

IN THE HIGH COURT OF ZAMBIA

HPA/01/2025

HOLDEN AT LUSAKA

(Criminal Jurisdiction)

BETWEEN:

RAPHAEL MANGANI NAKACHINDA

APPELLANT

AND

THE PEOPLE

RESPONDENT

**BEFORE HONOURABLE LADY JUSTICE ANN MALATA-ONONUJU
IN OPEN COURT ON THE 21ST DAY OF OCTOBER, 2025.**

*For the Applicant: N. Botha with Mr. M Chongola Messrs. Makebi
Zulu*

*For the Respondent: Mrs. S. Banda, State Advocate – National
Prosecution Authority*

**JUDGMENT ON APPEAL AGAINST CONVICTION
AND SENTENCE**

CASES REFERRED TO:

1. *Mwewa Murono Vs The People Z.R. 207 (SC);*
2. *Davies Chishala and Tony Nyemba Vs The People Appeal No. 15, 16/2021;*
3. *The People Vs Bright Mwape and Fred M'membe (1995) ZR SH;*
4. *Sikunyema Vs The Queen (1963-1964) Z.N.R. L.R. 66;*
5. *Muzyamba Vs The People (1975) ZR 83 (SC);*
6. *Bevin Ndovi Vs The Post Newspaper Limited and Times Print Pak Zambia Limited, SCZ Judgment No.8 of 2011;*

7. *The People Vs Bright Mwape Fred M'membe* (S.C.Z. Judgment No. 4 of 1996);
8. *The Attorney General Vs Roy Clarke* Appeal No. 96a/2004;
9. *Fred M'membe and Bright Mwape Vs The People* (Fred M'membe, Masautso Phiri and Goliath Mungonge Vs The People);
10. *John Banda Vs The People* SCZ Appeal No. 183 of 2013.

LEGISLATION REFERRED TO:

1. *The Penal Code Act, Chapter 87 of the Laws of Zambia;*
2. *The Constitution of Zambia, Chapter 1 of the Laws of Zambia;*
3. *The Interpretations and General Provisions Act Chapter 2 of the Laws of Zambia;*
4. *The Penal Code (Amendment) Act No. 23 of 2022 of the Laws of Zambia; and*
5. *The Court of Appeal Rules, Act No. 7 of 2016 of the Laws of Zambia.*

OTHER WORKS REFERRED TO:

1. *Black's Law Dictionary*, Bryan A. Garner (ed) 9th Edition, St. Paul Minn: West Publishing Company, 1979;
2. Tony Weir: *An Introduction to Tort Law*, 2nd Edition, Oxford University Press, 2006;
3. Speaker A., Strong C., and Busuttil G: *Gatley on Libel and Slander*, 11th Edition, Sweet and Maxwell, 2008; and
4. *Phipson on Evidence*, 17th Edition, London, Thomson Reuter, 2010.

1. INTRODUCTION

- 1.1 The is an Appeal by the Appellant (the Defendant in the Court below) against the Judgment of the Subordinate Court delivered on 21st May, 2024. By that Judgment, the Subordinate Court convicted the Appellant for the offence of Defamation of President pursuant to **Section 69** of the **Penal Code, Chapter 87** of the **Laws of Zambia**, and sentenced him to one year six months simple imprisonment.
- 1.2 The Appellant stood charged and was found guilty of the offence of **Defamation of President**, contrary to **Section 69** of the **Penal Code, Chapter 87** of the **Laws of Zambia**, and he was sentenced to one year six months simple imprisonment.
- 1.3 The particulars of the offence were that the Appellant on 13th December, 2021, at Lusaka in the Lusaka District of the Republic of Zambia, with intent to bring the President of the Republic of Zambia, Mr. Hakainde Hichilema, into hatred, ridicule, or contempt, did cause to publish defamatory matter by word of mouth, where he addressed people at the High Court for Zambia, which was also broadcasted by Muvi Television that:

“His Excellence President Mr. HAKAINDE HICHILEMA has summoned Judges at his private residence, intimidating and coercing them to frustrate P.F legal battles.”

2. THE BRIEF FACTS

- 2.1 In the furtherance of their case, the Prosecution called six (6) witnesses.
- 2.2 **PW1, HARDSON MABETA**, a Politician and MP for Kankoyo under the United Party for National Development (UPND) testified that on 13th December, 2021, around 18:00 hours, he went to Parliament Motel and while in his room started watching the news on MUVI TV and there was a news item where the Patriotic Front Party (PF) was quoted, complaining that President Hakainde Hichilema was interfering with the Judiciary in an attempt to create a one-party state.
- 2.3 It was **PW1**'s testimony that on 14th December, 2021, he reported the matter to Woodlands Police Station, Lusaka, as he was disturbed as a law maker by the video clip he had seen indicating that the Republican President had an agenda to form a one-party state. **PW1** identified the Appellant as the person in the video-clip, having known him since 2019.
- 2.4 He testified in cross-examination that he did not meet President Hakainde Hichilema after watching the news clip, and neither did he speak to him. That he did not see the President meet with the Judges and did not know if President Hichilema met the Judges.
- 2.5 **PW2, MOSES KALONDE**, a Businessman testified that on 13th December, 2021, he was home around 18:30 hours,

watching the MUVI TV news when there was a news item attributed to the Appellant where he was quoted as having said that the 'binoculars' had picked as he was zooming over weekend that President Hichilema was not sleeping as he had been summoning Judges to his house to try and intimidate them or coerce them to advance an agenda to bring a one-party state. **PW2** testified that he had known the Appellant for 10-11 years and identified him in Court.

2.6 He testified that he felt aggrieved as a law-abiding citizen and proceeded to report the matter to the Police at Central Police Station, Lusaka, on 14th December, 2021. That he did not know President Hichilema on a personal level but knew him as the President of the Republic of Zambia.

2.7 **PW3, ERIC MWABEMBE**, a Businessman, testified that on 13th December, 2021, while browsing Facebook around 18:00 hours came across a video that had been posted on the MUVI TV Facebook page. He testified that he watched the Appellant addressing the media near the High Court grounds saying in the video-clip that: ***“as we were coming here, we were zooming over the weekend Hakainde Hichilema is not sleeping as he has begun to call upon Judges to his house or summon Judges to his house to try and intimidate them or coerce them to advance an agenda to create a one-party state in the country.”***

- 2.8 That as this statement was disrespecting the President, and on 14th December, 2021, he reported the matter to Woodlands Police Station, Lusaka.
- 2.9 That the President did not tell him his reputation was injured nor did he inquire from him if his reputation was injured or not. That the President is a government asset and must be protected.
- 2.10 **PW4, ALFRED NJOJI CHIPOYA**, a Senior Private Secretary to the President testified that his duties are to manage the President's office on routine incoming and outgoing mails, which he responds to. He maintains the President's diary for appointments, clearance of persons meeting with the President by taking their particulars to ensure their details are recorded for security reasons when they meet with the President.
- 2.11 He testified that on 22nd December, 2021, he was visited by Police Officers to find out the issue of the appointment of the Presidents diary between the 1st week of December, to 22nd December, 2021. That he was asked whether the President had met any Judges or anyone from the Judiciary during that period and he explained that the President had not met with any Judge, Magistrate or Judicial Officer during the period as there was no such visitation.
- 2.12 **PW5, INNOCENT PHIRI**, a Journalist testified that he works at MUVI TV, where he has been for 16 years as TV

Broadcaster and now Head of Current Affairs and Productions.

- 2.13 That on 14th December, 2021, he covered an event involving the Appellant who was among several Members of Parliament (MPs) who had gone to the High Court to offer solidarity to some MPs of the PF who had been expelled from Parliament by the Speaker.
- 2.14 That it was there the Appellant informed the Press that he had received information indicating that President Hichilema was intending to summon the Judges at his Community House, with the intention to interfere with the officers of the Judiciary in line with the case they had submitted before Court and that was the end of the briefing.
- 2.15 It was **PW5**'s testimony that he then went back to the office and packaged the story in readiness for the publication on the main news at 18:30 hours and repeated at 21:15 hours.
- 2.16 **PW6, INNOCENT MAKUKUKWANI** a Police Officer based at Police Headquarters testified that on 13th December, 2021, whilst on duty, the Officer in Charge assigned him to investigate a case of Defamation of the President where the Appellant made remarks at the High Court grounds where he addressed a group of people, and was broadcasted on several platforms, including MUVI TV and in this address he alleged that the President, his

Excellency Mr. Hakainde Hichilema, had started summoning Judges to his residence at night in order to coerce them to turn the country into a one-party state.

2.17 That **PW6** obtained footage from MUVI TV and was able to identify the Appellant uttering the said words. He then met up with **PW4** at State House and a perusal of the diary showed that the President had no appointment to meet the Judges or Judicial Officers that the Appellant had referred to.

2.18 This marked the close of the Prosecution's case.

2.19 The Defence called four (4) witnesses.

2.20 The Appellant herein, **DW1**, testified that the words on the indictment did not depict and express what he had said and the meaning in its full context of what he was communicating.

2.21 It was **DW1**'s testimony that after President Hichilema was inaugurated on 26th October, 2021, as a Politician, the Appellant felt that he needed to play his role in offering checks and balances, upholding the tenets of democracy in a multi-party state or country. To this effect, on 28th August, 2021, **DW1** launched what he termed 'Operation Binoculars,' which aids one to see something whose details you are unable to capture and it had a mechanism to zoom that image closer for a better view of it.

- 2.22 That when he came across information, he spoke on it expecting that those in Government would respond to either clarify, confirm or deny the said information.
- 2.23 **DW2, PATRICK BANDA** testified that in 2021, the Electoral Commission of Zambia (ECZ) had announced the General Election results and he thought he could participate in Lusangazi as Council Chairperson. He testified that he intended to stand on the PF ticket, but another candidate was chosen.
- 2.24 That he was then approached by Mr. Levy Ngoma, who had discovered that he was a popular candidate in that area, and asked him to contest under the UPND. It was **DW2's** testimony that he was asked to choose as the PF was in opposition and UPND was the ruling party. That Mr. Ngoma told him that even if he won the elections, he would not step in the chamber as the elections would be nullified and Mr. Gary Nkombo told him that they were now controlling the system.
- 2.25 It was **DW2's** testimony that Mr. Mulambo Haimbe, then Minister of Justice, told him that the courts were in his hands and the Judges and Magistrates were under his control. That **DW2** is the one who told the Appellant that it was Mr. Levy Ngoma, Christopher Mundia and others at Eureka Park who said that Magistrates and Judges are met by the President at State House.

