Court of Appeal. That court held that the trial judge was wrong to find for the appellants (defendants in the original action).

In principle, I agree with the summary of the facts and the litigation history of this matter as elucidated in the majority judgment and thus find no plausible reason to attempt to rehash them, save for the limited purpose of giving context to the discourse relative to my dissent.

Before I venture into an extended analysis based on the relevant facts and findings of the court below, it is perhaps worth making preliminary comments, by way of a short detour, to contextualise the magnitude of chiefdom succession disputes in Zambia which are now common place. They have, in many instances, rendered periods of generational transitions, times of crisis for chiefdoms where specific lineages try to unconventionally take over or monopolise power. This could lead to vicious confrontation and, in some cases, a heightened sense of witchcraft and wizardry, perceived or real.

It is not lost on me that conflicts sometimes take place within the triumphant lineages themselves. There may be repeated periods of crisis while there is no substantive chief *in situ* as the succession wrangles rage on, or where a court injunction maintains the *status quo* pending court resolution of the dispute. Quite often, this engenders weakness in the administration of the affected chiefdom and could, in turn, facilitate opportunism and undermine the edifice of the whole customary structure.

The chieftaincy succession dispute implicated in this appeal may regrettably have born testament to some of these observations.

The matter has been in court in the last nine or so years. Even without facts or deep reflection, it is easy to appreciate that for as long as a succession dispute of this kind remains in court, neither the person enthroned as chief, nor those claiming to be the rightful heirs to the chieftaincy, can enjoy confidence, genuine peace and tranquility. This could extend to the traditional support structures established or created by the person occupying the throne.

I now revert to the substance of my reflection. As well-explained in the majority judgment, a painful dispute had arisen amongst members of the Soli ethnic group of Lusaka Province, who all claimed to be of the chiefly lineage, over succession to the royal Shamifwi Bundabunda chieftaincy of the Soli people. This followed the death of the 9th Chief Bundabunda (Patrick Mambo Chakalashi) in February 2013.

The death of the chief was followed by a period of great anxiety, uncertainty and contestation. Succession proceedings, which followed a six months period of mourning and were presided over by Senior Chieftainess Nkomeshya Mukamambo II of the Soli

people, were characterized by vicious disagreement as to who the rightful heir should be. They unsurprisingly ended in a deadlock.

To be clear, initially six families had laid claim to the chieftaincy. Following a preliminary internal assessment of their family trees, the contest, literally speaking, was narrowed down to three families, namely, the Mulonga, the Tubi-Kalifu (where the appellants belong) and the Kashimbi (which is the respondents' family lineage).

A meeting involving the concerned families was convened on 30th August 2013. It came up with an electoral college comprising headmen and women in the chiefdom who were to vote for a successor. Each of the three families put up a candidate – the Tubi-Kalifu family (appellants) settling for Kausa Machindalo, the Kashimbi family (respondents) going with David Musona and the Mulonga family (not party to this appeal), putting up Fickson Chikweleti.

Confusion erupted when the Mulonga family allegedly sponsored some commotion to the whole succession process. They claimed that they were the sole heir to the throne. Elections had to be postponed to a later date. However, in the midst of the confusion

and the protestation that ensued, the Mulonga family installed Fickson Chikweleti as chief in September of 2013.

Consequently, the respondents (the Kashimbis) commenced the present action in the High Court against Fickson Chikweleti and members of the Mulonga family, as well as the appellants, claiming a declaration that Frickson Chikweleti was wrongfully installed and that their family was the rightful heir to the Bundabunda chieftaincy.

The Kashimbis contended that according to Soli custom and tradition, the chieftaincy rotated amongst the Kashimbi, Mulonga and Tubi family members and that now was the turn for the Kashimbi family to identify and nominate a suitable individual to assume the chieftaincy. They contended that the installation of Patrick Mambo Chikweleti from the Mulonga family as Chief Bundabunda, was wrong because he hailed from an ineligible family lineage.

The Mulonga family resisted the claim by the Kashimbis on the basis that from time immemorial, ascension to the Bundabunda throne was a preserve of the Mulonga family and that selection of a successor to the Bundabunda throne was never by election.

