IN THE CONSTITUTIONAL COURT OF ZAMBIA 2016/CC/0023

HOLDEN AT LUSAKA

REPUBLIC OF ZAMBIA
CONSTITUTIONAL COURT OF ZAMBIA
11 NOV 2016
REGISTRY 2
P. O. BOX 50067, LUSAKA

IN THE MATTER OF: ARTICLE 118(2)(e) OF THE AMENDED CONSTITUTION ACT No.2 of 2016 VIS a VIS SECTION 207 AND 208 OF THE LAWS OF ZAMBIA

IN THE MATTER OF: AN INTERPRETATION OF ARTICLE 118(2)(e) OF THE AMENDED CONSTITUTION ACT No. 2 OF 2016 VIS a VIS SECTION 207 AND 208 OF THE CRIMINAL PROCEDURE CODE CHAPTER 88 OF THE LAWS OF ZAMBIA, PARTICULARLY THE WORDS "UNDUE REGARD TO PROCEDURAL TECHNICALITIES".

BETWEEN:

HENRY M KAPOKO APPLICANT

AND

THE PEOPLE RESPONDENT

Before Sitali, Mulenga, and Munalula, JJC in Open Court on 28th September, 2016 and 7th November, 2016

For the Applicant: Mr Kelvin Fube Bwalya and Mrs Susan Chazanga, Messrs KBF and Partners

For the Respondent: Mr Boniface Chiwala, Attorney General's Chambers, with Ms. Karen Banda, Anti Corruption Commission

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JUDGMENT

Munalula, JC, delivered the Judgment of the Court

Cases referred to:

1. R v Phillipo Nkonde and Others 4 N.R.L.R 254 (omitted from Reprint).
2. David Shaw v the Queen (1963-1964) Z. and N.R.L.R. 141.
3. Mulundika and 7 Others v the People (1995) Z.R. 20.
4. Utex Industries Ltd v Attorney General (Civil application no.52/95).
5. Century Enterprises Ltd v Greenland Bank (in Liquidation) (HCT-00-MA-0916 of 2004) (arising from HCT-00-CC-CS-0877-2004).

6. James Mangeli Musoo v Ezeetec Limited (Cause no. 1263 of 2012); [2014] eKLR.
7. Mercy Mwende Kivundu v S.N. Anjichi - as the Secretary and Executive Director of Kenya Institute of Bankers (Cause No. 230 of 2012).
8. Lt. General Wilford Joseph Funjika v Attorney General (2005) Z.R. 97.
9. Barrow and Young v The People (1966) Z.R.66.
10. Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR.
11. Mrs Matovu Sarah and Others v Abacus Pharmacy (Africa) Limited HCT-00-CC-CA-11-2012.
12. NFC Africa Mining Plc v Techro Zambia Ltd SCZ No. 22 of of 2009

Legislation referred to:

The Constitution of Zambia, 1991.

The Constitution of Zambia (Amendment) Act No.2 of 2016.

The Criminal Procedure Code, Chapter 88 of the Laws of Zambia.

The Constitutional Court Rules, 2016.

The Constitution of Kenya, 2010.

The Constitution of the Republic of Uganda, 2006.

Other works referred to:

MDA Freeman, Lloyd's Introduction to Jurisprudence 7th edition (London, Sweet and Maxwell).
Oxford English Dictionary 2nd edition.

Phipson On Evidence, 14th edition.

Rules of the Supreme Court, (White Book) 1999 Edition.
Jeffrey Goldsworthy "Constitutional Interpretation" Michel Rosenfeld (ed.) The Oxford Handbook of Comparative Constitutional Law (Oxford University Press, UK 2012).

The Applicant (the Accused in criminal proceedings in the court below) filed originating summons in the Constitutional Court against the Anti-Corruption Commission (the Prosecution in the court below) on 20th June, 2016. The Attorney General joined suit with the Anti-Corruption Commission (ACC) upon being served with originating summons. The two, are the Respondents herein. The Applicant is seeking interpretation of Article 118(2) (e) of Act no. 2 of 2016 (hereinafter referred to as the 'Constitution as amended') in relation to sections 207 and 208 of the Criminal Procedure Code (CPC), Chapter 88, of the Laws of Zambia. The application arose out of ongoing criminal proceedings in the Magistrate's Court.