- 2.26 **DW3, LOGIC LUKWANDA**, a Journalist at PRIME TV testified that on a particular day, whilst in the field covering a story of PF MPs at Lusaka High Court, after the case was adjourned, the senior PF members, including the Appellant gathered outside the Court premises where they issued various statements regarding what they had gone there for.
- 2.27 That he was the one who packaged the news item and could neither deny nor admit that the said defamatory statement was made.
- 2.28 **DW4, SYDNEY MULENGESHI**, a Legal Practitioner testified that he received a call on 12th April, 2022 from Honourable Levy Ngoma who asked if he had time to speak to a potential client which he answered in the affirmative. He was then told that the said client was **DW2**, who would call him to consult on a legal matter.
- 2.29 **DW4** testified that he did not know the offence the Appellant was charged with. That he received a phone call from Mr. Levy Ngoma but there was no record of communication between himself and Mr. Ngoma.
- 2.30 The Subordinate Court found that the Appellant did cause to be published from his mouth words that were defamatory to the President, as the intention was to have the President ridiculed and expose him to hatred for interfering with the Judges thereby impeding their independence or to be in contempt of the President.

2.31 The Appellant was thus found guilty of the offence of Defamation of the President, contrary to **Section 69** of the **Penal Code, Chapter 87** of the **Laws of Zambia**, and was sentenced to one year six months simple imprisonment.

2.32 Being dissatisfied with the Court's judgment rendered on 21st May, 2024, the Appellant now appeals to this Court raising Seven (7) Grounds of Appeal, as follows:

GROUND ONE

The trial Court erred in both law and fact by concluding that the Appellant did not legitimately criticize the President contrary to the evidence.

GROUND TWO

The trial Court erred by convicting the Appellant against the weight of the evidence presented.

GROUND THREE

The trial Magistrate erred in both law and fact by holding that the Appellant had defamed the President when he commented on a matter of public interest.

GROUND FOUR

The learned trial Magistrate erred in both law and fact by ruling that the Prosecution had proved its case beyond reasonable doubt, despite the failure to establish the essential elements of the offence of defamation of the President.

GROUND FIVE

The trial Court erred in both law and fact by failing to recognise that the words alleged in the charge sheet were inconsistent with the evidence presented and contextually flawed.

GROUND SIX

The trial Magistrate erred in law and fact when she misconstrued the alleged statement to be against the Judiciary and used the same reasoning to impose the sentence when the evidence suggests that the alleged statement was in defence of the Judiciary and Democracy.

GROUND SEVEN

*The trial Court erred in both law and fact by failing to consider or electing not to consider the guidance provided in the case of *Muzyamba v. The People* when determining the sentence to impose.*

3. THE APPELLANT'S HEADS OF ARGUMENT

- 3.1 The Appellant filed Heads of Argument on 22nd January, 2025.
- 3.2 The Appellant stood charged and was found guilty of the offence of **Defamation of the President** contrary to **Section 69** of the **Penal Code Chapter 87** of the **laws of Zambia** and he was sentenced to one year six months simple imprisonment. Being dissatisfied with the Court's Judgment, he now appeals to this Court raising Seven (7) Grounds of Appeal. The said Grounds were argued in the order that they appeared.

GROUND ONE

- 3.3 Counsel for the Appellant contended that the trial Court erred in both law and fact by concluding that the Appellant did not legitimately criticize the President contrary to the evidence.
- 3.4 Counsel submitted that **Section 69** of the **Penal Code Chapter 87** of the **Laws of Zambia** proscribes Defamation of President in the following terms:

“Any person who, with intent to bring the President into hatred, ridicule or contempt, publishes any defamatory or insulting matter, whether by writing, print, word of mouth or in any other manner, is guilty of an offence and is liable on conviction to imprisonment for a period not exceeding three years.”

- 3.5 That the burden to prove each and every element of the offence is on the Prosecution as laid down in the case of **Mwewa Muroso Vs The People**¹ and in that case, the Supreme Court of Zambia held that:

“In criminal cases, the rule is that the legal burden of proving every element of the offence charged, and consequently the guilt of the accused lies from beginning to end on the prosecution.”

- 3.6 That it is the settled principle of law that failure to prove one element of the offence raises doubts and proves that the Prosecution has failed to prove their case.
- 3.7 Counsel drew the Court's attention to the case of **Davies Chishala and Tony Nyemba Vs The People**², where the Supreme Court held that:

“If there is reasonable doubt on any point which requires to be proved in a criminal matter then the prosecution has not discharged its burden of proof on that point; save, of course, if it is a point on which the burden of proof has shifted to the accused.”

- 3.8 It was Counsel's submission that **Section 69** of the **Penal Code Chapter 87** of the **Laws of Zambia** criminalizes defamatory remarks against the President and sets up a number of elements that must be proved by the Prosecution in order to secure a conviction and one of the key elements that the State must prove is the absence of lawful justification or privilege. To satisfy this requirement, the State must demonstrate that the Accused lacked any lawful basis to make the statement in question.
- 3.9 That at page J33, the Court below found that the Appellant did not verify the information and the Court stated as follows:

“This information was told to the Accused and that Levy Ngoma rang DW2, he did not verify this information as Publicity Secretary as DW2 was telling the Accused that Levy Ngoma told him that they were controlling the system. Further that Christopher Mundia advised him to follow the advice of not appealing the Tribunal outcome as Magistrates, High Court Judges, Supreme and Constitutional Court Judges meet with the President at State House and tell when to set free....”

- 3.10 Counsel pointed out that there was and still is no requirement for verification of information that was given to the Appellant as he was told and some of this information was said in his hearing.
- 3.11 That the Appellant had justification to make the statement he made in the interest of protecting the sanctity of institutions and lawful justifications include statements made in good faith on matters of public interest.
- 3.12 That the evidence presented unequivocally shows that the matters leading to the Accused's statement, as described by **DW2**, involved issues of significant public concern.
- 3.13 It was Counsel's submission that **DW2**'s testimony detailed grave experiences, including threats, abduction,

and interactions with individuals closely associated with the President and crucially, it remains uncontroverted that the Special Advisor to the President, Mr. Levy Ngoma, allegedly informed **DW2** that Magistrates, High Court Judges, and Supreme Court Judges convene with the President at State House, where decisions on whom to release and what to do are made.

3.14 That in this context, the statement made by the Accused was not only motivated by a genuine concern for public interest but also constituted fair and honest criticism.

3.15 It was Counsel's submission that the Accused's statement was made in good faith and with the legitimate aim of addressing systemic concerns and institutional integrity.

3.16 That the statement was motivated by a genuine desire to raise awareness about the sanctity of judicial independence and the preservation of democratic principles.

3.17 That it constituted fair and honest criticism, focusing on governance and accountability without crossing into defamation or insult as he provided checks and balances being a member of the opposition, Patriotic Front (PF).

3.18 To fortify their position, Counsel referenced the case of **The People Vs Bright Mwape and Fred M'membe**³, where the Court affirmed that **Section 69** of the **Penal Code, Chapter 87** of the **Laws of Zambia** does not strip

citizens of their right to legitimately criticize the President or the Government.

3.19 That this underscores the importance of ensuring that citizens retain the ability to hold public office bearers accountable without fear of reprisal.

3.20 It was Counsel's submission that the Accused acted within the bounds of lawful justification, as the statement addressed pressing matters of public interest in a fair and honest manner and it is the State's burden to prove the absence of this justification, a burden which was not discharged.

3.21 That the Prosecution failed in this regard to prove the essential elements of this offence and on the basis of the case of **Davies Chishala and Tony Nyemba Vs The People**², there is doubt as to whether this offence was committed or not and this doubt must be construed in favor of the Appellant and as such, the decision of the Court below should be overturned and the Accused person must be acquitted forthwith.

GROUND TWO

3.22 Counsel submitted that the trial Court erred by convicting the Appellant against the weight of the evidence presented.

3.23 Counsel referenced the case of **Sikunyema Vs The Queen**⁴ submitting that it is very instructive in this regard. In that case, the Court of Appeal held that:

“Failure to take into account material evidence by the lower Court should weigh in favour of the appellant.”

- 3.24 That the trial Court's conviction of the Appellant was against the weight of the evidence presented. The unchallenged testimony of **DW2** established a credible basis for the Appellant's statement, demonstrating that it was made in good faith, on a matter of public interest, and without malice.
- 3.25 It was Counsel's contention that the Prosecution failed to disprove lawful justification beyond reasonable doubt, and the Court's failure to properly evaluate the evidence resulted in a miscarriage of justice.
- 3.26 Counsel submitted that the Court will note that throughout the Judgement, the Court below did not consider the evidence of the Defence witnesses. In this case, about four (4) defence witnesses were called by the Appellant and this evidence does not appear in the Courts Judgment when making her evaluation of the evidence and finally arriving at her decision.
- 3.27 That for example, **DW2** gave evidence as to how he was told about some interference with judicial processes. A cursory perusal of the trial Court Record will show that this evidence was not considered in the evaluation of evidence by the lower Court nor did the Court give a reason for discarding such evidence.

- 3.28 It was Counsel's argument that this evidence remains unchallenged evidence on Record.
- 3.29 That the trial Court's failure to consider material evidence presented by the Defence constitutes a significant error and this position is firmly supported by the principle established in the already cited case of **Sikunyema Vs The Queen**⁴, *supra*.
- 3.30 Applying this principle to the present case, the failure by the trial Court to consider material evidence provided by **DW2** and other Defence witnesses weighs heavily in favour of the Appellant.
- 3.31 Counsel contended that the lower Court's omission demonstrates a clear error in its evaluation of the evidence, rendering the conviction unsafe. The Record clearly demonstrates that the Court below neglected to evaluate or address the evidence presented by the four Defense Witnesses, including crucial testimony from **DW2**. Specifically, **DW2** testified about allegations of interference with Judicial processes, which was central to the Appellant's justification for making the impugned statement.
- 3.32 Counsel submitted that by way of emphasis, this testimony was not only unchallenged by the Prosecution but also directly supported the Appellant's case and the absence of any analysis or reasoning by the lower Court

in relation to this evidence constitutes a serious oversight and undermines the fairness of the Judgment.

3.33 That the trial Court's failure to consider the unchallenged evidence of the Defence witnesses, particularly the testimony of **DW2**, represents a grave procedural and factual error and this omission violates the Appellant's right to a fair trial and undermines the integrity of the conviction.