The (Tubi-Kalifu) appellants, for their part, stoutly resisted the claim in the High Court, contending that the first appellant was the rightful heir to the throne being from the matrilineal side of the family. They contended that the respondents (Kashimbis), were not in the lineage of succession and neither were the Mulongas if the rotational criterion was to be used.

Mulenga J, as she then was, tried the matter. Before her was a lively conflict of evidence and not so much of a tussle on issues of law. Difficult and nuanced questions of fact on which evidence was required, arose. To some of the factual questions that emerged, there were some easy answers. To other questions, however, there were no clear-cut answers while the available factual answers were in some cases hazy. Doing her best in the circumstances, the learned judge made findings of fact upon which she based her decision.

She came to the conclusion that on the evidence as presented to her, the Tubi-Kalifus (now appellants, then defendants) were right. Chieftaincy succession in the chiefdom was on rotational basis and that it was the turn of the Tubi-Kalifu to assume the

chieftaincy. It would appear that on that basis the first appellant was installed as Chief Bundabunda.

The respondents (Kashimbis) were, predictably, displeased with that decision. They appealed to the Court of Appeal which reversed the decision of the High Court, holding that it was their (the Kashimbis') turn to ascend to the throne. In upsetting the judgment of the High Court, the Court of Appeal faulted the trial judge on several evidentiary points. The Mulongas apparently did not participate in the proceedings in the Court of Appeal.

Like in a game of checkers, it then was the appellants (Tubi-Kalifus') turn to appeal the Court of Appeal decision to this court. This court, has now, by a majority, upheld the decision of the Court of Appeal.

Though I should like to emulate the laconic terms in which the *ratio decidendi* of the majority judgment is couched, it seems to me upon reading that judgment, that even after the evident outpouring of effort in structuring it, it still leaves me in doubt as to whether the relevant customary law on chieftainship succession, is entirely clear, or for that matter, finally settled. In the normal course of things that law ought to have been argued

by the parties to the appeal, articulated and applied by this court.

I think on the contrary, that the High Court judgment was sound and should have been given imprimatur by the Court of Appeal, and if not by that court, by this court. And so, with of course, the greatest of respect to my Lords, I am not in agreement with the majority judgment. And although I am fully alive to the futility of my dissent, I feel constrained to offer it because of the uneasy feeling I have that the position of customary law on chieftainship succession as it stands and as it has been projected in the majority judgment, is anything but satisfactory.

I should quickly add, lest I be thought unfairly to criticise some of the most senior members in the judicial hierarchy as having in their judgment offered deficient legal reasoning, that there are in fact no glaring legal errors in reasoning that I discern in the majority judgment. The only difficulty I perceive relates to the general approach taken by my learned brothers preferring the majority judgment in coming to the conclusions they reach, particularly granted the fluidity of the law involved in this case,

i.e. customary law, and the absence in the appeal of real questions of law for this court to chew on.

Additionally, both the Court of Appeal and the majority in this court have taken an approach that unduly upsets findings of fact when that was not, in my view, warranted on the particular facts of this case. The unsurprising consequence of that approach by the majority, I think, is that it sets for this court and for that matter, the Court of Appeal, the task of engaging in a factual inquiry which, at the relevant procedural stage, both courts are ill-equipped to conduct.

This, in my considered view, cannot be regarded as a satisfactory discharge by an appellate court, and more grievously the apex court, of its role of interpreting or making law accessible, intelligible, clear and predictable.

To be certain, my disagreement with the majority judgment is predicated on principally two reasons. First, the state of customary law itself as far as it related to chieftaincy succession and whether it can be considered to be the best reflective basis for appeals to this court. In other words, is customary law sufficiently articulable by this court or clear enough to be

amenable to application – leave alone interpretation, by this court? Can this court develop substantive customary law principles in the same way it does judge–made law principles in respect of other areas of life such as contract, tort or land law? What role does this court have in administering customary law?

Second, this appeal, perhaps more than anything else, questions once again the role that different courts in the judicial hierarchy have in making determinations of fact and whether overturning findings of fact is warranted where, for the most part, no tangible legal issues are raised in an appeal.

In truth, these issues call for little discussion, yet in the context of the present appeal, I think it is important to reprise these questions because they are not matters that this court should continue to take uncritically.