The background to the application is that the ACC is prosecuting the Applicant on 65 counts of theft by public servant, money laundering and abuse of authority. The Prosecution called a total of 59 witnesses and at the end of their case the Applicant was found with a case to answer and put on his defence. Counsel for the defence then issued *subpoena duces tecum* against the Permanent Secretary in the Ministry of Health and the Secretary to the Cabinet to produce documents to assist the Applicant in the preparation of his defence. When the matter came up for hearing, counsel for the defence made an application to amend the *subpoena duces tecum* in order that the Permanent Secretary in the Ministry of Health could be treated as if he had been summoned as a witness and testify in the proceedings. Counsel further sought an order that the Permanent Secretary's testimony should precede that of the Applicant. Counsel argued that the Applicant might be denied an opportunity to testify on the documents produced by the subpoenaed witnesses if they were to produce the documents after he had testified.

Counsel further argued that the change proposed in the sequence of testifying, would not prejudice the State even if it would be contrary to sections 207 and 208 of the CPC. He cited a number of authorities to support the claim that under the common law an accused person testified

first as a matter of practice rather than of law. He averred that Article 118(2)(e) of the Constitution as amended, which states that the courts should not, in determining a matter, accord undue regard to procedural technicalities, had created a new order which supports a deviation in procedure in the interests of justice. Finally he implored the court to waive the requirement for the Applicant to testify ahead of his witnesses.

The Prosecution objected to the application on the grounds that the CPC specifies the order in which the accused person and his witnesses may testify. The accused person is to testify before his witnesses and sum up his case at the close of the defence case. According to the Prosecution, the provisions are not only instructive but also couched in mandatory terms leaving the court with no discretion in the matter. They questioned whether the intended effect of Article 118(2)(e) of the Constitution as amended is to annihilate the procedure in sections 207 and 208 of the CPC.

The trial court considered the legal reasoning behind the requirement that a witness who has not yet testified should be excluded from the courtroom; which logic informs sections 207 and 208. The trial court determined that the reason for the provision was to avoid the possibility of witnesses moulding their testimony to fit that of other witnesses. Allowing the accused person to listen in to the testimony of his witnesses before he himself

testifies, could well lead to the massaging of his testimony to minimise any inconsistencies and make the ultimate objective of receiving testimony, that is to find the truth and deliver justice, more difficult. The trial court concluded that the CPC specifies the sequence in which the defence testimony is presented because the sequence is a matter of substantive justice as opposed to procedural technicality. Changing the sequence in which an accused person presents his testimony in relation to the witnesses called would violate the CPC and the possibility of prejudice to the prosecution's case could not be ruled out.

The trial court declined to interpret Article 118(2)(e), as such interpretation was not within its powers. Omitting interpretation was, in the court's view, not fatal to the determination of the case. The trial court further declined the application to amend the subpoena *duces tecum* to allow the subpoenaed witnesses to testify. Instead the court gave the Applicant the option to have the subpoenaed witnesses merely produce the requisite documents, in which case, the production of the documents could precede the Applicant's testimony; or in the alternative, if the witnesses were called to testify, they could do so after the Applicant had given his evidence. Being dissatisfied with the decision of the trial court, the Applicant moved

this Court for an interpretation of Article 118(2)(e) of the Constitution as amended.

The Applicant seeks determination of the following questions:

*1. What is the meaning of the words, "**the courts shall be guided by the following principles: justice shall be administered without undue regard to procedural technicalities**" in terms of the rules of procedure in criminal trials.*

2. Whether the trial magistrate by refusing to grant the applicants application to have a subpoenaed witness testify before the accused based on section 207 and 208 of the Criminal Procedure Code amounted to having undue regard to procedural technicalities contrary to Article 118(2)(e).

3. Whether section 207 and 208 of the Criminal Procedure Code can continue to exist in view of the provisions of Article 118(2)(e).

4. What was the intention of the legislature when drafting and enacting the Constitution provisions in Article 118(2)(e).

