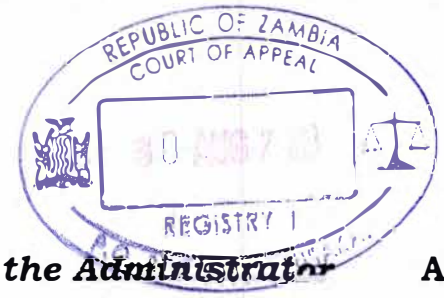
IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 163 OF 2021**

HOLDEN AT NDOLA

(Civil Jurisdiction)



B E T W E E N:

BRENDA KACHASU *(Suing as the Administrator of the Estate of the late Paul Kachasu)* **APPELLANT**

AND

MWELWA MANDA *(Sued as Administrator of the Estate of the late Dr Francis Manda)* **1ST RESPONDENT**

UNIVERSITY TEACHING HOSPITAL **2ND RESPONDENT**

ATTORNEY GENERAL **3RD RESPONDENT**

CORAM: Chashi, Majula and Patel, JJA

ON: 23rd and 30th August 2023

For the Appellant:	*(1)*	*J.C Kalokoni, Messrs Kalokoni & Co.*
	(2)	*S.W Ndemanga (Mrs), Mesdames Ndemanga Mwalula and Associates*
For the 1st, 2nd and 3rd Respondents:		*C. Watopa and M. Katolo (Ms), Assistant Senior State Advocates*

J U D G M E N T

CHASHI, JA delivered the Judgment of the Court.

Cases referred to:

1. ***In Re A Ward of Court (Withholding Medical Treatment) No. 2 (1996) 2, IR, 79***

2. ***Malette v Shulman & Others (1990) 69 DLR and (Ont. C.A) 1990 Can L II 68 68 (ON CA)***

3. ***Airedale National Health Service Trust v Bland (1993) 2 WLR, 316***

4. ***In Re T*** *(adult: refusal of medical treatment)* ***(1992) 4 All ER, 649 (CA)***

5. ***Schloendorff v Society of New York Hospital, 105 N.E 92 (N.Y. 1914)***

6. ***ES v AC – Case No. SA 57/2012***

7. ***Castell v De Greef, 1994 (4) SA 408***

8. ***Government of the Republic of Namibia v LM and Others (2014) NASC 19***

Legislation referred to:

1. ***The Court of Appeal Act, No. 7 of 2016***

2. ***The Constitution of Zambia Act, No 18 of 1996***

Rules referred to:

1. ***The Protection of Fundamental Rights Rules, Statutory Instrument No. 56 of 1969***

Other authorities referred to:

1. ***Clerk and Lindsell on Torts, 17 Edition, Sweet & Maxwell London, 1995***

2. ***British Journal of Midwifery, Volume 7, No. 12, published on line on 27th September 2013*** *(https://doi.org/10.12968/.1997.7.12.8209)*

3. ***The Health Professions Council of Zambia Guidelines for Good Practice in the Health Care Profession-Obtaining Patients Informed Consent: Ethical Considerations, 1st Edition, March 2016***

1.0 INTRODUCTION

1.1 One of the most difficult medical legal problems confronting hospitals and other health care providers is the treatment of Jehovah's Witness patients who are in need of blood transfusion but who refuse that procedure on religious grounds.

1.2 In this appeal we are dealing with the Jehovah's Witness religion, which is a Christian denomination, well known for their refusal to receive blood transfusion. They believe that the bible prohibits Christians from accepting blood transfusions. They have placed reliance on several biblical references such as Leviticus 17:11, Leviticus 3:17, Acts 15:28 and Acts 21:25. This refusal leads to various challenges for medical practitioners involved in the treatment and management of Jehovah's Witness patients, as was the case faced by the 1st Respondent in this matter.

1.3 This is an appeal against the Judgment of Hon. Mrs Justice E.P Sunkutu delivered on 5th May 2021.

1.4 In the said Judgment, the learned Judge dismissed the Appellant's action in the court below on account of impropriety and consequently want of jurisdiction.

