

**IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*

**2022/HP/ 1800**

**IN THE MATTER OF : ARTICLE 1(3) AND 2 OF THE CONSTITUTION  
OF ZAMBIA ACT NO.2 OF 2016**

**IN THE MATTER OF : ARTICLES 13,17,15,20 AND 28 OF THE  
CONSTITUTION OF ZAMBIA**

**IN THE MATTER OF : THE PROTECTION OF FUNDAMENTAL  
RIGHTS REGULATIONS,1969**

**IN THE MATTER OF : THE ACTIONS BY THE ZAMBIA POLICE  
SERVICE, AGENTS OF THE RESPONDENT TO  
BREAK INTO THE PETITIONER'S RESIDENT  
WITHOUT A WARRANT PERMITTING THEM  
TO ENTER THE PREMISES**

**IN THE MATTERS OF : THE ACTIONS BY THE ZAMBIA POLICE  
SERVICE AGENTS OF THE RESPONDENT TO  
DETAIN THE PETITIONER WITHOUT  
FORMALLY CHARGING AND ARRESTING HIM**

**IN THE MATTER OF : THE ACTIONS BY THE ZAMBIA POLICE  
SERVICE, AGENTS OF THE RESPONDENT BY  
TORTURING A LAW - ABIDING CITIZEN PRE  
AND POST EFFECTIVE THE ILLEGAL  
DETENTION**

**IN THE MATTER OF : THE ACTIONS BY THE ZAMBIA POLICE  
SERVICE, AGENTS OF THE RESPONDENT TO  
CURTAIL THE PETITIONER FROM  
BROADCASTING HIS DAILY LIVE SEGMENT  
ON HIS FACEBOOK PAGE**

**BETWEEN:**

**CHILUFYA TAYALI**

**AND**

**ATTORNEY GENERAL**



**APPLICANT**

**RESPONDENTS**

**Before the Honourable Ms. Justice S. Chocho, in Chambers.**

*For the Applicant:* No Appearance

*For the Defendant:* Ms N. Choongo, Acting Principal State Advocate  
and Mr. K. Malikebo State Advocate – Messrs  
Attorney General Chambers.

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## **J U D G M E N T**

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**Cases referred to:**

1. *Silungwe V The People (1974) ZMHC 3 and Re Siuluta And Three Others ZR (1979)*
2. *Getrude Munyonsi, Attorney General V Ngalabeka SCZ 23 OF 1999*
3. *The People V Ronney Chinyama and 4 Others HP/ 089/2020*
4. *Attorney General Vs Roy Clark Appeal NO.96A/2004*
5. *Law Association of Zambia V Attorney General SC 46 (2016)*
6. *Christine Mulundika V The People SCZ NO. 25 OF 1995*
7. *The People V. Austine Chisanga*
8. *Golden Peter Mwanza and Melvin Beene V Attorney General Appeal NO. 153 of 2016*

**Legislation referred to:**

1. *Section 69 of the Cyber Crimes and Security Act No. 2 of 2021*
2. *Article 28 of the Constitution Chapter 1 of the Laws of Zambia*
3. *Articles 17, Article 13, Article 15 and Article 20 of the Constitution of Zambia*
4. *Section 15 (7) of the Zambia Police Act Chapter 107 of the Laws of Zambia*
5. *Section 33 of the Criminal Procedure Code*

### **1. INTRODUCTION**

- 1.1 This Judgment is in respect of petition filed by the Petitioner claiming us against the Respondent, the following reliefs:

### **J3**

- 1.1.1 A declaration that the actions of the Respondent's contravenes the Constitution of Zambia.
- 1.1.2 A declaration that the Petitioner's rights to protection to right of personal liberty, protection of right to privacy of property, right to freedom of expression and speech and protection in inhuman and degrading treatment have been infringed.
- 1.1.3 A declaration that the detention of the Petitioner without being charged is and was illegal and against the Bill of Rights.
- 1.1.4 Costs of incident to this Petition.
- 1.1.5 Such declaration and order of the Court may deem it.