The Applicant's case centres on Article 118(2)(e) of the Constitution as amended which reads:

> ***In exercising judicial authority, the courts shall be guided by the following principle[s]:***
>
> ***...justice shall be administered without undue regard to procedural technicalities...***

In his written submissions to the Court, Counsel for the Applicant laid out the grounds for this Court's jurisdiction. He referred to Articles 1 and 128 of the Constitution as amended. The relevant part of Article 1 states as follows:

> ***1. (1) This 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.***

The relevant portion of Article 128 states that:

> ***128. (1) Subject to Article 28, the Constitutional Court has original and final jurisdiction to hear— (a)a matter relating to the interpretation of this Constitution; (b)a matter relating to a violation or contravention of this Constitution;...(e)whether or not a matter falls within the jurisdiction of the Constitutional Court... (3) Subject to Article 28, a person who alleges that— (a)an Act of Parliament or statutory instrument;... contravenes this Constitution, may petition the Constitutional Court for redress.***

Counsel for the applicant in his submissions, built on what was argued in the trial court. Counsel stated that sections 207 and 208 violate the provisions of Article 118(2)(e). Sections 207 and 208 of the Criminal Procedure Code read as follows:

Section 207 (1) At the close of the evidence in support of the charge, if it appears to the Court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused and shall inform him that he has the right to give evidence on his own behalf and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence, if any.

Section 208 Unless the only witness to the facts of the case called by the defence is the accused, the accused person or his advocate may then open his case, stating the facts or law on which he intends to rely, and making such comments as he thinks necessary on the evidence for the prosecution. If an accused person wishes to give evidence or to make an unsworn statement on his own behalf he shall do so first, and thereafter he or his advocate may examine his witnesses, and, after their cross-examination and re-examination, if any, may sum up his case.

In counsel's opinion, the sections deprive the Applicant of his right to give his evidence in the order best calculated to enable him to respond to the charges against him, leading to a failure of natural justice. To fortify the

argument, counsel cited **R v Phillipo Nkonde and Others**[1] in which the court observed that while the taking of the evidence of a witness before that of the accused was not illegal, it was not proper practice to follow. Proper practice entailed that the accused give his evidence first followed by his witness or witnesses. He also cited the case of **David Shaw v the Queen**[2] in which the court stated that:

> ***"[C]ounsel for the defence in a criminal trial has a legal right to call his witnesses including the accused in such order as he thinks fit, unless a statute provide[s] otherwise, that [position] arises as a result of the application of the ordinary common law rule that a party is entitled to call his witnesses as he thinks fit..."***

Counsel reiterated the supremacy of the Constitution affirmed in the celebrated case of **Mulundika and 7 Others v the People**[3] which renders unconstitutional and therefore invalid legislation which offends the Constitution and infringes constitutional guarantees of the rights in the Constitution.

He quoted *Phipson On Evidence, 14th edition,* page 196 paragraphs 11.05 and 11.06, to state that it is general practice but not law, that all witnesses other than experts remain outside the courtroom until they are called upon to give their evidence. He explained that the practice is intended to ensure

that witnesses in the act of testifying are out of the hearing of other witnesses who are to follow. Counsel however observed that with the consent of the judge and the concerned party, investigating officers frequently remain in court during the hearing of part of or all of the evidence. He concluded that as the arresting officer is allowed to be present in court before all witnesses testify, so too should an accused person since he is innocent until proven guilty. In those circumstances going against established practice in the interest of justice would not be contrary to law.

Counsel further submitted that the authorities cited were decided long before the introduction of our constitutional order; that the constitutional order does in fact enshrine the right to a fair hearing in criminal trials. Counsel took comfort in the view that Article 18 (2)(e) of the Bill of Rights in the Constitution, equates the accused person's right to determine the course of his defence to that of the prosecution, as it permits any person charged with an offence to obtain the attendance of, and carry out the examination of, witnesses testifying on his behalf on the same conditions as witnesses called by the prosecution. In closing, counsel reiterated that sections 207 and 208 have no place in the modern day administration of justice. An accused person should be allowed to line up his witnesses as

he pleases to facilitate the flow of evidence. That, no prejudice would be occasioned to the prosecution's right to cross-examine the witnesses. Further, that there is no legal justification for such archaic procedures, in the face of well settled case law and the new constitutional dispensation.

The Respondents' counsel, filed an answer to the originating summons supported by skeleton arguments in which they defended the duty of the court in administering justice, to have due regard to procedural technicalities. On 20th July, 2016, following grant of leave by the Court, the Respondents' counsel filed an amended answer and supporting skeleton arguments in which they took issue with paragraphs 13 to 15 of the Applicant's affidavit in support of originating summons.

In the original skeleton arguments, Respondents' counsel laid out an interpretation of Article 118(2)(e) that is supported by authorities drawn from other countries in the sub-region which they consider to be of persuasive value. According to counsel, the **Constitution of the Republic of Uganda 2006**, in Article 126 (2) (e) enjoins courts dealing with both civil and criminal matters to administer substantive justice without undue regard to procedural technicalities.