2.0 BACKGROUND

2.1 The late Paul Kachasu, (Kachasu) a dedicated and baptised Jehovah's witness, aged 81 years, was a prostate cancer patient diagnosed with cancer of the prostate gland. In accordance with the scripture in Acts 15:28, he was of the strong belief that blood transfusion was contrary to divine law. He had to that effect on 2nd December 2007 executed a **Durable Power of Attorney of Health Care (DPA)**, that served as an advance directive, addressed to all medical practitioners under whose care he might come, directing that under no circumstances did he consent to the administration of allogenic blood or blood products, except for non-blood alternatives, as the treating physician in consultation with his duly appointed Health Care Agent might consider appropriate for his condition then prevailing.

2.2 On 7th December 2007, Kachasu was admitted to the University Teaching Hospital (UTH) with severe anaemia

and within a short time he lapsed into unconsciousness and had to be admitted to the Intensive Care Unit (ICU), under the care of the 1st Respondent (Dr Francis Manda), a renowned Urologist, now deceased. Upon reviewing Kachasu's condition, it was discovered that he had severe anaemia and a very low blood level. The immediate recommendation was that he be administered with a blood transfusion.

2.3 The 1st Respondent, approached Kachasu's wife and other members of the family to advise them of the need for a blood transfusion and he was advised that Kachasu did not wish to have a blood transfusion as evidenced by the DPA. That prior to being unconscious, Kachasu had repeatedly on several occasions stated that he did not want a blood transfusion. She therefore recommended that the 1st Respondent administers Erythropoietin to boost his blood production.

2.4 Six hours later, the 1st Respondent, observed that Kachasu's condition was deteriorating, he thus made the following decision and carried it out:

"I as a treating doctor, I have taken a professional decision not to go along with euthanasia. Transfer to the main ICU for the needful. No visitors during the transition..."

2.5 Seven days after the blood transfusion, on 13th December 2007, Kachasu died.

3.0 ACTION IN THE COURT BELOW

3.1 On 25th July 2008, the Appellant as administrator of the Estate of the late Kachasu, commenced court proceedings by way of writ of summons claiming the following reliefs:

(1) Damages and interest for assault and battery against the 1st and 2nd Respondents for administering treatment on late Kachasu without his consent

(2) Exemplary or aggravated damages

3.2 According to the attendant statement of claim, despite the clearly expressed wishes of Kachasu, as confirmed in writing by the DPA, which was valid and applicable, the 1st Respondent wilfully and in defiance of the known wishes of the patient, transfused two separate

units of allogenic blood, into Kachasu, who subsequently died.

3.3 The Appellant averred that the blood transfusion, in wilful defiance of the known wishes of the patient amounted to trespass to the person, which is a tort of assault and battery.

3.4 Under the head of exemplary or aggravated damages, the Appellant claimed that the circumstances in the matter demonstrate arrogant disregard of the deeply held conscientious beliefs of an elderly and sick patient under the care of the 1st Respondent and whose action the 2nd Respondent was vicariously liable. That as such, it was an especially egregious breach of the 1st Respondent's duty to his patient.

3.5 The 3rd Respondent was subsequently added to the proceedings. In the defence settled by the Respondents, the Respondent made bare and general denials.

3.6 There was no trial conducted as the parties agreed that the matter should proceed by settlement of agreed facts and submissions. The Appellant filed submissions in the

court below, whilst the Respondents neglected to do so.

4.0 DECISION OF THE COURT BELOW

4.1 In her Judgment delivered on 5th May 2021, Sunkutu, J after considering the pleadings and the Appellant's submissions, in which the Appellant brought to the court's attention, the common law applicable in Europe, Canada and America and various authorities; posed the following question for determination.

"Whether the action was tenable before the court"

4.2 After taking recognizance that the reliefs sought are in the form of general and exemplary damages and that the case was anchored on the principle of competent adult patients being entitled to decide what medical treatment they should receive or indeed refuse to have, on the basis of their religious belief and background. The learned Judge took note of the various authorities that had been cited, in which the plaintiffs who had sued had succeeded regarding the issue of their being entitled to receive certain medical treatments and

interventions, even if the refusal was certain to result in death.