## **2. BACKGROUND AND AFFIDAVIT EVIDENCE**

- 2.1 The background will be this matter as per pleadings and affidavit evidence is that the Petitioner's rights were infringed by the actions of the Respondents.
- 2.2 The Petitioner by affidavit verifying Petition date to 15<sup>th</sup> November, 2022 and sworn by the Petitioner **CHILUFYA TAYALI** avers that on the 13<sup>th</sup> November, 2022 whilst he was at home with his family,

the Respondent (Police officers from Crime Division or Zambia Police Headquarters and the Anti - Flying Squad) surrounded his residence and without a warrant intending to take him to their offices.

- 2.3 The Petitioner further avers that he refused to surrender himself to the officers but instead called his lawyers and after availing them instructions the Respondent was informed that the Petitioner would be presented to the Responding the very next day.
- 2.4 The Petitioner further avers that without warrant and totally ignoring his lawyers undertaking the Respondent forced their way into his residence by breaking the gate, forced him out of the house and whisked him to Police Headquarters.
- 2.5 The Petitioner avers that during the ordeal he was on live Facebook broadcast which was cut short due to the forced entry onto his premises by the Respondent.
- 2.6 The Petition further avers that he was transported to Police Headquarters, later to Chilenje Police Station and then transferred to Mussamba Community Police posts.

- 2.7 The Petitioner further avers that he was tortured by the Respondent, at his residence and unrouted to Chilanga Police Station.
- 2.8 The Petitioner avers in his affidavit that he was in unlawful detention without formal charge or arrest.
- 2.9 The Respondent opposed the petition by answer and affidavit in support of answer both filed on 16<sup>th</sup> February 2023.
- 2.10 The Respondent by affidavit sworn by one Joseph Simuchembu avers that it received an inquiry file into alleged offence of harassment utilizing means of electronic communication contrary to **Section 69 of the Cyber Crimes and Security Act No. 2 of 2021**.
- 2.11 The Respondent further avers that the entry search and arrest was with the warrant and lawful.
- 2.12 The Respondent avers that their officers were met with the hostility on the part of the Petitioner who refused to cooperate and did not open and thereby Respondent proceeded to force the gate open.

2.13 The Respondent avers that the Petitioner was on 14<sup>th</sup> November, 2022 warned and cautioned in the presence of his Legal Counsel. The Petitioner now was officially charged for the offence of harassment utilizing means of electronic communication contrary to Section 69 of the Cyber Crimes and Security Act No. 2 of 2021.

2.14 The Respondent further avers that the Petitioner was later released on Police bond and that there was no breach of the Petitioner's Constitutional Rights.

### **3. THE LAW AND SUBMISSIONS**

3.1 The matter was scheduled for hearing on, three separate dates from October, 2023 to January, 2024 and the record will show that the Petitioner has never attended before this Court and no excuse was ever advanced. At the hearing of 18<sup>th</sup> January, 2024, the Respondent applied that the Court proceed to deliver Judgment on the evidence and legal arguments. I considered this in the interest of justice.

3.2 I shall not reproduce the submissions and skeleton arguments filed by the parties, suffice it to state that I have duly considered the same I am indeed grateful to counsel.

3.3 Principally the Petitioner submits that the Court has power to redress the violation of fundamental rights, as provided under **Article 28 of the Constitution Chapter 1 of the Laws of Zambia:**

**“subject to clause (5), if any person alleges that any of the provisions of Articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court which shall**

**(a) Hear and determine such application**

**(b) Determine any question arising in the case of any person; which is referred to it”**

3.4 The Petitioner submits that the Respondent breached the provisions of **Articles 17, Article 13, Article 15 and Article 20 of the Constitution of Zambia**, in relation to him and thereby infringed on his human rights.

3.5 The Petitioner submitted that the Respondent forcefully gained entry to his premises without a warrant and removed him from the premises reference was made to the **Section 15 (7) of the Zambia Police Act Chapter 107 of the Laws of Zambia.**