Let me also add that in offering this dissent, I am not only answering to my individual conscience but also extending an invitation to the public and the legal profession for a healthy conversation about the law's future development in the area of chieftaincy succession and the role of this court in that process.

I think that it is important to make the basic premise clear: customary law in Zambia derives from the customary practices of each of the 73 or so ethnic groups in the country. These ethnic groups are not homogeneous. Since these customary practices have never been unified or codified, substantive customary law cannot be understood to denote a single common system of law accepted in the whole country, but to customs and traditions regulating the rights, liabilities and duties of the different ethnic groupings.

Customary law, therefore, differs from place to place and from ethnic group to ethnic group; and even from time to time within a single area as times change. It is for this reason that justice premised on the application of customary law does not encompass the elaborate principles and rules such as those one finds under the equally unwritten common law.

That customary law is often uncertain and is continually being changed is clear from a series of judgments in this country where decisions were made by this court based on particular customs within ethnic groups. Thus, in **Mwiya v. Mwiya**[1], it was a Lozi custom on sharing property that was involved; not a general

customary law principle of property sharing. In **Chibwe v. Chibwe**[2], it was an Ushi custom on sharing property that was implicated as opposed to one applicable across the country. In **Kaniki v. Jairos**[3] a Lala custom of 'Akamutwe' was involved – not a general custom.

Viewed in perspective, therefore, there would be no such thing as uniform Zambian customary law. There would, however, potentially be 73 variants of customary laws representing as many ethnic groups in Zambia, on each aspect of life.

Yet, customary law is recognised as a significant source of law. Article 7 of the Constitution of Zambia, Chapter 1 of the Laws of Zambia (Act No. 2 of 2016), states that the source of law include Zambian customary law which is consistent with the Constitution. This section must, of course, be read with the overarching provisions of Article 1 of the Constitution which declares the Constitution to be the supreme law of the land "and any other written law, customary law and customary practice that is inconstant with its provisions is void to the extent of the inconsistency."

Notwithstanding the constitutional recognition of customary law as a source of law, application of customary law is problematic, not just because it is unwritten, but also because it is difficult to build a body of principles from carefully structured analogies from the past owing to the diversity of customs and the need for flexibility to accommodate change. In the end it is impossible to point to any clear body of principles as constituting customary law on many points.

When it comes to chieftaincy succession disputes, ascension to chieftaincy depend on the customary principles of particular chiefdom, and these principles are not the same throughout the 73 ethnic groups in Zambia. A wide sampling of succession disputes confirm this position. This, in my view, poses a serious challenge to the notion of customary law or customary laws to be applied by the courts. It also makes the precedent setting role of this court, as far as substantive customary law is concerned, very difficult if not impossible.

In **Kilolo Ng'ambi v. Opa Kapijimpanga**[4] for example, the Supreme Court was faced with a somewhat unusual situation. Following the death of Chief Kapijimpanga on the throne in 2008, and in

obedience to traditional succession procedures, an electoral college customarily comprising identified members of the royal family assembled to choose the next chief.

When a deadlock was experienced, the electoral college, by a written agreement amongst themselves, deferred the issue to Chief Mujimanzovu to break the impasse by choosing one of the six contenders to be the chief. Chief Mujimanzovu chose the appellant. The respondent, unhappy with that choice, petitioned the High Court to nullify the selection of the chief, contending that the method used did not accord with the known succession customary law of the Kaonde people. The High Court agreed.

On appeal to this court, we set aside the High Court decision stating that the electoral college had properly delegated its authority to choose a successor to the throne to Chief Mujimanzovu who thus properly executed the delegated authority.

In **Netta Shimwambwa Shakumbila v. Patrick Chibamba** [(5)], the appellant was a member of the Shakumbila chieftaincy royal clan who considered herself to be in the line of succession to the Shakumbila chieftaincy. The respondent equally considered

himself to be in the line of succession. Following the death of the incumbent chief in September 2006, disagreement ensued as to who was the rightful heir.

The court heard that following the death of the chief, Sala custom, practice and tradition reposed authority in the senior headman Muchabi who was also known as 'Mukwashi' to nominate a successor to the chief.

On this occasion, Mukwashi appointed the respondent to act as chief out of the five candidates aspiring for the position. The appointee acted as chief until Benson Mwambula, who was not Mukwashi, pronounced the respondent as the substantive chief. This was because the Mukwashi, who was present at the meeting, could not stand up to name the chief owing to a leg problem.