4.3 However, despite the aforestated, the learned Judge in a tangent opined as follows:

> ***"However, and in as much as the authorities cited for my attention are of extreme importance, I find myself constrained to entertain this matter, on account of jurisdiction. Part III of The Constitution of Zambia Act, Chapter 1 of The Laws of Zambia; provides for the protection of the fundamental rights and freedoms of the individual, in particular Article 19 (1)..."***

4.4 After considering Article 19 (1), the learned Judge took the view that the Appellant's action was one arising out of a possible breach of a fundamental right and freedom, and not a breach of the 1st Respondent's professional duties as argued by the Appellant. That it therefore followed that, the enforcement of the same must be brought before the High Court by way of a

petition as provided for by Rule 2 of **The Protection of Fundamental Rights Rules**[1].

5.0 THE APPEAL

5.1 Dissatisfied with the Judgment the Appellant has appealed to this Court advancing the following four (4) grounds:

(1) That the learned Judge in the court below erred in law and fact when she held that the Appellant's case was anchored on the breach of the Appellants freedom of conscience as a Jehovah's witness, thus disregarding the pleadings which showed that the Appellant's claim was based on a tortious claim of assault and battery, arising from the 1st Respondent's action of performing a medical procedure on the Appellant without his consent.

(2) That the learned Judge in the court below misdirected herself in law and fact when she failed to address the legal nature of the 1st Respondent's admitted misfeasance of

performing a medical procedure on the 1st Appellant without his consent.

(3) That the learned trial court erred in law when she dismissed the Appellants action for impropriety and failing to adjudicate on the triable issues agreed by the parties.

(4) That the learned Judge in the court below erred in law when she dismissed the Appellants action for impropriety based on a question of jurisdiction of the court which matter was raised by the court on its own motion at Judgment stage without according the parties an opportunity to address the question.

6.0 ARGUMENTS IN SUPPORT OF THE APPEAL

6.1 In arguing the appeal, Mr Kalokoni and Mrs Ndemanga, Counsel for the Appellant relied on the Appellant's heads of argument, which they augmented with oral submissions. In arguing the first and second grounds, the Appellant contended that, whilst Kachasu may have refused medical treatment on the basis of

his Christian belief and conscious, the act by the 1st Respondent of ignoring his rights, was a tortious action of trespass to the person. That the learned Judge therefore took a narrow view when she held that the action was, anchored on Kachasu's freedom of conscience only and was a matter to be commenced by way of a petition for breach of a constitutional right.

6.2 The case of **In Re A Ward of Court (Withholding Medical Treatment) No. 2**[1] was cited, in which the Irish Court of Appeal held that:

> ***"Medical treatment may not be given to an adult person of full capacity without his or her consent. There are a few rare exceptions to this, eg in regard to contagious diseases or in a medical emergency where a person is unable to communicate. This right arises out of civil, criminal and constitutional law."***

6.3 According to the Appellant, it was the preserve of the injured party to choose the recourse for the injury sustained. That an injured person who has medical treatment administered against his wishes can pursue

an action either under civil, criminal law or constitutional law to the extent allowed by the law. According to the Appellant the learned Judge in the court below should have proceeded to address her mind on the tortious acts of the 1st Respondent.

6.4 Our attention was also drawn to the learned authors of **Clerk and Lindsell on Torts**[1] – at page 43 where the following is stated:

> **"Any medical treatment involving physical contact with the patient's body is *prima facie* a battery unless the patient has expressly or implicitly consented to that contact. It is no answer to a competent patient's claim in battery that the doctor believed that, he acted in the patient's best interest."**

6.5 Reliance was also placed on the Canadian Supreme Court case of **Malette v Shulman & Others**[2], where it was held that:

> **"A competent adult is generally entitled to reject a specific treatment or all treatment or to select an alternate form of treatment, even**

if the decision may entail risks as serious as death and may appear mistaken in the eyes of the medical profession or of the community...it is the patient who has the final say on whether to undergo the treatment."

6.6 The Supreme Court in upholding the award of $20,000 (Canadian dollars) in damages, stated that, whilst Dr Shulman did not act negligently, he tortously violated his patients' rights over her own body by acting contrary to the Jehovah's Witness card and administering blood transfusions that were not authorised. His honest and even justifiable belief that the treatment was medically essential did not serve to relieve him from liability for the battery resulting from his intentional and unpermitted conduct.