3.34 It was Counsel's submission that this failure by the trial Court to account for material evidence should weigh in favour of the Appellant and in light of this significant oversight, Counsel urged this Honorable Court to allow the Appeal, quash the conviction, and set aside the sentence imposed on the Appellant.

GROUND THREE

3.35 Counsel contended that the trial Magistrate erred in both law and fact by holding that the Appellant had defamed the President when he commented on a matter of public interest.

3.36 Counsel quoted **Section 69** of the **Penal Code Chapter 87** of the **Laws of Zambia** and submitted that the essential elements of the offence of Defamation of the President per the said Section are:

(a) A defamatory statement intended to bring the President into hatred, ridicule, or contempt;

- (b) *The publication of the defamatory or insulting statement which was communicated to at least one other person besides the President;*
- (c) *The defamatory statement must be insulting in nature or tend to lower the President's reputation;*
- (d) *The statement must have a connection to the President; and*
- (e) *The statement must be made in the absence of lawful justification, such as fair criticism or matters of public interest.*

3.37 Counsel submitted that it is a well settled principle of law that the burden to prove the elements of the offence which the Accused stands charged with rests on the Prosecution, who ought to prove the elements of the offence beyond all reasonable doubt, and Counsel submitted that they are fortified in their argument by the case of **Mwewa Muroho Vs The People**¹, wherein the Supreme Court held that: -

“In criminal cases, the rule is that the legal burden of proving every element of the offence charged, and consequently the guilt of the accused lies from the beginning to end on the prosecution. The standard of proof must be beyond all reasonable doubt.” (Emphasis theirs)

3.38 Counsel also placed reliance on the case of **Davies Chishala and Tony Nyemba Vs The People²**, where the Supreme Court held that:

“If there is reasonable doubt on any point which requires to be proved in a criminal matter then the prosecution has not discharged its burden of proof on that point; save, of course, if it is a point on which the burden of proof has shifted to the accused.”

3.39 Counsel submitted that in *casu*, the Prosecution has failed to prove the essential elements needed to prove the offence of Defamation.

3.40 That the Prosecution failed to establish these elements beyond reasonable doubt. The evidence was insufficient to show that the Appellant's statement was defamatory, intended to harm the President's reputation and lacked lawful justification and therefore, the Court's reliance on uncorroborated and inconsistent testimonies renders the conviction unsafe.

3.41 That the Prosecution bore the burden of proving the essential elements of Defamation of the President beyond a reasonable doubt and the evidence adduced failed to demonstrate that the Appellant's statement was made with malicious intent or that it harmed the President's reputation.

3.42 Counsel contended that the Prosecution witness testimonies were inconsistent, and the Prosecution failed to establish a clear connection between the alleged statement and the requisite harm defined under **Section 69** of the **Penal Code**.

3.43 To fortify their position, Counsel restated the principle laid down in the case of **The People Vs Bright Mwape and Fred Mmembe**³, where the Court held among other things that **Section 69** of the **Penal Code Chapter 87** of the **Laws of Zambia** does not deprive any citizen the right to legitimately criticize the President or the Government.

3.44 That this underscores the importance of ensuring that citizens retain the ability to hold public office bearers accountable without fear of reprisal.

3.45 It was Counsel's submission that the Accused acted within the bounds of lawful justification, as the statement addressed pressing matters of public interest in a fair and honest manner and it is the State's burden to prove that the statement did not amount to legitimate criticism, in that, the statement was made in the absence of justification.

3.46 That the State did not discharge this burden.

GROUND FOUR

3.47 It was Counsel's contention that the learned trial Magistrate erred in both law and fact by ruling that the Prosecution had proved its case beyond a reasonable

doubt, despite the failure to establish the essential elements of the offence of Defamation of President.

3.48 That **Section 69** of the **Penal Code Chapter 87** of the **Laws of Zambia** is instructive in understanding the elements of the offence of Defamation of the President; That therefore, the essential elements of the offence of Defamation of the President per the above stated Section are:

- (a) A defamatory statement intended to bring the President into hatred, ridicule, or contempt;*
- (b) The Publication of the defamatory or insulting statement which was communicated to at least one other person besides the President;*
- (c) The Defamatory statement must be insulting in nature or tend to lower the President's reputation;*
- (d) The statement must have a connection to the President; and*
- (e) The statement must be made in absence of Lawful Justification, such as fair criticism or matters of public interest.*

Burden and Standard of Proof

3.49 It was Counsel's submission that it is a well-established principle in criminal law that the burden of proving every element of the offence charged lies with the Prosecution and must be discharged beyond all reasonable doubt as

affirmed by the Supreme Court in the case of **Mwewa Murono Vs The People**¹.

3.50 That in the instant case, the Prosecution failed to meet this standard, as the evidence presented did not sufficiently establish the essential elements of the offence of defamation of the President.

Failure to Prove Defamatory Content

3.51 Counsel contended that the Record reveals that none of the Prosecution's Witnesses testified to the effect that the statement made by the Appellant was Defamatory and furthermore, the Prosecution failed to provide evidence demonstrating that the statement tended to lower the President in the estimation of right-thinking members of society or that it caused him to be shunned, ridiculed, or hated.

Intent to Defame not Established

3.52 It was Counsel's submission that the Prosecution also failed to establish that the Appellant intended to harm the President's reputation. On the contrary, the evidence on Record shows that the Appellant's statement was motivated by a genuine concern for matters of public interest, specifically judicial independence and democratic governance.

Lawful Justification Overlooked

3.53 Counsel argued that the Appellant's statement was rooted in the uncontroverted testimony of **DW2**, who recounted credible allegations of interference with judicial independence and this testimony provided lawful justification for the Appellant's statement, which aimed to highlight systemic issues rather than to defame the President.

3.54 That the Prosecution failed to disprove this lawful justification, rendering the conviction unsafe.

Uncorroborated and Inconsistent Evidence

3.55 It was Counsel's contention that the Prosecution's case relied on uncorroborated and inconsistent testimonies that did not establish the elements of the offence beyond reasonable doubt.

3.56 That this lack of credible and reliable evidence undermines the foundation of the conviction.

3.57 That in light of the foregoing, it is clear that the Prosecution failed to discharge its burden of proving the essential elements of the offence of Defamation of the President beyond all reasonable doubt. The evidence presented was insufficient to establish that the statement was defamatory, intended to harm the President's reputation, and lacked lawful justification.

3.58 Counsel submitted that the conviction was not supported by the weight of the evidence and urged this

Honorable Court to allow this Ground of Appeal and quash the Conviction.

GROUND FIVE

3.59 Counsel contended under this Ground that the trial Court erred in both law and fact by failing to recognise that the words alleged in the Charge Sheet were inconsistent with the evidence presented and contextually flawed.

3.60 That the alleged defamatory statement, as described in the Charge Sheet, does not align with the evidence presented during trial and the Court failed to critically analyze the context and the meaning of the Appellant's statement.

3.61 Counsel drew upon the authority of the case of **Sikunyema Vs The Queen**⁴, where the Court of Appeal held that:

“Failure to take into account material evidence by the lower Court should weigh in favour of the Appellant.”

3.62 That in other words, the Court was emphasizing that inconsistencies between the charge and evidence are fatal to the Prosecution's case and therefore, the trial Court's failure to address these discrepancies constitutes a serious miscarriage of justice and should weigh in favour of the Appellant.

GROUND SIX

- 3.63 It was Counsel's contention that the trial Magistrate erred in law and fact when she misconstrued the alleged Statement to be against the Judiciary and used the same reasoning to impose the sentence when the evidence suggests that the alleged Statement was in defence of the Judiciary and Democracy.
- 3.64 That the Appellant's statement, when read in its entirety, defends the Judiciary and democracy against perceived threats and the trial Court's interpretation was selective and misrepresented the context.
- 3.65 That the offence that the Appellant was charged with according to the indictment is **Defamation of President** contrary to **Section 69 of the Penal Code Chapter 87** of the **Laws of Zambia** and not Defamation of the Judiciary, as such offence does not exist, and therefore, the statements must be considered in their full context.
- 3.66 Counsel contended that the trial Magistrate's failure to do so invalidates the reasoning underpinning the conviction and sentence.

GROUND SEVEN

- 3.67 It was Counsel's contention that the trial Court erred in both law and fact by failing to consider or electing not to consider the principle established in **Muzyamba Vs The People**⁵ when determining the sentence to impose.
- 3.68 Counsel submitted that in the case of **Muzyamba Vs The People**⁵, the Court held that:

“An Accused person must be sentenced in accordance with the law as it stands at the date of the sentence. This principle ensures fairness and reflects the legal framework prevailing at the time the sentence is pronounced.”

Repeal of Section 69 of The Penal Code

3.69 Counsel submitted that the offence of Defamation of the President, as provided under **Section 69** of the **Penal Code Chapter 87** of the **Laws of Zambia**, was repealed by the **Penal Code (Amendment) No. 25 of 2022**. As of the date of the Appellant's sentencing, this provision no longer existed in the law, rendering any conviction and sentencing under this repealed provision invalid.

Duty of The Trial Court To Consider The Current Law

3.70 It was Counsel's argument that the Court was bound by the principle in **Muzyamba Vs The People**⁵ to assess the legal status of the offence as of the date of sentencing. By disregarding the fact that **Section 69** had been repealed, the trial Court failed to apply the law correctly, resulting in a miscarriage of justice.

Application of the Principle in this Case

3.71 It was Counsel's submission that **Section 69** having been repealed by the time of sentencing, the trial Court ought to have considered the Appellant's conviction unsustainable and the continued enforcement of a repealed provision contravenes the basic principles of

justice and the rule of law, as it imposes a penalty for conduct no longer deemed an offence under the law.

3.72 That the Appellant's Sentence is invalid as it was based on a provision of the law that no longer existed at the time of sentencing, and following the guidance in **Muzyamba Vs The People**⁵, this Honorable Court should recognize that the trial Court erred in law by failing to account for the repeal of **Section 69** of the **Penal Code**.

3.73 Counsel thus implored this Court to quash the conviction and acquit the Appellant, as sentencing the Appellant under a repealed law violates fundamental principles of justice and fairness.

4. THE RESPONDENT'S HEADS OF ARGUMENT

4.1 On 18th February, 2025, the Respondents filed in their Heads of Argument and submitted as follows.

4.2 Counsel for the Respondent submitted that the Appellant was tried and Convicted by the Subordinate Court for the offence of Defamation of the President contrary to **Section 69** of the **Penal Code Chapter 87** of the **Laws of Zambia**, the particulars being that Rapheal Mangani Nakachinda with intent to bring the name of the President into ridicule and contempt, issued defamatory remarks on December 13, 2021, accusing the Head of State of intimidating and coercing Judges to frustrate Patriotic Front Party (PF) legal battles.