Counsel cited two cases in which the provision was interpreted. Firstly, **Utex Industries Ltd v Attorney General**[4] where the Court stated that the makers of the Constitution could not have intended to wipe out the rules of procedure but rather that such rules should be applied with due regard to the circumstances of each case. Secondly, **Century Enterprises v Greenland Bank (in Liquidation)**[5] where the Court held that the administration of justice should normally require that the substance of all disputes be investigated and decided on the merits, and that errors and lapses should not necessarily debar a litigant from the pursuit of his rights. However that this did not mean that rules of procedure should be ignored with impunity.

On the basis of the authorities cited, the Respondents' counsel averred that the intention of Article 118(2)(e) was not to rid the courts of the rules of procedure but rather to enable substantive justice to be carried out by ensuring that each case is determined on the merits. Counsel argued that sections 207 and 208 provide for the order in which evidence is to be presented and do not curtail the content of that evidence or prevent its being heard. Consequently the said sections are relevant as they do not hinder the determination of a case on the merits; such hindrance being the

evil that Article 118(2)(e) is meant to cure. Counsel reiterated that the two sections are not in conflict with Article 118(2)(e).

Counsel also cited authorities from Kenya. The **Constitution of Kenya, 2010**, provides in Article 159(2)(d) that "justice shall be administered without undue regard to procedural technicalities." Counsel cited the case of **James Mangeli Musoo v Ezeetec Limited**[6] in which a technicality was defined as a provision of law or procedure that inhibits or limits the direction of pleadings, proceedings or decisions on court matters; and the court held that whilst the provision did not oust technicalities, undue regard should not be had to technicalities inhibiting the hearing and determination of a disputed issue. In the second authority cited, **Mercy Mwende Kivundu v S.N. Anjichi - as the Secretary and Executive Director of Kenya Institute of Bankers**[7] the court held that Article 159(2)(d) entailed that the court is to determine cases in a manner that ensured substantive justice and would not lock out a litigant with a valid claim from accessing justice.

Armed with these authorities, counsel for the Respondents opined that Article 118(2)(e) does not oust technicalities. It only restricts undue regard to technicalities. Using the *Oxford English Dictionary 2nd edition*, counsel defined the word "undue" to mean "unwarranted or inappropriate, because excessive or disproportionate".

In the amended skeleton arguments, the Respondents' counsel dwelt on the events in the trial court stating that, no prosecution witness was permitted in the courtroom before he or she took the stand. Counsel then attacked the allegation that section 208, on the procedure to be followed by the accused person in presenting his testimony and that of his witnesses offends Article 18(2)(e) on the right to a fair trial, as the latter gives the accused the latitude to call witnesses in any order that he desires. In counsel's view, the Applicant had misconceived Article 18(2)(e) by failing to read it in conjunction with Article 18(12)(c) as required by the Constitution.

Article 18(2)(e) reads:

> ***Every person charged with a criminal offence- shall be afforded the facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and obtain the attendance and carry out the examination of witnesses to testify on his behalf in court on the same conditions as those applying to the witnesses called by the prosecution...***

Whereas Article 18 (12)(c) reads:

> ***Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of paragraph (e) of clause (2) to the extent that it is shown that the***

> ***law in question imposes reasonable conditions that must be satisfied if witnesses called to testify on behalf of an accused person are to be paid their expenses out of public funds.***

Citing the holding in **Lt. General Wilford Joseph Funjika v Attorney Generai**[9] which interpreted the provision, counsel for the Respondents argued that Article 18(2)(e) relates to the accused being able to obtain attendance of his witnesses and carrying out their cross- examination; and not necessarily to the order in which the witnesses are to be called. Further that equality of entitlement with the prosecution as stated in the two provisions read together relates to securing the attendance of witnesses and carrying out the examination of the witnesses called.

The Respondent's counsel averred that the Applicant had not been denied a right to call his witnesses or to cross-examine any of the prosecution witnesses. That in fact counsel for the Applicant did, after the trial court's ruling, examine the Permanent Secretary in the Ministry of Health and the Secretary to the Cabinet both of whom produced documents and were cross-examined by the State.