6.7 Further reliance was placed on the case of **Airedale National Health Service Trust v Bland**[3] where it was held that:

"It is unlawful, so as to constitute both a tort and the crime of battery to administer medical

treatment to an adult who is conscious and of sound mind, without his consent."

6.8 It was submitted that the 1st Respondent's actions were tortious and an arrogant disregard of Kachasu's right to self-determination. We were urged to uphold the two grounds, reverse the decision of the court below and enter Judgment for damages for trespass to the person in accordance with Section 24 (1) (a) of **The Court of Appeal Act[1].**

6.9 As regards the third ground, it was submitted that having settled agreed facts, the court should have entered Judgment on the agreed facts as established and proceeded to make express Orders based on that. It was submitted that the court below set up a new case for the parties, by recasting a tortious matter as pleaded into a constitutional matter and as such expanded the boundaries of the litigation beyond the scope defined by the parties in their pleadings.

6.10 In respect to the fourth ground, it was submitted that the question of jurisdiction which formed the basis of the court to dismiss the matter was not raised by

either of the parties, nor were they given an opportunity to address the question. That it was therefore improper for the court to raise the question on its own motion at Judgment stage. It was the Appellant's view that the court should have invited the parties to address it on the question of jurisdiction before rendering its Judgment.

6.11 The Appellant drew our attention to Section 24 (1) (a) of **The Court of Appeal Act**[1] and beseeched us to give effect to the findings of the trial court. We were urged to uphold the appeal in its entirety and set aside the decision of the court below. It was contended that whilst this Court does have jurisdiction to Order a retrial before another Judge of the lower court, in view of the length of time it has taken to conclude the matter, this Court should grant an Order for damages for assault and battery against the Respondents based on the parties agreed facts, without resorting to having another Judge of the lower court to hear the matter *de novo*.

7.0 RESPONDENT'S ARGUMENTS

7.1 The Respondents did not file their heads of argument. Although Counsel for the Respondents were before court at the hearing of the appeal, they were on that basis precluded from participating in the arguments.

8.0 ANALYSIS AND DECISION OF THE COURT

8.1 We have considered the Appellant's arguments and the Judgment being impugned. We will deal with all the four grounds together as they are entwined. The issue they raise is whether the learned Judge was vested with jurisdiction to determine the matter before her or not. There is definitely no precedent in our jurisdiction in respect to the issues which have been raised in grounds one and two of the appeal. We however note that there is a number of American, Canadian, Irish, Australian and English common law cases some of which have been cited by the Appellant which are highly persuasive. We also take recognizance that Zambia is recognised as a common law jurisdiction. English common law and doctrines of equity apply in our jurisdiction.

8.2 The learned authors of **Clerk & Lindsell on Torts, at paragraph 12-01** state as follows:

> **"The fundamental principle, plain and incontestable, is that every person's body is inviolate. Interference however slight with a person's elementary civil right to security of the person and self-determination in relation to his own body, constitutes trespass to the person. Trespass to the person may take three forms. A battery is committed when there is an actual infliction of unlawful physical contact with the plaintiff and assault where the plaintiff is caused to apprehend the immediate infliction of such a contact. Deprivation of liberty constitutes false imprisonment."**

8.3 An extract from the **British Journal of Midwifery[2],** states as follows:

> **"One of the most important civil actions which are included in the bundle of civil wrongs known as *"torts"* is that of trespass to**

the person. Any person who alleges that his or her person has been touched without his or her consent or other lawful justification could sue for trespass to the person. Unlike an action for negligence, an action for trespass is actionable without proof of harm being suffered. A doctor might decide that a person needed to have blood transfusion and thereby save their life – if the transfusion was given without the consent of the mentally competent woman, then she could sue for trespass to the person even if she would have died without transfusion. The fact that the woman benefited from the treatment is not valid defence for the doctor (Malette v Shulman)"

8.4 It is evident from the aforestated, that issues of transfusion of blood without the consent of a patient amounts to trespass to the person. The facts of the Kachasu case speaks specifically to that. The endorsement on the writ of summons was for damages

for assault and battery. So were the averments in the statement of claim. Therefore, the liability which was being apportioned to the Respondents was tortious for trespass to the person. The Appellant was in this case not asserting his constitutional rights, but seeking recompense for trespass to the person. In **Re T** *(adult: refusal of medical treatment)*[4] the Court of Appeal in England held that; treating a person without consent amounts to trespass; except where unconscious or unable to give consent in which case must be treated with best interests and clinical Judgment.