- 4.3 At the end of the trial, the Appellant was Convicted and Sentenced to 18 Months Imprisonment with simple labour.
- 4.4 Disenchanted by the decision of the Lower Court the Appellant appealed to the High Court, impugning the decision of the Lower Court on the Grounds as set out above at 2.32.

GROUND ONE TO FIVE

- 4.5 It was Counsel's submission that the first five Grounds highlighted above, would be dealt with concurrently, since they are related and border on a common issue, the common issue being that there was insufficient evidence adduced by the Prosecution to warrant the conviction of the Appellant.
- 4.6 Counsel contended from the onset the Lower Court was on firm ground when it convicted and sentenced the Appellant for the subject offence as the Prosecution proved its case beyond all reasonable doubt.
- 4.7 That the Record of Proceedings show that all the elements of the offence were proved.
- 4.8 That the Trial Court at J35 was on firm ground when she stated as follows:

“Though according to the accused this was a fight for democracy it did not mean he needed to lie to the people he was addressing about an

issue which had no truth in it as it was directed at the President not a political party.”

4.9 It was Counsel’s submission that the offence with which the Appellant was charged is provided for under **Section 69** of the **Penal Code Chapter 87** of the **Laws of Zambia** thus:

“Any person who, with intent to bring the President into hatred, ridicule or contempt, publishes any defamatory or insulting matter, whether by writing, print, word of mouth or in any other manner, is guilty of an offence and is liable on conviction to imprisonment for a period not exceeding three years.”

4.10 That the following are the elements;

- i) *The accused published defamatory or insulting matter*
- ii) *Whether by writing, print, word of mouth or in any other manner*
- iii) *With intent to bring the President into hatred, ridicule or contempt.*

i) The Accused published defamatory or insulting matter.

4.11 Counsel submitted that the said Section which creates the offence of defamation does not define the word ‘Publish’ and that in order to define the word ‘Publish’, recourse will

be had to **Black's Law Dictionary** by **Bryan A. Garner 9th Edition** which defines the word 'Publish' as:

1) to distribute copies (of a work) to someone other than the one defamed;

2) to communicate (defaming words) to someone other than the person defamed.

4.12 That from the definition given in **Black's Law Dictionary**, a person will be considered to have published something if he distributes defamatory material to someone other than the one being defamed or if he communicates defamatory words to someone other than the defamed person.

4.13 That **PW5, Logic Lukwanda**, a journalist from Crown TV stated on Page 11 of the Record of Proceedings that on the material day he covered an event at the High Court and aired it on the News and in that news item the Appellant was addressing people at the High Court saying, during the weekend they were zooming the binoculars and saw President Hakainde Hichilima was not sleeping and that he has begun to summon Judges to his house to try and intimidate them or coerce them to advance an agenda to bring a one-party State in this Country.

4.14 Counsel submitted that **PW2** on Page 25 of the Record of Proceedings, said that when he listened to the news, he felt aggrieved.

- 4.15 That **PW1, Hardson Mabeta**, on Page 25 of the Record of Proceedings said that when he saw the video clip that was indicating that the President had an agenda to form a one-party State, he was very disturbed and very concerned as a lawmaker.
- 4.16 Furthermore, **PW3, Eric Mwabembe**, on Page 35 of the Record of Proceedings stated that he watched the said clip on his Facebook Page, and he went to report to the Police because the statement was disrespectful to the President.
- 4.17 It was Counsel's submission that from the above it is clear that the Prosecution satisfied the first element of the offence, that is, that the defamatory words were communicated to another person other than the President himself.
- 4.18 That the word defamation was defined in the case of **Bevin Ndovi Vs The Post Newspaper Limited and Times Print Pak Zambia Limited**⁶, wherein it was stated as follows:
- “A defamatory statement is one which tends to lower a person in the estimation of right-thinking members of society generally, as to cause him to be shunned or avoided or to expose him to hatred, contempt, or ridicule, or to convey an imputation on him to hatred, contempt, or ridicule, or to convey an imputation on him disparaging, or injurious to him in his office, profession, calling, or trade or business.”*

4.19 That **PW1**, on Page 22 of the Record of Proceedings said that he was very disturbed with the sentiments and very concerned as a lawmaker.

4.20 That **PW3**, on Page 35 of the Record of Proceedings stated that after watching the clip, he decided to report to the Police because the statement was disrespectful to the President.

4.21 Counsel submitted that from the above, the feelings of the above witnesses and their perception towards the President was adversely affected, thus the words were defamatory.

ii) Whether by writing, print, word of mouth or in any other manner.

4.22 Counsel contended that the words "*any other manner*" means that the insulting matter can be in any form including in writing, print or word of mouth.

4.23 That it is not in dispute that the defamatory remarks were by word of mouth in this matter.

iii) With intent to bring the President into hatred, ridicule or contempt.

4.24 That it is undoubtedly clear that the person who published the article intended to bring the name of the President into hatred and ridicule.

4.25 That the Appellant lied in the clip in question and it was intentional.

4.26 It was Counsel's submission that **PW4** stated on Page 44 of the Court Proceedings that the President never met any Judges or anyone from the Judiciary during that period in question.

4.27 That **Section 69** of the **Penal Code** criminalizes Defamation of the President. That in this case, the statement in question by the Appellant was concerning the President of Zambia as evidenced by the mention of the President's full name and the Statement was made on a public forum, for the consumption of others being social media and those that listened to MUVI and CROWN TVs and fall within the term "publishes" envisaged by **Section 69**.

4.28 These issues are not in question.

4.29 It was Counsel's contention that the crux of the matter is whether the comments are defamatory or insulting in nature and whether the published material is 'lese-majeste' (an insult to the crown).

4.30 That defamation as defined in Tony Weir, **Tort Law** at Page 162 is:

"A is liable for saying anything to C about B which would be apt to make the average citizen think worse of the latter."

4.31 Furthermore, **Black's Law Dictionary 9th Edition**, at Page 479 defines Defamatory as:

“The act of harming the reputation of another by making a false statement to a third person.”

4.32 It was Counsel’s argument that the second limb of the offence is insulting, which is markedly different from defamation per se and it is defined by **Black’s Law Dictionary Free Online Legal Dictionary 2nd Ed** as:

“An affront or indignity to a person’s self-respect that could warrant the awarding of damages.”

4.33 Counsel submitted that **PW3** stated that the statement was disrespectful to the President.

Absence of Lawful Justification

4.34 Counsel drew the Court’s attention to the case of **The People Vs Bright Mwape and Fred Mwembe**⁷ where it was held that:

“There was no pervasive threat inherent in section 69 which endangered the freedom of expression.”

4.35 That when the matter initially was before Chitengi, P. J in the High Court, the Judge opined thus:

“...Section 69 does not anywhere say that nobody will speak or publish anything of the President. The sections dealing with sedition and criminal libel also admit of criticism. And the provisions in the Defamation Act cap 70 of the Laws of Zambia provide immunity against libel suits in

certain circumstances. The crisp issue is therefore what kind of criticism is allowed...

...In other words, legitimate criticism motivated by desire to ensure that government affairs are properly run for the public good or criticism by a politician in the opposition to expose the shortcomings of the President and Government in power so that he can wrestle political power from them at the next election and use it to the benefit of the country..."

4.36 From the above, it is clear that legitimately criticizing the President is lawful if done within the law. In this case the Appellant exceeded his freedom of expression.

4.37 Counsel also referred to the case of **The Attorney General Vs Roy Clarke**⁸, where the Supreme Court went at length to give guidance as to what kind of criticism would be deemed legitimate.

4.38 That in the matter heard by the full bench of the Supreme Court, the following dictum are pertinent to this matter:

"...In Zambia, one can criticize or poke fun at the Head of State and government leaders or indeed elders but this must be done in felicitous language and not in the crude language the Respondent used..."

GROUND SIX

- 4.39 It was Counsel's submission that it is shocking that the Defence are contending that the Appellant's statement was in defence of the Judiciary.
- 4.40 That a statement by the Appellant that President Hakainde Hichilema is coercing Judges is false and actually contemptuous.
- 4.41 That the Appellant's statement that Judges are receiving instructions from a third hand, were aimed at distorting the direction of matters that were actively before the Courts of law involving the PF.
- 4.42 Counsel contended that the words that the Appellant published from his mouth were defamatory to the President as the intention was to have the President ridiculed and expose him to hatred for interfering with the Judges thereby impeding their independence or to be in contempt of the President.
- 4.43 That the defamatory words compromise the independence and integrity of the Judiciary.

GROUND SEVEN

- 4.44 It was Counsel's submission that the Supreme Law of our Land is authoritative.
- 4.45 That **Article 18(4) of The Constitution** states as follows:
"A person shall not be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall

be imposed for any criminal offence that is severer in degree or description that the maximum penalty that might have been imposed for that offence at the time it was committed.”

4.46 That however, **Article 139(12) (c) (v)** of **The Constitution** stated that a repeal of the law does not affect ongoing legal proceeds.

4.47 Further, **Section 14(3) (e)** of the **Interpretations and General Provisions Act** provides that:

“a repeal will not affect an ongoing prosecution.”

4.48 Counsel submitted that the offence with which the Appellant was charged was committed before the offence of **Defamation of President** was repealed and as such, the new law does not have any effect on the proceedings.

4.49 That the trial Court had the opportunity of seeing and hearing the witnesses and the Appellant and it is therefore best placed to make any findings of fact.

4.50 That from the evidence on Record and as argued above, there can be only one conclusion, that the Appellant committed the offence.

4.51 This is the position of the trial Court and Counsel implored this Honourable Court to uphold the Conviction and dismiss this Appeal.

4.52 That the summary of the arguments is that the Appellant does not dispute uttering the words in question, as Page

81 of the Record of Proceedings shows that he admitted uttering the defamatory words in question.

4.53 Further, there was no evidence to substantiate his claim that what he said was told to him by **DW2**, Patrick Banda. In the clip he did not say that he was told by **DW2**.

4.54 In summation, Counsel prayed that all the Grounds of Appeal be dismissed and this Honourable Court upholds the Conviction and Sentence imposed on the Appellant.

5. THE APPELLANTS REPLY TO RESPONDENT'S HEADS OF ARGUMENTS

5.1 The Appellant, on 20th February, 2025, filed in a Reply to the Respondent's Heads of Argument.

5.2 Counsel for the Appellant submitted that the Appellant, a Statesman of notable repute, finds himself ensnared in the relentless grip of Prosecution that appears less concerned with justice than with the preservation of power.