Taking issue with counsel for the Applicant's understanding of **David Shaw v The Queen**[2], counsel, for the Respondents pointed out that the court in that matter, in fact stated that the common law rule on the order in which to

call witnesses to the stand, was subject to statutory provisions directing a particular order. Therefore the court stated that where the accused person elected to give evidence and to call witnesses, he should give his evidence first. Counsel argued that while under the relevant provision the court could use its discretion to depart from the statutory recommendation, a defence counsel had no right to insist on it doing so. The Respondents counsel also cited **Barrow and Young v The People**[9] in which *Shaw* was cited with approval.

The Respondents' counsel concluded that the said authorities reflected the common law practice as the CPC did not, at the time, specify the order in which defence evidence was to be presented. Under the current law, section 208 of the Criminal Procedure Code expressly and mandatorily sets out the order that must be followed. Further, that section 208 does not violate the applicant's right to fair trial and due process of the law; rather it is the handmaid to justice. The court must thus accord due regard to it.

At trial, the parties relied on their skeleton arguments and authorities cited, which they augmented with oral submissions. Counsel for the Applicant reiterated the claim that sections 207 and 208 of the Criminal Procedure Code which deal with the procedure and manner of calling witnesses cannot reasonably be sustained in view of the provisions of Article

118(2)(e). He briefly recounted the arguments in the court below, leading to the issuance of originating summons in this Court. He said that the Applicant's inability to call the permanent secretary in the Ministry of Health to testify before the Applicant himself took the stand would undermine his defence and consequently his right to a fair trial. If the permanent secretary merely presented documents, he would have to be recalled at a later stage when the said documents were being interrogated so he could speak to them.

Counsel said that the presentation of the permanent's secretary's testimony before the Applicant testified in his own defence, would not advantage the Applicant unduly. In his view, the case for the Prosecution had already been laid before the criminal court and was in fact the basis for placing the Applicant on his defence. The Prosecution's evidence in the criminal trial court could not therefore be prejudiced by subsequent events. Since the Prosecution were free to present their evidence in any manner convenient to them, the right to a fair trial required that the Applicant be allowed to arrange his witnesses in any manner or form that he deemed fit when he made his case.

Counsel went further to argue that the enactment of the amended Constitution was an attack on the old procedures in sections 207 and 208

as it focused on doing substantial justice and avoiding procedural technicalities. He stated that the provisions fly in the face of Article 118(2)(e). He urged the Court to repeal the provisions or at least modify them to the extent to which they contravene the Constitution in order to do justice and provide leeway in the manner of arranging witnesses by accused persons so that they can properly defend themselves.

In concluding, counsel took issue with what he termed "the usual it depends on the circumstances " argument. It was his submission that whereas certain procedures may be necessary in the administration of justice, sections 207 and 208 have outlived their usefulness. That flexibility in the order of calling witnesses would not prejudice the prosecution's case, and in fact, help other cases in future, in which justice could be denied because of procedural technicality.

When the Court drew counsel's attention to the link between Article 18(2)(e) and Article 18(12)(c) as laid out in the Respondent's submissions , he maintained his position that the interpretation relied upon by the Respondent's counsel was made prior to the new order under the Constitution as amended which in his words 'seeks to help both the prosecution and the defence' in a criminal trial. He reiterated that the

Constitution as amended is intended to 'avoid' being bogged down by procedures such as that contained in sections 207 and 208.

Counsel for the Respondents' oral answer, was brief. He maintained the position that sections 207 and 208 are not in conflict with Article 118(2)(e). Further that, the two provisions make it mandatory for an accused person to give his testimony before calling his or her witnesses. Counsel argued that in fact none of the State's witnesses had been present in court before they testified. He denied the claim that changing the sequence of testifying was inconsequential. In his view, reversing the statutory procedure would have an impact because cases are decided on a number of principles, one of which is the inconsistencies and inaccuracies in the evidence of the accused.

The Respondents' counsel added that, if an accused person sits in while his witnesses testify before he, himself takes the stand, the case may not be decided on the merits due to collusion and fabrication. As a result the Prosecution would not benefit from any possible inconsistencies. He further said that although Article 118(2)(e) is new in Zambia, it had been applicable in other jurisdictions for some time. The meaning of the provision in such jurisdictions is that cases should be determined on the merits. Counsel

closed his answer by saying that sections 207 and 208 do not contravene Article 118(2)(e) and are still good law.