8.5 The learned Judge, in our view, erred in abdicating her duty and responsibility by holding that she had no jurisdiction as this was a constitutional matter which needed to be commenced by way of petition pursuant to Article 19 of The Constitution. This therefore is a proper case for setting aside the decision of the court below and we accordingly set the same aside.

8.6 Given that this matter was commenced in 2008 and Judgment was only delivered in 2021, and also that there was no concrete defence as the defence consisted

of only bare and general denials; and also looking at the statement of agreed facts and the failure by the Respondents to tender their submissions into court, this is a proper case for us to seek recourse to Section 24 (1) (a) **CAA** and enter Judgment as the circumstances of the case permits us to do so. In addition, there is sufficient material on the record to enable us to do so.

9.0 DETERMINATION OF LIABILITY

9.1 As earlier alluded to, the Appellant in the court below was seeking damages for assault and battery. In addition, exemplary or aggravated damages. There was no trial held as the parties agreed to settle a statement of agreed facts, which appears at page 90 of the record. Prominent amongst the agreed facts is that the 2nd Respondent, which extends to the 3rd Respondent, were vicariously liable for any act or omission committed by the 1st Respondent.

9.2 It was also agreed under paragraphs 5,6,7 and 8 as follows;

> **"(5) The 1st Respondent acknowledged during the course of discussions that he understood**

well the patients wishes as regards blood transfusions and that he knew of the deceased's specific wishes and instructions.

(6) During the course of treatment, the deceased was transferred to the intensive care unit where access to him by relatives and friends was restricted in accordance with hospital regulations.

(7) That the 1st Respondent explained the condition of the deceased to the spouse and some relatives who were around at the time and that there was need to transfuse him urgently, but did not get any positive response. That due to the seriousness of the condition, the 1st Respondent rang and spoke to the late President Mr. Levy Mwanawasa, who was abroad in France at the time and the late President advised the 1st Respondent to do all that he could to save the deceased, who was the President's uncle.

(8) The 1st Defendant conducted a blood transfusion on the deceased, who subsequently died on 17th December 2017 at 10:50 hours."

9.3 Prior to the settlement of the statement of agreed facts, the Respondents had settled their defence, which as earlier alluded to contained bare and general denials and to some extent admissions. Of interest is paragraph (7) in which it is averred as follows:

"The Respondents as regards paragraph 11 of the statement of claim admits that he conducted a blood transfusion on the Appellant, but will aver that the Appellant having collapsed due to hypovolaemic shock, resuscitation included blood transfusion. Further, the Respondents admit that the Appellant died at the stated date and at the stated time in the statement of claim."

9.4 When the parties were directed to file their submissions in the court below, only the Appellant did. The Respondents neglected to do so. The learned

Judge in the court below proceeded to render her ruling based on the pleadings, statement of agreed facts and the Appellant's submissions through the Judgment, now subject of this appeal.

9.5 It is evident from our perusal and consideration of the pleadings, the statement of agreed facts and the record in general, that the 1st Respondent, despite being aware of the **DPA** and without Kachasu's consent proceeded to administer blood transfusion against the wishes and directives of the Appellant.

9.6 The Constitution of Zambia, guarantees and affords every individual certain rights. Article 13 of **The Constitution of Zambia**[2] provides for protection of rights to personal liberty and prescribes that no person shall be deprived of his personal liberty except as may be authorised by law. Article 19 provides for protection of freedom of conscience. In particular Article 19 (1) prescribes as follows:

> **"Except with his own consent, no person shall be hindered in the enjoyment of his freedom of conscience and for purpose of this Article,**

the said freedom includes freedom of thought and religion, freedom to change his religion or belief, and freedom either alone or in community with others and both in public and in private, to manifest and propagate his religion and belief in worship, teaching, practice and observance."