5.3 That on 13th December 2021, within the precincts of the High Court in Lusaka, and broadcast by both Muvi TV and Crown TV Facebook Pages, the Appellant is alleged to have, by word of mouth, published statements designed to incite hatred, ridicule, and contempt towards the President, Mr. Hakainde Hichilema.

5.4 That in so doing, he is accused of attributing to the President an act of summoning Judges to his residence in an attempt to orchestrate a one-party state.

- 5.5 It was Counsel's submission that the law of defamation, by its very nature, is personal. Yet in this instance, the Respondent seems to suggest that legal mechanism permits the President, armed with executive authority, to initiate proceedings without ever subjecting himself to cross-examination on whether he, in truth, suffered defamation. Thus, while a President may at any moment label others as corrupt or nefarious, the citizen is left without recourse to challenge such characterizations, a disquieting inversion of justice.
- 5.6 That in light of these considerations, the Appellant submits that his remarks, which were said in the context of a robust democratic debate, were not intended to defame but to critique perceived governmental overreach.
- 5.7 However, the use of a repealed legal provision to stifle legitimate political discourse not only contravenes the principles of fairness and proportionality but also risks undermining the very essence of free speech in a democratic society.

Arguments In Reply To Grounds One To Six

- 5.8 It was Counsel's argument that the Respondent's submission fails to address the fundamental legal principles governing the law of Defamation, particularly the requirement that Defamation is a personal action and can only be initiated by the person allegedly defamed.

5.9 That, instead, the Respondent attempts to rely on the subjective feelings of individuals who were neither the subject of the alleged Defamatory statement nor legally competent to bring a defamation. The trial court, in convicting the Appellant, relied on legally flawed reasoning that ignored the essential elements of the offence of **Defamation of the President** under **Section 69** of the **Penal Code**.

5.10 That the Respondent has sought to justify the Conviction of the Appellant by arguing that the Prosecution proved its case beyond a reasonable doubt. However, a critical examination of the evidence on Record, coupled with the relevant legal authorities, reveals that the trial Court erred in both law and fact in reaching its decision. The reply below is tendered to argue Grounds One to Six in Reply.

5.11 Counsel referenced to the Learned Author **Gatley on Libel and Slander** who, at Page 227, Paragraph 8.1, unequivocally states that:

“An action for defamation is purely a personal action. The proper person to sue as claimant is the person defamed.” (Emphasis Theirs)

5.12 Counsel submitted that this principle is codified under **Section 192** of the **Penal Code**, which defines defamatory matter as:

“Matter likely to injure the reputation of any person by exposing him to hatred, contempt, or

ridiculer or likely to damage any person in his profession or trade by an injury to his reputation.” (Emphasis Theirs)

- 5.13 That the wording of this Section clearly establishes that defamation pertains to an injury to a person's reputation.
- 5.14 That the Record of Proceedings demonstrates that none of the Prosecution Witnesses testified that President Hakainde Hichilema personally complained of being defamed, on the contrary, the Prosecution's own evidence confirms that individuals who were neither the President nor legally entitled to complain took it upon themselves to report the matter.
- 5.15 Thus **PW1**, admitted under Cross-Examination that he was not the subject of the alleged defamation. He simply “felt disturbed” and took it upon himself to report the matter to the Police.
- 5.16 It was Counsel’s argument that **PW2**, similarly admitted that he reported the matter to the police not because he was defamed, but because he “felt aggrieved”.
- 5.17 That **PW3**, further confirmed that he was personally affected by the statement and reported it to the Police based on his own perception of disrespect.
- 5.18 That **PW4**, admitted that he did not even understand why the Accused was before the Court and that **PW5**, unequivocally stated that the Accused did not refer to President Hakainde Hichilema in a defamatory manner.

Additionally, **PW6**, the Arresting Officer, admitted that the President himself never lodged a complaint and that he never spoke to the President regarding the alleged defamation.

- 5.19 It was Counsel's contention that these admissions demonstrate that the individual allegedly defamed, 'the President', never personally complained of any harm to his reputation.
- 5.20 That the trial Court thus erred in convicting the Appellant in the absence of any evidence that the President himself felt defamed or that his reputation suffered actual injury.
- 5.21 That the Respondent argues that defamation was established because several witnesses "felt aggrieved" by the Appellant's statement. However, this reasoning is legally unsustainable.
- 5.22 Counsel submitted that defamation is not about whether third parties feel offended; rather, it is about whether the statement in question injured the reputation of the specific person alleged to have been defamed. The lower Court, in reaching its Judgment, ventured upon a path paved with fundamental errors misconstruing the law, disregarding evidentiary inconsistencies, and ultimately arriving at a conclusion unsupported by the weight of the evidence.
- 5.23 It was Counsel's submission that the conviction of the Appellant was erroneous, as the Prosecution failed to prove its case beyond a reasonable doubt.

- 5.24 That to sustain a conviction under **Section 69** of the **Penal Code**, the Prosecution must establish that the Appellant's words were published with the intent to bring the President into hatred, ridicule, or contempt and the trial Court erred in finding such intent when, upon proper analysis, no such intention can be inferred from the evidence on Record, because the Prosecution in this matter did not present the purportedly defamed individual, as a witness neither did he report to have been defamed.
- 5.25 That instead, it relied on a parade of witnesses who were neither the direct subject of the alleged defamation nor legally competent to claim personal injury to their own reputations.
- 5.26 Counsel contended that the Appellant's statements were made in the context of a political discussion, a matter of public interest. The right to criticize public officials, including the President, is a cornerstone of democratic discourse. As **PW3** himself admitted (at page 41 of the Record), there was "nothing wrong" with saying that the President was meeting members of another branch of government. Indeed, criticism of public officials, even if harsh, does not automatically amount to Defamation.
- 5.27 That the Respondent has relied on the case of **Bevin Ndovi Vs The Post Newspaper Limited & Times Print Park Zambia Limited**⁶, which by strict analysis does not help

their case, the Supreme Court made it clear that a statement is defamatory only if it tends to lower a person in the estimation of right-thinking members of society generally. It follows that the person defamed must be the one who experiences this reputational harm.

- 5.28 That the Respondent's reliance on the reactions of **PW1, PW2, PW3, PW4** and **PW5** who merely felt aggrieved, ignores this fundamental principle and their discomfort does not establish Defamation.
- 5.29 And that furthermore, *Gatley on Libel and Slander* at page 227) reaffirms that an action for defamation is purely personal and the absence of direct testimony from the President, who alone could attest to any reputational injury; renders the Prosecution's case incomplete.
- 5.30 It was Counsel's submission that the lower court, in convicting the Appellant, erred by treating third-party indignation as a substitute for direct harm to the President's reputation.
- 5.31 Thus, the Respondent's argument is devoid of legal merit, as it is founded on emotions rather than the principles of Defamation law.
- 5.32 That the trial Court further erred by failing to properly scrutinize the credibility of the Prosecution's Witnesses and Counsel referenced the Learned Authors of *Phipson on Evidence* who at Page 333, Paragraph 12-36) state that:

“The credibility of a witness depends on his knowledge of the facts, his intelligence, his disinterestedness, his integrity his veracity... all these questions may be asked in Cross Examination which tend to expose the errors, omissions, inconsistencies, exaggerations or improbabilities of the witness's testimony.”

(Emphasis Theirs)

- 5.33 Counsel contended that the Prosecution's Witnesses were riddled with inconsistencies and contradictions: **PW3** admitted that he only listened to a portion of the video, yet concluded that it was defamatory without full context. **PW6** acknowledged that the person of the President himself never complained, yet still insisted the words were defamatory. **DW2** provided unchallenged testimony that highlighted the political motivations behind the case, yet this was ignored by the trial Court.
- 5.34 That the weight of the evidence, therefore, did not support a conviction and a Court is duty-bound to ensure that findings of guilt rest on sound legal and evidential footing. By failing to do so, the Lower Court fell into serious error and as such, Grounds One to Five must be upheld.
- 5.35 Counsel submitted that at the core of this Appeal lies a fundamental principle of defamation law: defamation is personal.

- 5.36 That the Respondent has attempted to construct a case built not on legal reasoning but on the subjective emotions of third parties, none of whom were the direct victim of the alleged defamatory statement and this approach is legally unsound and contrary to well established jurisprudence.
- 5.37 That the Respondent relied on **Black's Law Dictionary** to define "publish" as: "*the communication of defamatory material to a third party,*" and while this definition is correct in the abstract, its application here is flawed. Defamation is not merely about publication; it requires that the published statement actually defame the complainant.
- 5.38 It was Counsel's contention that the Respondent claims that because the Appellant's Statements were aired on television and social media, the requirement of publication was satisfied. However, mere publication does not constitute defamation unless the content itself meets the legal threshold of injuring the complainant's reputation.
- 5.39 That in this case, the alleged statement suggested that the President met with Judges to influence Judicial decision and this is a statement of political criticism, a constitutionally protected right in any democratic society.
- 5.40 Counsel argued that it is not an assertion of personal misconduct or moral failing that would lower the President's reputation in the eyes of the public and the trial Court therefore erred in treating political criticism as

criminal defamation, and the Respondent's argument failed to distinguish between the two.

- 5.41 Counsel made reference to Tony Weir, ***Tort Law*** who at Page 162 states that: “*defamation occurs when a statement makes the average citizen think worse of the person defamed,*” and submitted that the Respondent had not provided any evidence that the public perception of the President changed due to the Appellant's statement.
- 5.42 That instead, they relied on a handful of politically affiliated witnesses who personally disagreed with the statement and this is not sufficient to meet the burden of proof.
- 5.43 That while the Respondent is correct that publication occurred, they had failed to establish that what was published was legally defamatory.
- 5.44 Furthermore, that **PW4**'s testimony that the President did not meet with Judges is not conclusive proof that the Appellant was lying and it only proves that **PW4** himself was not aware of such meetings.
- 5.45 That the trial Court should have required direct evidence that the statement was false and not relied on speculative testimony and more importantly, the Respondent's argument ignores the principle that intent must be proved beyond a reasonable doubt.
- 5.46 It was Counsel's contention that the Appellant's statements were made in the context of a political censure,

a setting where exaggerated and critical statements are common.

5.47 That the Prosecution did not establish that the Appellant's primary intention was to defame, rather than to express political dissent and as such, the Respondent's contention that the Prosecution proved its case beyond a reasonable doubt is legally unsustainable.