This court held that the Sala people did not appear to have a consistent custom which is clearly discernable in the selection process of the chief. If such a consistent and clearly identifiable practice was in existence, it had not been convincingly explained by the witnesses that testified in court. Consequently, we found no concrete and irrefutable basis upon which to hold that the

respondent's appointment as chief was contrary to any custom, tradition and practice of succession.

In coming to our decision, we contrasted the situation before us then from that which presented itself in an earlier succession dispute decided by us in **Ted Chisavwa Muwowo alias Chief Dangoliya Muyombe v. Abraham Muwowo alias Temwanani Winston Muwowo (suing as Chairman of the Uyombe Royal Establishment)** [6]. In that case we upheld the lower court's decision that where, as in that very case, the custom and procedure for selection of a successor were very clear, the selection of the successor to the chieftaincy should have been done in adherence to the tradition and customs of the people concerned, in that case the Bayombe people.

In **Oggie Muyuni Mudenda v. Dickson Muyeka Kamaala**[7] the parties had differences regarding the rightful heir to the chief Hamaundu throne. The High Court judge highlighted the serious difficulties that she faced in dealing with the case, including the fact that's most of the evidence available was hearsay and the advanced ages of the real witnesses to the customs and traditions made them prone to experiencing senior moments even when they were in the process of giving testimony. On appeal to the Court of Appeal, that court stated as follows:

> **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 to the late chief.**

What is clear from all these cases is that there seems to be no hard-customary law principles that are followed all the time even within the same ethnic groupings. The truth as born out of the cases I have examined, is that customary law relative to chiefly succession is often uncertain and is continually being changed or developed. This should be hardly surprising given that it is recognised in the very definition of 'chief' in the Constitution that such person is one:

> **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 a chiefdom.**

Without venturing to enter into the sacred territory of interpreting the Constitution, which is preserve of the constitutional court, one sees this provision as making the consent of the people in a chiefdom an alternative basis to customs, traditions and usage in bestowing a chief.

As the Supreme Court is the lead court in settling precedents for lower courts to follow, the difficult of doing so in terms of

customary law is self-evident. As the cases I have alluded to above reveal, what the court has managed to do over many disputes it has determined is not to apply anybody of customary law principles as such, but rather general common law principles such as the efficacy of agreement, due process, general conceptions of fairness and other non-discrete adjectival law dictates.

In answer to the questions, I posed earlier on regarding the state of customary law and the role of this court, I would say that customary law on chieftaincy succession, is notoriously difficult to ascertain or define in a way that is exclusive and exhaustive. It is not sufficiently articulable nor is it clear enough to be amenable to neat application by this court. That this court can neither create customary law, nor change it, is fairly obvious. What the court can do, however, is to shape any customary law that properly comes before it and has passed the constitutionality and repugnancy tests, by giving such law an interpretation that imbues it with constitutional values such as non-discrimination, gender equality, dignity and respect for human rights.

Beyond ensuring that all chieftaincy disputes are resolved with elementary fairness and justice consideration in mind there is not much of customary law precedents on legal principles that are easily discernable in case law on succession to chieftainship. This court cannot change customary law either as we recognised in **John Malokotela v. Majaliwa Sitolo Muwaya and Thaya Odemy Chiwela**[8]:

> **Tradition and custom is an accepted way of doing things in community or society. It can be changed through a system of evolution. It cannot be imposed on the people by the court.**

Where there is no law to interpret or create by this court, there may well be no role to play. This in my view explains why appeals in chieftaincy disputes are principally predicated on facts.

It is for this reason that I believe that customary law disputes where the issues revolve around customary law proper, would be better dealt with by other bodies such as a committee of the House of Chiefs or a special *adhoc* tribunal set up for that specific purpose.

As regards the second point on whether or not an appellate court ought to interfere with findings of fact, it is clear to me that the issues that the Court of Appeal entertained, were factual in

content and hinged on the evidence that was adduced before the trial judge.