9.7 In the case concerning the refusal by an adult of full mental capacity to have a blood transfusion administered, the starting point is the principle of patient autonomy which is embraced by the aforestated Articles of our Constitution. As a primary matter, all patients have the constitutional right to determine what shall and shall not be done to them. This right extends to any treatment that may save the patient's life. That includes blood transfusions which are particularly important in circumstances involving Jehovah's Witness patients.

9.8 This right in most common law jurisdictions, has been referred to as the right to self determination and has been recognised all around the common law world. The right to refuse treatment is part of the broader right to self determination and has been described by the New

York Court of Appeal in the case of **Schloendorff v Society of New York Hospital**[5] as follows:

> **"Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a person who performs an operation without the persons consent commits an assault for which he is liable in damages."**

9.9 In the case of **ES v AC**[6], the Supreme Court of Namibia had this to say:

> **"The principle of patient autonomy reflects that it is a basic human right for an individual to be able to assert control over his or her own body. Adhering to this principle requires that a patient must consent to medical procedures after having been properly advised of their risks and benefits, so that the consent is informed. Medical practitioners must inform their patients about the material risks and benefits of the recommended treatment, but it is up to the patient to decide whether to**

proceed with a particular course of treatment. For this reason, it is the patient's Judgment of his or her own interests that is the most important factor."

9.10 These principles were also set out clearly in the case of **Castell v De Greef**[7] in which the full bench of The Cape Provincial Division of the Supreme Court of South Africa, as it then was, stated as follows;

"It is clearly for the patient in the exercise of his or her fundamental right to self-determination, to decide whether he or she wishes to undergo the operation and it is in principle wholly irrelevant that the patient's attitude is grossly unreasonable in the eye of the medical profession; the patients right to bodily integrity and autonomous moral agency entitles him or her to refuse medical treatment."

9.11 The **Castell** case was endorsed by the Supreme Court of Namibia in the case of **Government of the Republic of Namibia v LM and Others**[8], where in

particular the court referred to a quote from an unpublished doctoral thesis by **Van Dosten** entitled: **The Doctrine of informed consent in medical law** which reads:

> **"The fundamental principle of self determination puts the decision to undergo or refuse a medical intervention squarely where it belongs, namely with the patient. It is after all, the patients life or health that is at stake and important though his life and health as such may be, only the patient is in such a position to determine where they rank in his order of priorities, in which the medical factor is but one of a number consideration that influence his decision whether or not to submit to the proposed intervention. But even where medical considerations are the only ones that come into play. The cardinal principle of self determination still demands that the ultimate and informed decision to undergo or refuse the proposed intervention**

should be that of the patient and not that of the doctor."

9.12 Although we earlier alluded to lack of precedent on this subject matter in our jurisdiction, we are mindful of **The Health Professions Council of Zambia Guidelines for Good Practice in The Health Care Profession-Obtaining Patients Informed Consent**[3], (Guidelines) which was brought to our attention by Counsel for the Appellant. Of relevance to this appeal are guidelines 3.1.4, 8.2 and 9.4.3 which reads as follows:

> **"3.1.4 Patient's have the right to refuse health services and are entitled to information regarding the implications, risk and obligations of such refusal.**
>
> **8.2 However, health practitioners must respect the terms of any valid advance refusal by the patient which they know about, or which is drawn to their attention.**

9.4.3 Health practitioners must respect any refusal of treatment given when the patient was competent, provided the decision in the advance statement is clearly applicable to the present circumstances, and there is no reason to believe that the patient has changed his or her mind. Where an advance statement of this kind is not available, the patient's known wishes should be taken into account."

9.13 From the aforestated authorities, consent to treatment is widely regarded as the cornerstone of the doctor-patient relationship. Therefore ordinarily where the patient is competent, the right of self-determination outweighs all other interests, including state interests and the individual is generally permitted to reject medical treatment even at the risk of certain death. Although indeed as can be seen from some cases already cited that there are exceptions to this general

rule such as where the patient is not competent, pregnant, of unsound mind and so forth.