5.48 That the trial Court's failure to apply the correct legal standard resulted in a wrongful conviction.

GROUND SEVEN

5.49 In response to Ground Seven, Counsel submitted and contended that the trial Court erred in both law and fact by failing to consider the established principle in **Muzyamba Vs The People**⁵ when determining the appropriate sentence.

5.50 That in this landmark case, the Court clearly held that an accused person must be sentenced in accordance with the law as it stands at the time of sentencing and this principle is vital as it ensures fairness and accurately reflects the legal framework that is applicable when the sentence is pronounced.

5.51 That moreover, the offence of **Defamation of the President**, as specified in **Section 69** of the **Penal Code**, was repealed by the **Penal Code (Amendment) No. 25 of 2022**, thus, by the time of the Appellant's Sentencing, this provision no longer existed within the legal system,

rendering any Conviction and subsequent Sentencing under this repealed law entirely invalid.

- 5.52 That the trial Court was, therefore, bound by the principle set forth in **Muzyamba Vs The People**⁵ to assess the legal status of the offence at the time of Sentencing and the Court's disregard for the repeal of **Section 69** constitutes a failure to correctly apply the law, resulting in a miscarriage of justice.
- 5.53 Counsel submitted that in light of the repeal, the trial Court should have deemed the Appellant's Conviction unsustainable and the continued enforcement of a provision that has been repealed fundamentally contravenes the basic principles of justice and the rule of law, imposing a penalty for conduct that is no longer classified as an offence.
- 5.54 That it is imperative to recognize that any conviction based on a non-existent provision cannot stand, as it undermines the core tenets of justice and fairness.
- 5.55 It was Counsel's submission that the Appellant's Sentence is invalid, as it is rooted in a law that was no longer in effect at the time the sentence was pronounced and following the guidance provided in **Muzyamba Vs The People**⁵, urged this Honourable Court to acknowledge the legal missteps made by the trial Court in failing to account for the Repeal of **Section 69** of the **Penal Code**.

- 5.56 And in light of these considerations, Counsel implored this Court to quash the Conviction and Acquit the Appellant, as Sentencing him under a repealed law fundamentally violates the principles of justice and fairness that our legal system upholds.
- 5.57 Counsel submitted that in summation, the arguments laid before this Honorable Court reveal a critical misunderstanding of the fundamental tenets of defamation law and a concerning misapplication of legal principles by the trial Court.
- 5.58 That central to the discourse is the irrefutable principle that Defamation is a personal action, inherently reliant on the direct complaint of the individual allegedly harmed, in this case, Hakainde Hichilema.
- 5.59 That the Respondent's reliance on the subjective feelings of third-party witnesses, who lacked the legal standing to initiate a defamation claim, undermines the Prosecution's case and exposes a profound flaw in the trial court's reasoning.
- 5.60 Furthermore, that the failure to acknowledge the repeal of **Section 69** of the **Penal Code** at the time of sentencing not only contravenes established legal principles, as articulated in **Muzyamba Vs The People**⁵, but also manifests a grave miscarriage of justice.
- 5.61 It was Counsel's contention that the trial Court's Conviction of the Appellant, devoid of evidence directly

substantiating that the President experienced any reputational harm, is further compounded by the fact that the Appellant's statements were made within the context of political discourse, a protected right in a democratic society.

5.62 That the Prosecution's argument is further weakened by the lack of credible evidence demonstrating that the Appellant's words amounted to actionable defamation.

5.63 That in light of these considerations, it becomes abundantly clear that the trial Court erred significantly in both law and fact and the Respondent's insistence on upholding the Conviction based on emotional reactions rather than solid legal foundations fails to meet the necessary burden of proof.

5.64 That the principles of justice, fairness, and the rule of law demand that the Appellant's Conviction be quashed, as it was based on a non-existent legal framework.

5.65 Counsel thus respectfully urged this Court to acquit the Appellant, thereby reinforcing the vital protections afforded to individuals in a democratic society and ensuring that justice prevails in accordance with established legal standards.

6. THE HEARING

6.1 At a Hearing held on 1st July, 2025, Counsel submitted that they did file written Heads of Arguments in Support of the Appeal on 22nd January, 2025.

- 6.2 Counsel submitted that the Appellant wished to rely on the said written submission save to reiterate that the conviction by the Lower Court based on the totality of the evidence on Record should not be upheld by this Honourable Court on the basis of the submissions that were filed.
- 6.3 It was Counsel's prayer that the Conviction and Sentence be set aside and the Appellant should be set free.
- 6.4 Counsel for the Respondent submitted that they did file written arguments into Court on 18th February, 2025, which they would rely on entirely and proceeded to augment the same.
- 6.5 It was Counsel's submission that the Court below was on firm ground when it did convict the Appellant herein.
- 6.6 That a perusal of the said Record of Appeal will show that it is not in dispute that the word "*alleged*" in this matter were not uttered or said by the Appellant. And further, that the evidence of **PW1**, **2**, and **3** as per the Record, will show how the said individuals were affected by the words spoken.
- 6.7 For this reason, they stated that the Court below was on firm ground to convict the Appellant.
- 6.8 In Reply, Counsel for the Appellant submitted that they wished to rely on the Appellants Heads of Argument in Reply filed on 26th February, 2025, and they would rely on

the same, save to briefly augment in response to the last submission by Counsel for the Respondent.

- 6.9 That the evidence of **PW1, 2, and 3** did not substantiate the conviction by the Lower Court and their submission was based on paragraph 4.5 and 4.6 of their Arguments in Reply as they had demonstrated why the evidence of the said witnesses was misplaced and invited the Court to peruse those said paragraphs.
- 6.10 That in that regard, they maintain their earlier prayer that the Lower court's Judgment stands on stilts and they invited the Court to set aside the conviction and set the Appellant free .
- 6.11 The Matter was adjourned to 21st October, 2025 at 09:00 hours, for Judgment in Open Court.

7. CONSIDERATION AND DETERMINATION OF THE COURT

- 7.1 The Court acknowledges its indebtedness to both Counsel for their submissions rendered in this Appeal. In arriving at this decision, the Court has given due consideration to the Seven (7) Grounds of Appeal advanced, the comprehensive written submissions filed by the Parties and the entire Record of Proceedings from the trial Court below.
- 7.2 The Appellant was charged and convicted for the offence of Defamation of President contrary to **Section 69** of the **Penal Code, Chapter 87** of the **Laws of Zambia**, whose provision stipulated as follows:

“Any person who, with intent to bring the President into hatred, ridicule, or contempt, publishes any defamatory or insulting matter, whether by writing, print, word of mouth or in any other manner, is guilty of an offence and is liable on conviction to imprisonment for a period not exceeding three years.”

- 7.3 Dissatisfied with the decision of the lower Court, the Appellant instituted the present Appeal, challenging both the Conviction and consequent Sentence.
- 7.4 The Grounds of Appeal are as set out under **Paragraph 2.32** above.
- 7.5 Whilst acknowledging that all Grounds advanced by the Appellant warrant this Court’s considered attention, it is logical to commence with an analysis of the submissions under **Ground Seven** of the Appellant’s Heads of Arguments, as its disposition may inform the subsequent inquiry.
- 7.6 Under Ground Seven, Counsel for the Appellant submitted that the trial Court erred in both law and fact by failing to consider or electing not to consider the principle established in **Muzyamba Vs The People**⁵ when determining the sentence to impose. That in that case, the Court held that an Accused person must be sentenced in accordance with the law as it stands at the date of the sentence.

- 7.7 Furthermore, that the offence of Defamation of the President, as provided under **Section 69** of the **Penal Code, Chapter 87** of the **Laws of Zambia**, was repealed by the **Penal Code (Amendment) Act No. 23 of 2022** and as of the date of the Appellant's sentencing, this provision no longer existed in the law, rendering any conviction and sentencing under this repealed provision invalid.
- 7.8 Counsel for the Respondent contented that the offence with which the Appellant was charged was committed before the offence of Defamation of President was repealed and as such the new law does not have any effect on the proceedings.
- 7.9 Counsel referred this Court to **Section 14(3)(e)** of the **Interpretations and General Provisions Act** which provides as follows:

“3. Where a written law repeals in whole or in part any other written law, the repeal shall not—

(e) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceedings, or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be

imposed, as if the repealing written law had not been made.”

7.10 Counsel also drew upon the authority of **Article 139 (12)(c)(v)** of the **Constitution, Chapter 1** of the **Laws of Zambia** which states thus:

“12. Where any Act passed after the commencement of this Constitution repeals any provision thereof then, unless the contrary intention appears, the repeal shall not--

(v) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or confiscation or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or confiscation or punishment may be imposed, as if the repealing Act had not been passed.”

7.11 It is trite that Zambia is a constitutional democracy that prides on the supremacy of the Constitution. **Article 1(1)** of the **Constitution of Zambia, Chapter 1** of the **Laws of Zambia**, as amended by **Act No.2 of 2016** provides that:

“1. (1) The Constitution is the supreme law of the Republic of Zambia and any other written law, customary law and customary practice that is

inconsistent with its provisions is void to the extent of the inconsistency and any act or omission that contravenes the Constitution.

(2) An act or omission that contravenes this Constitution is illegal.”

7.12 The general rule is that when a law that created an offence is repealed, the offence is considered abolished from that moment forward. However, the critical question is what happens to pending prosecutions for acts committed before the repeal. This is almost always addressed in an Interpretation Act or the General Provisions of an Act and is known as a Savings Clause.

7.13 This clause explicitly states that the repeal of a law does not:

- Affect any previous operation of the law before its repeal;
- Affect any right, privilege, obligation, or liability acquired, accrued, or incurred under the repealed law;
- Affect any penalty, forfeiture, or punishment incurred in respect of an offence committed under the repealed law; and
- Affect any investigation, legal proceeding, remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment.

7.14 What this entails is that the Savings Clause saves or preserves the ability of the State to continue prosecuting offences that were committed when the law was still in force, even after it has been repealed.

7.15 **Section 2** of the **Penal Code** contains a “Savings Clause”. Particularly, **Section 2 (d)** provides that:

“2. Except as hereinafter expressly provided, nothing in this Code shall affect:-

(d) the liability or trial of a person, or the punishment of a person under any sentence passed or to be passed, in respect of any act done or commenced before the commencement of this Code.”

7.16 In *casu*, the act was a crime at the time it was committed by the Appellant in 2021 and this satisfies the principle of *nullum crimen, nulla poena sine lege praevia*, a doctrine holding that no punishment is permissible for an act that was not defined as a crime in the applicable law at the time of commission.