To recap, the issues which the Court of Appeal raised as requiring determination are laid out [at J36, para 12.0] as follows:

1. **Whether or not the Bundabunda chieftainship system of succession is rotational?**
2. **Whether the Kashimbi family are heirs to the Bundabunda throne?**
3. **Which family lineage should ascend to the throne?**

Although these questions could, strictly speaking, be considered as ones of mixed law and fact – that law being customary law – it is evident from the manner in which the Court of Appeal navigated around them that they were treated as if they were strictly factual questions as evidence the engagement of the court in a factual inquiry. And this is not surprising when we consider the state of customary law as I have explained it in the earlier part of this opinion.

What is beyond debate is that the trial judge is in a unique position to consider the evidence as is presented at trial. An appellate court is not in the same position. Therefore, it is

generally not appropriate for an appellate court to make a different finding of fact.

In the present case, one significant question on which the learned trial judge had to make a decision was whether the Bundabunda chieftaincy was rotational, and if so, amongst which lineages? As noted already, this was the same question the Court of Appeal set for itself.

The learned trial judge carefully considered the different versions given by the warring clan factions regarding what was the obtaining custom and tradition. She quite properly cautioned herself by referring to the case of **Kojo v. Bonsie**[9] where the Privy Counsel warned, in the words reproduced in the majority judgment at paragraph 13.8, on the need for caution when considering evidence on traditions.

Having found that Privy Council statement to be relevant in the dispute before her, the learned judge then analysed the Chief Bundabunda family tree of 17th April 1972 and the circumstances under which it was produced in court at trial by DW4, the Deputy Council Secretary of Chongwe Municipal Council. She considered this in relation to the evidence of each

of the witnesses. The learned judge, after a painstaking analysis, made a very pertinent finding of fact [at J45] that:

> **Thus, I find that the Bundabunda family tree dated 17th April 1972 was so valid and true a depiction of what it communicates. The said family tree does not specifically state the ancestral matriarch of the Bundabunda family, but it tabulates the mothers of the first three chiefs as Malunga, Nyasenga and Tubi. It then tabulates some descendants in detail. A thorough scrutiny of the family tree indicates that it agrees materially with the version advanced by the 5th and 6th Defendants [Kausa Machindalo and Felix Kandolo, now appellants] in that the names they allege to be the ancestral matriarchs of each lineage are akin to the names stated in the family tree. This in turn is contrary to the version advanced by the Kashimbis and Mulongas in that some of the matriarchs stated by the plaintiffs' witnesses (Kashimbis) and those given by the 1st to 4th and 7th defendants (Mulongas) do not appear on the family tree produced by DW4 as such, but where they do appear, they appear as mothers to later chiefs.**

More tellingly, the judge concludes [at J46] that:

> **The family tree filed in 1972 shows the first three chiefs Mboshi, Shakanda and Mubamba as being from Malunga, Nyansenga and Tubi respectively. This position supports the claim by both the plaintiffs and 5th and 6th defendants that the Soli Shamifwi tradition on ascendancy to the throne of Chief Bundabunda has in the past been on rotational basis among the three eligible families. I thus find accordingly.**

The learned judge continued to analyse the evidence as given by various witnesses on either side of the dispute as regards the family tree before she made another critical finding of fact in the following terms:

> **I further find that the first six successive chiefs were Mboshi, Shakanda, Mubamba, Kacheta, Selemani Chiyabweya and Musona who was on the throne in 1972 when the family tree was verified and stamped by the then Rural or District Council. The common**

evidence of the parties is that from 1973/1974 to-date, the chiefs who consecutively ascended to the throne were Jackson Chipungu took over from Lufwaneti. There is no mention of Musona, who is indicated as the chief who was on the throne during the period when the 1972 family tree was lodged. Nevertheless, it is clear that out of the three original lineages, the first one expired due to the fact that at some point, there were no female children to continue the lineage. This gives credence to the fact that there are currently two lineages that are eligible to ascend to the throne of Chief Bundabunda.