In his equally brief, if puzzling reply, counsel for the Applicant stated that the Respondents were being economical in their arguments. He reiterated that it was the Applicant's constitutional right to be present at his trial. Further that allegations of collusion and fabrication were over simplifying the process as the witness required to produce documents and testify before the Applicant took the stand, was a witness for the State, and he was unlikely to collude with the Applicant. Finally he said that the authorities from other jurisdictions were only of persuasive value whilst the local authorities cited by the Applicant were 'stronger'.

We are grateful to both counsel for the submissions made and the authorities provided. We have carefully considered the submissions. The applicant's position is that since the passing of Article 118(2)(e) mandating courts not to pay undue regard to technicalities in the administration of justice, the rules in sections 207 and 208 of the CPC prescribing that an accused person's testimony must precede that of his witnesses, need not be adhered to. In his view rigid adherence to the rules offends Article 118(2)(e) and hinders enjoyment of the right to fair trial. The Applicant sees no useful purpose that is served by the rules and argues that

circumventing them would not prejudice the prosecution's case. He prays that the rules should be found to be obsolete and unconstitutional.

The Respondents' position is that Article 118(2)(e) is not intended to do away with the rules of criminal procedure generally and/or sections 207 and 208 of the CPC in particular. The Respondents argue that procedural rules and even technicalities are part of the legal system in order to facilitate the administration of justice. Article 118(2)(e) in their view, is merely intended to ensure that cases are heard on the merits and delivery of justice is not torpedoed by excessive adherence to technicalities. Thus sections 207 and 208 should not be declared unconstitutional.

Before we go into the merits of the application we wish to briefly refer to this Court's jurisdiction as it has a bearing on how we respond to the question under consideration. As counsel for the Applicant has rightly pointed out, it is the responsibility of this Court to provide interpretation of the Constitution by virtue of Article 128(1)(a) of the Constitution as amended. This Court is also empowered to strike down any statutory provisions that contradict the Constitution under Article 128(1)(b) upon the application of any aggrieved person under article 128(3)(a). Further it is trite that the Constitution is by virtue of Article 1(1) the supreme law of the land and no Act of Parliament should contradict it in either, letter or spirit.

What is in issue before this Court is Article 118 (2)(e) and whether certain provisions of the criminal procedure relating to fair trial process fall within its purview. The Question is not whether sections 207 and 208 offend Article 18(2)(e),on the right to fair trial and are therefore subject to Article 28 as stipulated in Article 128, but whether they offend Article 118(2)(e) on undue regard to procedural technicalities. The Constitution as amended makes it clear in Article 128 as a whole that interpretation of any provisions of the Constitution other than the Bill of Rights is the preserve of this Court. At the same time, the Constitution as amended makes it clear in Article 267(1) that the Constitution shall be interpreted in accordance with the Bill of Rights. Thus this Court has to apply its mind to the rights enshrined therein.

We now move to the substantive question and address the specific prayers. In our view, the fundamental question to be determined by this court, is the meaning of Article 118(2)(e) of the Constitution as amended and its effect on rules of procedure in criminal trials generally and sections 207 and 208 of the Criminal Procedure Code in particular. For the sake of good order and since the issues raised are closely intertwined, we shall deal with the first and fourth prayer simultaneously before we deal with the second and third prayers in a similarly conjoined manner.

In the Applicant's first and last prayers, the Applicant asks this Court to provide interpretation of Article 118(2)(e) in relation to the rules of procedure in criminal trials and seeks elaboration of Parliament's intention in enacting the provision. It would be remiss of us not to place the interpretation of Article 118(2)(e) in its proper context and explain the importance of the Article in the general order of our judicial system. Article 118(2)(e) is mandatory and of general application in the administration of justice. All courts are bound by Article 118(2)(e) in administering justice. Only this Court is responsible for giving the Article its meaning, however the decision of this Court, will likely guide the future administration of justice in this country. Given the multiplicity and range of issues that the provision will come up against during its life, we are constrained to provide interpretation of the provision that does not fetter future delivery of justice, the protection of human rights or the growth of the law in line with the values and principles that bring the Constitution to life.

We are also mindful that the stability of our legal system is paramount. The Constitution enjoins us under Article 267 to develop the law as we interpret it. We are alive to the fact that the decisions of this Court should never turn the justice delivery system on its head. Our decisions should generate incremental improvements in both substantive and procedural justice, but

they must not jeopardise what has worked well in the past. The need for confidence in our legal system means that there must be good reason to depart from well settled procedure be it civil or criminal. Whilst Article 118(2)(e) signifies a new era, it also signifies caution. For the foregoing reasons we wish to state from the outset that we are taking a cautious and reasoned approach in interpreting Article 118(2)(e).