7.17 Subsequently, by the **Penal Code (Amendment) Act No. 23 of 2022, Section 69** of **Chapter 87** of the **Laws of Zambia** was repealed.

7.18 However, the Savings Clause explicitly permitted the continuation of legal proceedings for offences committed before the repeal and therefore, the trial Court had the full

legal authority to convict and sentence the Appellant under the law that was in force at the time of the offence.

- 7.19 The Appellant's argument that the law is no longer in existence would be technically correct for acts committed after the repeal in 2022.
- 7.20 The only exception to this rule would be if the repealing legislation itself contained an express clause that specifically extinguished pending prosecutions, thus making the provision of law prospective or non-retrospective, and in the absence of such a specific statement, the default Savings Clause becomes applicable.
- 7.21 Further to the above, Counsel for the Appellant, in Reply, submitted that the trial Court erred in both law and fact by failing to consider or electing not to consider the principle established in case of **Muzyamba Vs The People**⁵ when determining the sentence to impose. That in that case, the Court held that an Accused person must be sentenced in accordance with the law as it stands at the date of the sentence.
- 7.22 Counsel submitted these arguments in furtherance of the erroneous argument or position that as the offence under **Section 69** of the **Penal Code Chapter 87** of the **Laws of Zambia** having been repealed by **Penal Code (Amendment) No. 23 of 2022**, rendering it non-existent, the Lower Court erred in law and in fact by meting a Conviction and subsequent Sentence under the repealed

law thus making both the Conviction and Sentence invalid.

7.23 In the said Supreme Court case of **Muzyamba Vs The People**⁵, the pertinent holding states as follows:

“An accused person should be sentenced on the basis of the law as it stands at the date of sentence.”

7.24 It is important to understand the context in which the above holding on Sentence was made. The Supreme Court observed as follows:

“As to sentence, however, it emerges that although this offence was committed some time in October, 1973, the trial was not concluded until 20th August, 1974. On 16th August, 1974, the law was amended by the repeal of the provisions which impose a mandatory minimum sentence for stock theft in the case of first offenders. As from 16th August, 1974, in the case of a first offender, there is no minimum sentence although the maximum is still fifteen years. The appellant was a first offender and consequently he should have been sentenced on the basis of the law as it stood at the date of sentence.”

(Emphasis mine)

7.25 The Court, after taking into consideration the circumstances of the case, allowed the appeal against the

Sentence and went on to disregard the Sentence imposed on the Accused Person, and instead Sentenced him to two (2) years imprisonment with hard labour.

- 7.26 What is apparent in the above case is that the offence, even after the repeal, remained an offence. However, the Supreme Court when considering the appeal against the Sentence, and in deciding to impose a sentence of two (2) years imprisonment with hard labour, being the minimum sentence prescribed in the repealed law, took into consideration the circumstances surrounding the case including the fact the new law did not provide a minimum sentence and that the Accused Person was a first offender.
- 7.27 Counsel for the Appellant's argument is, as **Section 69** of the **Penal Code** was repealed at the time of sentencing the Appellant in *casu*, the Conviction and subsequent Sentencing under this repealed law is entirely invalid; that in light of the repeal, the trial Court should have deemed the Appellant's Conviction and Sentence unsustainable.
- 7.28 Counsel's argument, in relation to the holding in the **Muzyamba** case, seems to suggest that since the offence was non-existent at the date of sentencing of the Appellant, the Lower Court's conviction and sentence is invalid.
- 7.29 This could not be further from the truth. The Supreme Court in the **Muzyamba** case was not dealing with a repealed offence, it was dealing with a repealed sentence,

while the offence remained, imposing a mandatory sentence of 15 years without considering a minimum sentence as was provided for in the previous law.

7.30 Further to the above and as stated above, **Article 139(12)(c)(v) of The Constitution, Section 14(3)(e) of the Interpretations and General Provisions Act, and Section 2(d) of the Penal Code** all speak to the fact that the penalty or punishment of a person under a Sentence passed or to be passed may be imposed as if the repealing act had not been passed. This was the rationale used in the sentence imposed in the **Muzyamba** case.

7.31 Counsel for the Appellant's arguments in relation to the above fail.

7.32 Consequently, I am of the firm view that the trial Court was correct in its application of the law. The proceedings were properly founded upon the offence as it existed at the time of the commission of the act. The subsequent repeal of **Section 69**, while prospectively abolishing the offence, had no retrospective effect to vitiate a prosecution that was validly commenced, the trial in the Court below, and the subsequent Conviction and Sentence appealed against.

7.33 Ground Seven of the Appeal fails.

7.34 I will proceed to deal with the remaining Grounds of Appeal.

7.35 This Appeal arises from a Conviction for the Defamation of the President. The Appellant contends that the trial Court

made a fundamental error in its assessment of the evidence, its application of the law and its interpretation of constitutional rights.

GROUND ONE

- 7.36 Under Ground One, the Appellant submitted that the trial Court erred in both law and fact by concluding that the Appellant did not legitimately criticize the President contrary to the evidence.
- 7.37 Counsel for the Appellant contended that the burden to prove each and every element of the offence is on the Prosecution, as guided in the Supreme Court case of **Mwewa Muroho Vs The People**¹, and one of the key elements that the State must prove is the absence of lawful justification or privilege.
- 7.38 Furthermore, that to satisfy this requirement, the State must demonstrate that the Accused lacked any lawful basis to make the statement in question.
- 7.39 The trial Court at page 34 stated that the Appellant did not investigate the information he was given by **DW2**.
- 7.40 It was the Appellant's submission that the statement was motivated by a genuine desire to raise awareness about the sanctity of judicial independence and the preservation of democratic principles. That it constituted fair and honest criticism, focusing on governance and accountability without crossing into defamation or insult

as he provided checks and balances being a member of the Patriotic Front Party (PF).

7.41 Chitengi, P.J., as he then was, stated in the case of **The People Vs Bright Mwape and Fred Mmembe** that:

“As I see it, the limitations that Section 69 places on our freedom of expression or freedom of the press is no more than the price we have to pay for belonging to our society, as John Stuart Mill put it:

‘...Everyone who receives the protection of the society owes a return for the benefit, and the fact of living in society, records it indispensable that each should be bound to observe a certain line of conduct towards others.’”

7.42 In the above-cited case, it was held that:

“Section 69 does not deprive any citizen the right to legitimately criticize the President or the Government.”

7.43 It was also stated in the **Bright Mwape** case, *supra* that:

“It is common cause that freedom of expression is not absolute and that it is subject to the derogations in Sub Article 3 of Article 20 of the Constitution.”

7.44 In the case of **Fred Mmembe and Bright Mwape Vs The People (Fred Mmembe, Masautso Phiri and Goliath Mungonge Vs The People)**⁹ it was held as follows:

“That no one could seriously dispute that side by side with the freedom of speech was the equally very important public interest in the maintenance of the public character of public men for the proper conduct of public affairs which requires that they be protected from destructive attacks upon their honour and character. When the public person was the head of state the public interest was even more self-evident.”

7.45 The sanctity of personal reputation is a cornerstone of a civilized society, being a necessary incident of human dignity. This principle imposes a corresponding duty to refrain from any conduct; whether oral, written or symbolic, that maliciously or wrongfully injures the good name of another. The gravamen of the tort of defamation is the publication of a statement that tends to lower a person’s reputation in the estimation of a reasonable society.

7.46 Conversely, there is a powerful social imperative to ensure that citizens are not unduly restrained from offering fair and objective commentary on matters of public interest, including the actions of individuals, particularly those

holding public office. The law must therefore, strike a delicate balance between protecting individual reputation and preserving the space for necessary public critique.

7.47 Legitimate criticism is a crucial component of a functioning society, especially in a democracy. The law protects it but it draws a firm line at false statements of fact that are designed to or have the effect of destroying a person's reputation or that of his or her Office. Legitimate criticism is feedback based on truth, fair interpretation of facts or honest opinion on a matter of public interest. It is expressed in a manner that is not malicious or recklessly false.

7.48 The natural and probable consequence of the statement, which was its intended purpose, was to expose the President and his Office to public contempt, ridicule and injure his personal and official reputation. The act of publishing a statement of such serious consequence, that the President was conspiring with Judges to subvert the nation's multi-party democracy, without any evidentiary foundation, demonstrates a deliberate intent to harm.

7.49 The position I take is that the trial Court was on firm ground when it found that the Appellant's statement did not constitute legitimate criticism and is not protected as such. Accordingly, Ground One of the Appeal fails.

GROUND TWO

- 7.50 In their submissions, Counsel put forth the argument that the trial Court erred in fact and in law by Convicting the Appellant against the weight of the evidence presented.
- 7.51 The Appellant contended that the Court below neglected to evaluate or address the evidence presented by the four Defence witnesses, particularly **DW2** who testified about allegations of interference with judicial processes, which was central to the Appellant's justification for making the impugned statement.
- 7.52 It is my considered view that the trial Court was entirely justified in attributing no probative value to the testimony of **DW2**. The witness's assertions, remaining unchallenged in the sense of being uncontradicted, were nonetheless unsubstantiated by any corroborative evidence. A Court is not obliged to accept testimony merely because it goes unchallenged; its fundamental duty is to evaluate the evidence presented.
- 7.53 The Second Ground of Appeal is premised on a factual inference that finds no support in the Record. The testimony of **DW2**, while naming several individuals, conspicuously omitted any mention of the President. The leap taken by the Appellant to connect these unrelated allegations to the Head of State, by asserting that he was summoning Judges to establish a one-party state, is entirely inexplicable and without any evidentiary foundation.

7.54 Had the Appellant sought to genuinely advance a case for checks and balances, the logical course would have been to pursue the specific allegations against the individuals named by **DW2** and to furnish proof accordingly. His failure to do so, while instead making a sensational and unsubstantiated claim against the President, is fatal to this Ground. I cannot fault the trial Court for the position it took. Consequently, Ground Two of the Appeal fails and is hereby dismissed.

GROUND THREE

7.55 It was the Appellant's contention that the trial Magistrate erred in both law and fact by holding that the Appellant had defamed the President when he commented on a matter of public interest.

7.56 A matter is considered to be of public interest if it relates to the collective well-being and common good of society, impacting the population's shared needs, aspirations and fundamental rights.