- 3.6 The Petitioner submitted that Respondent action to detain him without formal charge and arrest is a violation of his personal liberty. The Petitioner referred to the case **SILUNGWE VS. THE PEOPLE (1974) ZMHC 3 and RE SIULUTA AND THREE OTHERS ZR (1979)<sup>1</sup>**. Petitioner also relied on the cases **GETRUDE MUNYONSI, ATTORNEY GENERAL VS NGALABEKA SCZ 23 OF 1999<sup>2</sup>** and **THE PEOPLE VERSUS RONNEY CHINYAMA AND 4 OTHERS HP/ 089/2020<sup>3</sup>**.
- 3.7 The Petitioner submitting that the Respondent had no right/power to arrest/detain him for purposes of investigations. He submits and claims conduct akin to false imprisonment.
- 3.8 The Petitioner submits that the Respondent has no mandate to torture and beat an individual as this is in violation of Article 15 of the Constitution of Zambia.
- 3.9 The Petitioner relied on the case the **ATTORNEY GENERAL VS ROY CLARK APPEAL NO.96A/2004<sup>4</sup>** and the case of **LAW ASSOCIATION OF ZAMBIA V ATTORNEY GENERAL SC 46 (2016)<sup>5</sup>**.
- 3.10 The Respondent on the other hand, in its Skeleton argument dated the 16<sup>th</sup> February, 2023, submitted that the police officers

performed. The Respondent particularly submits that the officers had a warrant to search and arrest and also that the Petitioner was duly arrested and charged with an offence of Harassment utilizing means of electronic communication. The search warrant is exhibited as "JS1".

3.11 The Respondent relied on provisions of Article 1 (3) and submitted that the Constitution shall bind all persons in Zambia, state organs and state institutions.

3.12 The Respondent relied on the Article 13(1) (e) of the Constitution of Zambia, Chapter 1 of the Laws of Zambia that provides as follows:

***"13. (1) a person shall not be deprived of his personal liberty except as may be authorized by law in any of the following cases:***

***(e) upon reasonable suspicion of his having committed, or being about to commit, a crime offence under the law in force in Zambia.***

3.13 The Respondent Invites the Court to dismiss the Petitioner's claims as the same fall under justiciable rights and placed the reliance of several case authorities including **CHRISTINE MULUDIKA AND 7 OTHERS V THE PEOPLE SCZ 25 OF 1995<sup>6</sup>,**

**THE PEOPLE V. AUSTINE CHISANGA AND GOLDEN PETER  
MWANZA<sup>7</sup> AND MELVIN BEENE V ATTORNEY GENERAL  
APPEAL NO. 153 OF 2016<sup>8</sup>.**

**4. COURT DECISIONS**

- 4.1 The clear and undisputed fact is that the Petitioner was picked up from his premises on the 30<sup>th</sup> November, 2023 and by the Respondent and taken firstly to Police Headquarters Chilanga Police Station and finally to Musamba Community Police post.
- 4.2 It is also undisputed that the prior to the Respondent picking up the Petitioner, the Petitioner was conducting a live Facebook broadcast.
- 4.3 The parties are not in agreement as to the legality of the Respondent's entry into the Petitioner's premises, the pick up of the Petitioner, and his detention.
- 4.4 This Court has to answer the question/s of whether the Petitioner's human rights were violated/infringed by the Respondent's actions or not. I shall do with each of the human rights as claimed to have been violated.

4.5 The Respondent alleges violation infringement of his right to personal liberty as set out by Article 13 and Article 17 of the Constitution of Zambia which provides:

*“No person shall be deprived of his personal liberty except as may be authorized by law in any of the following cases:*

- a. In execution of sentence or order of a Court, whether established for Zambia or some other country, in respect of a criminal offence or which he has been convicted;*
- b. In execution of an order of a Court of record punishing him for contempt of that Court or for a Court inferior to it;*
- c. In execution of an order of a Court made to secure the fulfillment of any obligation imposed to him by Law;*
- d. For the purpose of bringing him before a Court in execution of an order of a Court.*
- e. Upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the Law in force in Zambia.*

- f. Under an order of a Court or with consent of his parent or guardian, for his education or welfare during any period ending not later than the date when he attains the age of eighteen years;*
- g. For the purpose of preventing the spread of an infectious or contagious disease;*
- h. In the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of this care or treatment or the protection of the community;*
- h. For the purpose of preventing the unlawful entry of that person into Zambia, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Zambia or for the purpose of restricting that person while he is being conveyed through Zambia in the course of his extradition or removal as a convicted prisoner from one country to another; or*
- j. To such extent as may be necessary in the execution of a lawful order requiring that person to remain a from being area within Zambia or prohibiting him from being within such area, or to such extent as maybe reasonably*

*justifiable for the taking of proceedings against that person relating to the making of any such order, or to such extent as may be reasonably justifiable for restraining that person during any visit that he is permitted to make to any part of Zambia in which, in consequence of any such order, his presence would otherwise". (emphasis ours).*

4.6 The Petitioner avers that the Respondents surrounded his premises or residence without warrant or that no warrant was shown to him by the Respondent. That the Respondent forced their way into the premises by breaking the gate and forcing him out of the house. The Respondent maintains that they forced the gate open when the Petitioner failed to cooperate with them.