The fact that the Article is being interpreted in our jurisdiction for the first time and there are no local precedents to turn to for guidance poses a challenge. We must seek help beyond our borders and even further afield. Although counsel for the applicant expressed misgivings about the use of foreign authorities, it is our view that the manner in which a similar provision in a foreign jurisdiction is applied can provide guidance even if the foreign authority is not binding. Such comparison is commonplace. Jeffrey *Goldsworthy's "Constitutional Interpretation" in* Michel Rosenfeld *The Oxford Handbook of Comparative Constitutional Law at pp. 693-694* puts it thus:

> ***Comparative studies of how constitutions have been interpreted in different legal systems have a variety of objectives. Sometimes the objective is wholly practical: to help to interpret a provision in one constitution by learning how similar provisions have been interpreted elsewhere. Courts around the***

> ***world increasingly seek this kind of guidance...Such an inquiry ...can broaden lawyers horizons by dispelling any sense of false necessity and expanding their sense of what is possible. Learning how foreign courts tackle interpretive problems might reveal that one's own courts simply fail adequately to address arguments that apparently sensible people in other nations have addressed. Of course it does not follow that practices appropriate in one country are universally applicable: another potential benefit of comparative study is to help to explain or even to justify differences in terms of institutional, political, social and cultural circumstances.***

We find this approach helpful. Article 118(2)(e) is identical to a provision in the **Constitution of Kenya, 2010**. The Kenyan Supreme Court's interpretation of Article 159(2)(d) in their Constitution, which is a matching provision to our Article 118(2)(e), is a sensible starting point in the interpretation of our provision. The Kenyan provision reads:

> ***In exercising judicial authority, the courts and tribunals shall be guided by the following principles – ...(d) justice shall be administered without undue regard to procedural technicalities.***

The Supreme Court of Kenya in the case of **Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others**[10] stated that:

> ***[t]he essence of [the] provision is that a Court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing substantive justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone and which suits all situations of dispute resolution. On the contrary, the Court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best course.***

We agree with these sentiments. Article 118(2)(e) cannot be treated as a 'one size fits all' answer to all manner of legal situations. Article 118(2)(e) is a guiding principle of adjudication framed in mandatory terms. It is a basic truth applicable to different situations. The Article's beneficial value is achieved well if it is applied in an eclectic fashion depending on the nature of the rule before it. Each court will need to determine whether in the peculiar circumstances of the particular case, what is in issue is a technicality and if so whether compliance with it will hinder the determination of a case in a just manner. Thus our role in interpreting the provision in the case in *casu* is to say in general terms what Article 118(2)(e) means and then relate the meaning to the rules of criminal

procedure, in particular sections 207 and 208 as they apply in the trial court.

Several High Court decisions in both Kenya and Uganda have already had occasion to consider their equivalent of Article 118(2)(e). Their jurisprudence is evolving in the manner we have outlined and is therefore of interest to the Zambian courts. As we have already stated the East African decisions are drawn from the high court and are in no sense unimpeachable or indistinguishable in our situation, but they can be of persuasive value in instances where similar facts and law are in issue before the court.

In the Kenyan Industrial Court case of **James Mangeli Musoo v Ezeetec Limited**[6] the court defined a technicality as

> ***a provision of law or procedure that inhibits or limits the direction of pleadings, proceedings and even decisions on court matters. Undue regard to technicalities therefore means that the court should deal and direct itself without undue consideration of any laws, rules and procedures that are technical and or procedural in nature. It does not ... in any way oust technicalities. It only emphasises a situation where undue regard to these should not be had. This is more so where undue***

> ***regard to technicalities would inhibit a just hearing, determination or conclusion of the issues in dispute.***
>
> .....
>
> ***The Constitution and statute has no quarrel with due regard or even regard to technicalities...[I]f this was a technicality, the test would be whether this is duly or unduly applied or regarded.***

We wish to adopt this statement as our own and as the basis of our approach.