7.57 **Black's Law Dictionary (Bryan A. Garner (ed), 7th Edition, St Paul, Minn: West Publishing Company, 1979)** defines "public interest" as:

- "1. The general welfare of the public that warrants recognition and protection;***
- 2. Something in which the public as a whole has a stake; especially an interest that justifies government regulation."***

7.58 In his testimony, the Appellant sought to justify his defamatory statement by claiming he witnessed the President “summoning Judges” after “zooming in” with his binoculars during the weekend of 13th December, 2021. This Court finds this explanation as fanciful, salacious and illogical.

7.59 It is legally and factually unfathomable that such a vague and distant observation could rationally support the specific and grave inference of a plot to establish a one-party state. The Appellant’s failure to verify his claim and his decision to publicize this allegation is indicative of actual malice.

7.60 The Court acknowledges the indispensable role of public scrutiny in a democratic society. However, this role does not confer a privilege upon commentators to publish unsubstantiated statements that are calculated to injure the reputation of an individual or his Office. The right to offer checks and balances is not absolute and yields to the paramount duty to avoid causing unwarranted and defamatory harm that has the potential to cause immense distress amongst citizens.

7.61 The trial Court did not err when it made its finding. Consequently, I find no merit in Ground Three and dismiss it.

GROUND FOUR

- 7.62 Counsel contended that the trial Court erred in both law and fact by ruling that the Prosecution had proved its case beyond a reasonable doubt, despite the failure to establish the elements of the offence of Defamation of President.
- 7.63 Defamation requires proving the statement's existence and publication to a third party, that it identifies the Plaintiff, that it is defamatory (lowers reputation), and that it caused harm. Key evidence includes the defamatory statement itself, witness testimony to prove publication and the statement's harmful impact on the Complainant's reputation.
- 7.64 The Prosecution bears the burden of proving its case beyond a reasonable doubt.
- 7.65 The Supreme Court in the case of **John Banda Vs The People**¹⁰ stated that:

“There is no obligation on the part of the defence to prove as false every allegation in the prosecution's case. Where this to be the case, it would reverse that golden thread that runs through our criminal justice system, namely, that the burden of proof rests through out on the prosecution to prove their case against the accused person beyond all reasonable doubt. The accused is entitled to bring up any issue relevant to his defence. And in our considered view, the

appropriate time to do so is when it is his turn to give evidence in his defence.”

7.66 A statement must satisfy the following elements in order to be deemed as defamatory as set out under **Section 69** of the **Penal Code**: *the statement must be intended to bring the President into hatred, ridicule or contempt; the statement must be communicated to at least one other person besides the President; the statement must be insulting in nature or tend to lower the President’s reputation, the statement must have a connection to the President; and the statement must be made in the absence of lawful justification.*

7.67 Defamation typically protects false statements of fact, not hyperbole or opinion. The statement “***has begun to summon Judges to his house to try and intimidate and coerce them to advance an agenda to bring a one-party state***” is presented as a specific, verifiable event. It describes an action i.e. summoning the Judges, at a location and an intent (to intimidate or coerce for a specific goal). A listener would understand this as a claim that something specific and illegal has happened, not just as the Appellant’s political rant or criticism. Therefore, the statement is treated as a factual assertion.

7.68 The statement is “of and concerning” the President as the statement in question explicitly names the President, so this requirement is easily met.

- 7.69 With regards to the statement being published to a third party, the statement made was broadcasted on national television, being MUVI TV and their Facebook page, which is the very definition of widespread publication. This requirement is met.
- 7.70 This now begs the question, is the statement likely to cause harm to his reputation? This is the most critical element. A statement is defamatory if it is so inherently damaging that harm is presumed, and the aggrieved party does not even need to prove specific financial losses. The statement accuses the President of obstruction of justice and potentially Judge tampering. Accusing the President of trying to dismantle democracy to create a one-party state is a direct attack on his fitness and integrity in his role and on the Office of President.
- 7.71 Whereas the Appellant argued that the statement was meant to be taken as political commentary and the statement “to bring a one-party state in the country” the phrase “summoning Judges to his house” is a concrete, factual allegation.
- 7.72 Based on the foregoing, I find that the trial Court did not err when it found the statement to be defamatory. The statement in question satisfies all requisite elements of a defamatory publication as the assertion constitutes a specific, factual allegation of criminal conduct, namely obstruction of justice and a conspiracy to subvert

democratic processes. Such an assertion is precisely the type of communication that the law of defamation is designed to redress, as it is inherently injurious to reputation.

7.73 The trial Court correctly attributed no probative value to the testimony of the Appellant, which he asserted was predicated on the information supplied by **DW2**. The evidence of **DW2**, upon its own terms, was entirely unsubstantiated and failed to provide any independent corroboration for the statement made by the Appellant, **DW1**. Corroborative evidence is independent evidence that supports or confirms the truthfulness of another piece of evidence or a witness' allegation. The testimony must be independent and based on the witness' personal knowledge or observation. More importantly, the corroborating testimony must support a key or material aspect of the first witness' testimony, not just a trivial unrelated detail.

7.74 The Appellant's testimony remains unproven and devoid of evidentiary weight. This Court affirms the trial Court's decision and therefore, Ground Four fails.

GROUND FIVE

7.75 In relation to Ground Five of the Appeal, it was Counsel's argument that the trial Court erred in both law and fact by failing to recognize that the words alleged in the Charge

Sheet were inconsistent with the evidence presented and contextually flawed.

7.76 **Order 10 Rule 9 (2) Court of Appeal Rules** provides that:

“A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of the objection to the judgment appealed against, and shall specify the points of law or fact which are alleged to have been wrongly decided, such grounds to be numbered consecutively.”

7.77 A perusal of the Record confirms that the Appellant failed to particularize the basis for this Ground of Appeal. The Ground of Appeal which alleges inconsistencies and contextual flaws, was not substantiated with any specific reference to the evidential Record or a precise legal argument demonstrating how the alleged errors would warrant a reversal.

7.78 It is a well-established principle that it is not the role of the Court to speculate upon or construct a party's case. The Court cannot be tasked with imputing arguments to Counsel or drawing inferences that were not expressly and cogently presented for its consideration.

7.79 The Appellant failed to demonstrate that the trial Court erred in its findings. As this Ground of Appeal remains unsubstantiated, it is thus dismissed.

GROUND SIX

- 7.80 The Appellant contended in Ground Six of the Appeal that the Appellant's statement, when read in its entirety, defends the Judiciary and democracy against perceived threats and that the trial Court's interpretation was selective and misrepresented the context.
- 7.81 This Court has already established as a fact that the Appellant's statement was published with intent to injure the President's character. The subsequent contention in Ground Six, that the statement was meant as a defence of the Judiciary is untenable.
- 7.82 The very allegation that Judges were being coerced by the President to subvert democracy is, by its nature, an attack on the perceived independence and integrity of the Judiciary.
- 7.83 I am of the considered view that the trial Court correctly identified the defamatory statement, not as a direct insult to the Judges, but as a publication whose inevitable effect was to undermine the Judiciary's credibility in the public eye.
- 7.84 As the Appellant's arguments are founded on a premise that is logically irreconcilable with the established facts, the trial Court was correct in its holding and, consequently, Ground Six fails.
- 7.85 Further to the above, in Reply to Grounds One and Six of the Respondents Heads of Argument, Counsel referred to

Section 192 of the **Penal Code** and submitted that defamation pertains to an injury to a person's reputation. That the President, Mr. Hakainde Hichilema, having been personally defamed, did not personally complain of the same. It was contended that an action for defamation is purely personal, and the absence of direct testimony from the President himself, who alone could attest to any reputational injury, renders the Prosecution's case incomplete and therefore, the trial Court's failure to apply the correct legal standard resulted in a wrongful Conviction. That the Respondent's submission fails to address the fundamental legal principles governing the law of Defamation, particularly the requirement that Defamation is a personal action and can only be initiated by the person allegedly defamed.

7.86 **Section 69** of the **Penal Code** provides the offence of Defamation of President. **Section 192** simply gives the definition of defamatory matter as follows:

“Defamatory matter is matter likely to injure the reputation of any person by exposing him to hatred, contempt or ridicule, or likely to damage any person in his profession or trade by an injury to his reputation. It is immaterial whether at the time of the publication of the defamatory matter the person concerning whom such matter is published is living or dead:

Provided that no prosecution for the publication of defamatory matter concerning a dead person shall be instituted without the consent of the Director of Public Prosecutions.”

7.87 The purpose of **Section 69** of the **Penal Code** was to protect the dignity of the office of the President and by association and election, the President himself. The offence under **Section 69**, now repealed, is an offence against the office of the President, a crime against the dignity of the office and such proceedings are initiated by the State through the office of the Director of Public Prosecutions (DPP) upon receipt of complaints from the general public.

7.88 This is provided for under Article **180(4)(a)** of **The Constitution** which states as follows:

***“4. The Director of Public Prosecutions may—
a. institute and undertake criminal proceedings against a person before a court, other than a court-martial, for an offence alleged to have been committed by that person;”*** (Emphasis mine)

7.89 The reference to ‘a person’ in the above Article does not exclude the Republican President. The President, by virtue of the Office he holds, is immune from all prosecutions, civil and criminal, and further cannot commence an action in his capacity as President; he cannot personally

prosecute or initiate criminal cases and such matters are taken up, where appropriate, by the DPP.

7.90 **Article 98 (1), (2) and (4) of The Constitution** stipulates as follows:

“1. A person shall not institute or continue civil proceedings against the President or a person performing executive functions, as provided in Article 109, in respect of anything done or omitted to be done by the President or that person in their private capacity during the tenure of office as President.

2. The President shall not, in the President’s private capacity during the tenure of office as President, institute or continue civil proceedings against a person.

4. Subject to clause (9), the President or a person performing executive functions, as provided in Article 109, is immune from criminal proceedings which immunity continues after that person ceases to hold or perform the functions of that office.”

7.91 Therefore, and based on the above, the President cannot be sued nor sue in criminal proceedings, that is personally initiate criminal proceedings, as he is immune from such proceedings for actions taken whilst in office, and is precluded from commencing such proceedings even after

he ceases to hold or perform the functions of that office. Further that the DPP can institute proceedings for and on behalf of the Office of the President, and, by virtue of holding the office, the President.

7.92 Consequently, the above argument by Counsel for the Appellant has no merit.

8. CONCLUSION

8.1 For the foregoing reasons, this Court finds the Appellant's Appeal to be without merit and is dismissed in its entirety.

8.2 The Judgment of the trial Court is hereby affirmed, and the Conviction and Sentence shall stand forthwith.

DELIVERED IN OPEN COURT THIS 21ST DAY OF OCTOBER, 2025.



**A. MALATA-ONONUJU
HIGH COURT JUDGE**