Earlier in her judgment, the learned trial judge had explained why only two lineages were eligible to ascend to the throne. In her analysis of the evidence [at p. J46] she stated that:

> **It is apparent that the chief then, who is referred to as the present and sixth chief was Musona, the son of Nyamao. Nyamao is shown to have had only sons and thus had no daughters and it follows that there would be no successors to the throne from this line of the first house after the demise of the sixth chief. This is due to the fact that the chieftaincy is matrilineal.**

In its judgement, the Court of Appeal [at para 12.7] upheld the trial judge's finding that the Bundabunda chieftaincy was rotational, but rejected the conclusion that it was rotation only between two families, namely, the Tubi-Kalifu and Mulonga families. The basis for that rejection was not because of any analysis of the evidence undertaken by the court, as did the trial judge, but merely on the basis of the fact that DW3 (the 5th defendant, Kausa Machindalo) had testified that he had signed the joint report dated 29th August 2013 which stated that the

succession to the chieftaincy was rotational among the three families – including the Kashimbis. The witness' explanation as to why he appended his signature to the report was dismissed by the Court of Appeal on the basis of the parol evidence rule.

In my considered view, the Court of Appeal should not have overturned the trial judge's findings of fact which led it to a different conclusion. To be clear, the trial judge was in a position to make those findings of fact based on the evidence presented at trial. Such evidence was not presented to the Court of Appeal and, therefore, the latter was not in a position to make a different finding of fact from that of the trial judge. The same can be said about the majority in this court.

The majority judgment properly recognises that an appellate court, such as the Court of Appeal should not lightly interfere with a trial court's findings of fact and cite a number of authorities on the principle and the exceptions.

I have noted the authorities cited in the majority judgment on this point and agree with their import. I, however, do not agree with the conclusion reached by the majority that there was either perversity in the findings of the trial judge, or that those findings

were made in the absence of relevant facts or upon a misapprehension of facts.

Perhaps it is apposite to make a further point, namely, that it is all too easy for an appellate court to criticise individual sentences in a judgment or infelicities of language or reasoning employed by a trial judge, notwithstanding that at the end of the day her judgment on the entirety of the evidence may well have been correct.

I think it is important to stress that a judgement should be looked at in the round, particularly where the outcome depends on the judge's assessment of the credibility of the evidence tendered. It should not be picked over or construed as though it were a piece of legislation or a complex piece of commercial contract. Nor should a trial judge be criticised for not mentioning every item of evidence, or reconciling every little discrepancy.

Let me now turn to considering the grounds of appeal before us and why I am of the view that they ought not to have succeeded.

As regards ground one of the appeals, the majority judgment states [at para 14.8] that in evaluating the evidence before it, the trial court confined itself to the 1972 family tree and that she was

not able to resolve inconsistences noted in the document. This, therefore, justified the Court of Appeal's interference with the trial court's findings of fact.

With respect, I do not agree with this conclusion by the majority for two reasons. First, my own reading of the judgment of the High Court reveals that the learned trial judge, in over ten pages, wrestled with the evidence of all the witnesses including that of DW4, the Deputy Council Secretary of Chongwe Municipal Council, who produced the family tree lodged with the council as an official record. She analysed the contents of that document in relation to what each of the witnesses stated. Beyond that, she also analysed the evidence of clay pots and spears in the shrine and made her findings. It is certainly incorrect to assert as the majority judgment does, that the trial judge confined herself to the family tree of 1972.

The trial judge concluded [at J48/49] that:

> **I find that the plaintiffs have not proved to the required standard their claim that Chamapepe was ever a chief or that he ascended to the throne from the Kashimbi family... The plaintiffs have, therefore, not proved to the required standard that the Kashimbi family is eligible to ascend to the Bundabunda chieftainship.**

Second, the family tree of 1972 was lodged at a public office – the Chongwe Municipal Council, as a public record to be consulted

and referred to whenever necessary. This was some forty years before the present dispute arose. The learned trial judge was thus entitled to give full faith and credit to that document unless there was unimpeachable evidence or interference with its contents, particularly by those whose averments were in tandem with it. I thus hold the view that the first ground of appeal had no merit.

Coming to the second ground, the majority judgment has gone deep into reviewing the evidence and the findings of fact and concludes against the finding of the trial court [at para 14.19] that:

> **It is more probable, therefore, that the 10th clay pot was for Chief Chimapepe.**

By getting into the assessment of the factual evidence given by the witnesses and using speculative terms such as I have quoted, the majority, in my view, fell into error. They in effect usurped the role of the trial judge which this court has articulated time and again. In **Makumba and Others v. Greytown Breweries Ltd and Others** [10] this court pertinently observed as follows:

> **We are of the firm view that the assessment of conflicting witnesses' evidence is the province of the trial court; it does not belong here. As we stated in *Attorney General v. Kakoma*[11] a court is entitled to make findings of fact where the parties**

advance directly conflicting stories and the court must make those findings on the evidence before it having seen and heard the witnesses giving that evidence.