4.7 The record shows that the Respondent had search and arrest warrant detained.

4.8 I find that the provisions of Article 13 of the Constitution of Zambia exempting deprivation of liberty. The evidence of record shows that the Respondents operating under suspicion of commission of a criminal offence, obtained and executed a search warrant on the Petitioner's premises and further picked up the Petitioner as their prime suspect.

- 4.9 The Petitioner maintains that he was exercising his rights and freedom of expression and speech when the Respondents entered his premises and by their actions he had to cut off/stop the live stream. It would be totally absurd to assume that one should be allowed to break the law and commit an offence in the name of freedom of expression. It is trite that one's freedoms/rights end where the next person's freedoms/rights begin. Reference is made to the case of **CHRISTINE MULUNDIKA V THE PEOPLE SCZ NO. 25 OF 1995**. A very delicate balancing act must be undertaken with application of fundamental freedoms.
- 4.10 The Petitioner has not shown proof or evidence of the alleged torture, cruel, degrading punishment and/treatment. No medical reports or pictures of injuries is before court. Suffice it to state that the state agents have no right to torture, or subject any person to cruel degrading treatment.
- 4.11 It would appear to me that the Petitioner's right to liberty was deprived pursuant to Article 13 of the Constitution. It follows then that the Respondent has shown justification for their entry into their Petitioner's premises and search of the premises.

4.12 The Petitioner avers that he was detained by the Respondent without charge and arrest.

4.13 The record shows that the entire episode between the Petitioner and Respondents transpired from about 16:00 hours on 13<sup>th</sup> November to 14<sup>th</sup> November 2022. Reference is made to this period for the Court to determine whether the Respondents went outside the law as provides for detention and arrests or change of suspects.

4.14 The law has provides in **Section 33 of the Criminal Procedure Code** requires that a person arrested or detained must be taken to court within 48 hours. The record shows that the Petitioner was in fact charged and released on bond on 14<sup>th</sup> November 2022 in under 48 hours from his date of detention.

4.15 The Petitioner submits that his freedom of expression was violated, contrary to Article 20 of the constitution.

It is clear from the record that the respondent did interfere/curtail the Petitioner's Facebook broadcast when the officers entered his premises and picked him up.

4.16 It is trite that the Petitioner has the freedom to hold opinions without interference and the freedom to import and communicate

ideas and information without interference as provided in Article 20 of the Constitution.

4.17 I find that the Respondent did interfere with the Petitioner's freedoms as protected under. There is nothing on record showing/suggesting that the contents of the information/communication was illegal or criminal. The Respondents do not show if the arrest was in relation to the Petitioner's live broadcast.

4.18 I shall again make reference to the authority in the Christine Mulundika case. The Constitution as the supreme law of the land grants individuals with rights and freedoms which need to be protected. The record does not show exactly what the Petitioner was sharing/expressing during the said live broadcast but this Court has a duty to ensure, persons' rights and freedoms are not violated/infringed without lawful cause.

## **5. CONCLUSION**

5.1 For the foregoing reasons I find that the Respondents did not infringe the Petitioner's rights to protection of personal liberty/right to privacy of property. The Respondent did in fact act

within the confines of the law in execution of the search and arrest warrant.

5.2 I further find that the petitioner was in fact duly charged and arrested, his detention was within the legally allowable time frame.

5.3 I find that Respondent did infringe the Petitioner's right to freedom of expression and speech, by disturbing or terminating the live stream.

5.4 I order that each Party bears it's own costs.

5.5 Leave to Appeal is granted.

Delivered at Lusaka on 9<sup>th</sup> July, 2024.



**S. CHOCHO**  
**HIGH COURT JUDGE**