9.14 A comparable case to the matter herein is the leading case of **Malette v Shulman & Others**[2], which has received global recognition. In this case, Malette was injured in a car accident and was unconscious. This was a potentially life threatening situation. Malette was at the time carrying a card stating that she was a Jehovah's Witness and as a result, was unwilling to receive blood transfusion, in any circumstances. Dr Shulman chose to ignore the card and administered blood transfusions to save her life. After her recovery, Malette sued Dr Shulman for damages for negligence assault, battery and religious discrimination. The trial Judge ruled that the explicit instructions on the card validly restricted Dr Shulman from performing the blood transfusion and that there was no valid reason for ignoring the instructions on the card. Dr Shulman was held liable for battery. This decision was upheld by the Court of Appeal.

9.15 The *ratio* in that matter was that, a doctor is not free to disregard a patients advance instructions, since the law recognizes the right of self-determination and does not prohibit a patient from refusing emergency medical treatment. If a doctor were to continue with a medical treatment that interferes with the body of the patient without the patient's consent, then this action would constitute battery and the doctor would be civilly liable.

9.16 The reasoning of the Court of Appeal was that, rights of self-determination are recognized under a common law system and the tort of battery protects these rights by holding violators of these rights liable. That general rules that govern actions for battery are applicable to doctors and their patients. Malette had set unqualified instructions about blood transfusions. Dr Shulman was bound in law by her choice, even if that choice was made well in advance and went against his professional opinion.

9.17 According to the Court of Appeal, the written instructions were also a clear indication of her

intention to convey her wishes if she was unable to speak. It was not up to the doctors to *"second-guess the reasonableness of the decision"* or to pass any kind of judgment on the reasons for the decision. That by disregarding her wishes and continuing with the tortious invasion of her bodily integrity, Dr Shulman violated her right over her own body and was liable to battery. They went on in *dictum* to state that the state's interest in preserving the life or health of a patient as well as the integrity of the medical profession, are secondary to the patient's interest in directing the course of their life.

9.18 In *casu*, the 1st Respondent in similar circumstances chose to ignore the **DPA**. Although it was not pleaded, he used his own judgment as a professional medical doctor to transfuse blood to Kachasu, without his consent. Kachasu's explicit instructions on the **DPA**, validly restricted the 1st Respondent from performing the blood transfusion and there was no valid reason for ignoring the instructions on the **DPA.**

9.19 Based on the aforestated findings and the common law position, we opine that the 1st Respondent by disregarding the Appellant's wishes, violated the Appellants right over his own body. There was tortious invasion of Kachasu's bodily integrity and therefore the 1st Respondent is liable to battery. We accordingly vicariously in line with the statement of agreed facts, enter Judgment against the 3rd Respondent for general damages for battery.

9.20 As regards the claim for exemplary or aggravated damages, our view is that it fails as it has not been proved. Exemplary damages are punitive in nature. They are awarded in addition to actual damages when the defendant acted with recklessness, malice or deceit. We are not able to apportion recklessness malice or deceit to the 1st Respondent's conduct.

10.0 ASSESSMENTS OF DAMAGES

10.1 Here again, the leading case, which transcends continents, is **Malette v Shulman & Others**, whose facts we earlier laid out. And as earlier alluded to, it is comparable to the case before us in many respects. In

that case, the defendant was found liable for battery and was held to pay 20,000.00 Canadian dollars

10.2 The Appellant on the issue of damages, in their submissions in the court below placed heavy reliance on the award in the **Malette** case. Although the Appellant also cited other cases, we are of the view that the most persuasive award is as in the **Malette** case as it is the most comparable. We are inclined to adopt the same award at today's Canadian dollar rate which is at K15.00.

10.3 We accordingly award the Appellant the sum of K300,000.00 as general damages for battery. The award will attract interest at short term deposit rate from 20th July 2008, being the date of issuance of the writ of summons to the date of this Judgment and thereafter at the current commercial bank lending rate as determined by Bank of Zambia up to the date of full settlement of the award.

11.0 COSTS

11.1 We award costs here and in the court below to the Appellant. Same are to be borne by the 3rd Respondent and are to be taxed in default of agreement.

J. CHASHI
COURT OF APPEAL JUDGE

B.M. MAJULA
COURT OF APPEAL JUDGE

A.N. PATEL, SC
COURT OF APPEAL JUDGE