The third ground of appeal before us takes issue with the findings of the trial judge that the 1972 family raised a horde of issues which the trial judge did not resolve thus justifying interference of her findings of fact by the appellant court. The majority in this court equally believe that there are inherent contradictions in the versions of the witnesses which the trial judge did not consider. It will be recalled that the majority judgment has also taken issue with the trial judge because of her supposed overreliance on the family tree of 1972.

I have already made the point about a trial judge's role to reconcile conflicting evidence and make findings of fact. I have explained why I think the trial judge did a good job of it and should have been given plaudits rather than excoriation.

In the fourth ground of appeal before us, it was contended that the joint report signed between representatives of the Kashimbi family and the Tubi-Kalifu family acknowledged that the Kashimbi family was part of the Bundabunda royal family and is entitled to assume the chieftaincy on a rotational basis. A

relevant portion of that report is quoted in the majority judgment at paragraph 14.27.

The majority judgment goes further to quote from the case of **National Drug Co. and Privatisation Agency v. Mary Katongo[12]** to support the position that as the joint report was signed by the first appellant, he is bound by it. The judgment goes further to quote the criminal law authority of **Haonga & Others v. The People[13]** which settled that where a witness has been found untruthful on a material point the weight to be attached to the remainder of the evidence is reduced.

I respectfully disagree with the judgment of the majority on this point as well. First, I do not discern any dishonesty in the evidence of the first appellant from the explanation he gave as to why he signed the joint report. He stated that he signed it involuntarily to forestall the installation of a candidate from the Mulonga family and that he had no authority to sign it.

I think that in any event the contents of the joint report are substantially true and reflect the custom and tradition of the Soli people of Bundabunda chiefdom. The three families, including the Kashimbi family were entitled to assume chieftaincy on a

rotational basis. This was a finding made by the trial judge the relevant portion of which I reproduced earlier on in this dissent. The story does not, however, end there, ascension to the throne, though done on a rotational basis among the three families, was above all, to follows a matrilineal system. In her judgment, the trial judge did allude to this fact in a passage I quoted earlier on in this opinion.

My view is that this finding accords with what was in the joint report, namely, that the three families have traditionally been eligible to assume the chieftaincy on a rotational basis. Yet, the learned judge, after analysing the evidence before her, gave the reason for the rotational ascendancy to chieftaincy becoming restricted to two of the three families when she stated as follows [p. J46] (and I reproduce it for emphasis):

> **It is apparent that the chief then, who is referred to as the present and sixth chief was Musona, the son of Nyamao. Nyamao is shown to have had only sons and thus had no daughters and it follows that there would be no successors to the throne from this line of the first house after the demise of the sixth chief this is due to the fact that the chieftainship is matrilineal.**

Second, even assuming that the joint report were to be taken for what it says, it does not and cannot change a cultural traditional or customary practice. In other words, whether or not the

appellant had stated or committed himself to the position that all three eligible families were entitled to ascendancy to the throne on a rotational basis, it cannot supersede or upset the custom and tradition of the Soli people.

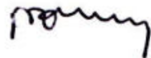
That custom, tradition or practice was that they were matrilineal and, therefore, where in a family there was no person to be drawn from the matrilineal lineage, such family is technically unable to offer a successor.

Pushed to its logical limit, the implication of the holding of the majority on the first appellant's signing of the joint report is this; that a few people in a customary setting affected by a certain custom or tradition, are at liberty to vary it by agreement such as that contained in the joint report, and that such variation of a custom or tradition should bind all the folks in a chiefdom. I do not think that this can be the correct position because that particular report or agreement did not represent the consent of all the people of the chiefdom.

I do think, however, that to attach the weight and significance to the joint report as the majority judgment does, is to give preclusive effect to an 'agreement' beyond the parties to it. A

customary practice or custom cannot be changed overnight on signature by agreement between a small number of parties.

It is for all these foregoing reasons that I would be inclined to uphold the appeal.



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Mumba Malila
CHIEF JUSTICE