Further in the *Ugandan High Court Commercial Division case of* **Century Enterprises Limited v Greenland Bank (In Liquidation)**[5] the court stated as follows:

> ***I am acutely aware that Article 126 of the Constitution enjoins Courts to administer justice without undue regard to procedural technicalities. This law however did not intend to do away with the rules of Civil Procedure. It was not meant to be a magic wand in the hands of defaulting litigants.***

Similar sentiments were expressed in the Ugandan High Court case of **Mrs Matovu Sarah and Others v Abacus Pharmacy (Africa) Limited**[11] where the court relied on the holding in **Utex Industries v Attorney General**[4] that the court was ***"not persuaded that Constituent Assembly delegates***

intended to wipe out the rules of procedure by enacting [a provision that] contains causation against undue regard to technicalities"

The approach we have taken is in our view broad enough to accommodate a range of legal questions and problems. While the facts and law in each case will vary the principle laid out by this Court on the meaning and application of Article 118(2)(e) remains constant. The court's word is clear. Article 118(2)(e) is not intended to do away with existing principles, laws and procedures, even where the same constitute technicalities. It is intended to avoid a situation where a manifest injustice would be done by paying unjustifiable regard to a technicality.

Although the framers of the Constitution did not have a standalone rationale to support the inclusion of Article 118(2)(e) which was introduced in the Final Draft Constitution prepared by the Technical Committee Drafting the Zambian Constitution the fact that it was placed with other principles to guide the Judiciary in ensuring that "...justice should be done and seen to be done without discrimination" fortifies our understanding of how Article 118(2)(e) relates to sections 207 and 208.

Having determined the meaning of Article 118(2)(e) and the manner of its application, we now wish to consider whether sections 207 and 208 of the

CPC fall within the purview of what Article 118(2)(e) seeks to guard against and should therefore be expunged from the CPC. The Applicant has argued that sections 207 and 208 read together hinder the hearing of a matter on the merits.

In our view, a call to revisit the content of our CPC is so fundamental that the discussion requires proper placement within its jurisprudential roots. The essence of law is systematic pre agreed rules prescribing acceptable ways of relating to each other to preempt and resolve disputes in a manner that can be accepted by the parties involved and indeed by society at large. Such rules may be substantive or procedural. Procedural rules are even more important in the area of criminal law where decisions of a court may take away fundamental human rights such as life and liberty.

Article 118(2)(e) is relevant to the administration of rules because our Constitution is the means of ensuring the validity, and to a large degree, the legitimacy of all our rules. Legal theory as it evolved in the 20th Century is instructive. **MDA Freeman, Lloyd's Introduction to Jurisprudence,** generally, sums up the many theories of law propounded by eminent jurists and philosophical scholars. Acknowledgement here of a few theories suffice to make our point. *Kelsen* envisaged the legal order as a system of legal norms derived from a basic norm. *Hart* saw the legal system as a

union of primary, duty imposing rules with secondary, power conferring rules, that include the rules of adjudication, change and recognition. And *Fuller*'s internal morality of law identified a procedural or institutional type of natural law in which procedural requirements, such as the law's generality, prior notification, prospective nature, clarity, certainty and utility must be recognised as goals in order for a legal system to qualify as a system of law. In short rules must exist in any fair legal system in order to level the playing field and promote integrity of process. In **NFC Africa Mining Plc v Techro Zambia Ltd**[12] the Supreme Court affirmed that "Rules of the Court are intended to assist in the proper and orderly administration of justice ."

Under our legal system, the rules of procedure applicable in criminal trials are spelt out in the CPC. The incorporation of the rules of procedure in the form of a code thus fulfills the basic requirements of law. The question is how then do these rules relate to Article 118(2)(e)? Our answer is that to understand how the CPC is viewed under the new constitutional order, the Constitution as amended must be read as whole. Article 120(3)(a), of the Constitution as amended states that "***The following matters shall be prescribed: processes and procedures of the courts"*** The term prescribed is defined in Article 266 as "***enacted in an Act of Parliament".***

This is why, the CPC is specifically acknowledged by the Constitutional Court in its Rules. The Rules of the Constitutional Court, 2016, in Order 1 rule 1, state that:

> ***the jurisdiction vested in the Court shall as regards practice and procedure, be exercised in the manner provided by the Constitutional Court Act, the Constitutional Court Rules, the Criminal Procedure Code or any other written law , or by such rules, orders, or directions of the Court as maybe made under the Act or the Criminal Procedure Code or such written law, and in default thereof in substantial conformity with the Supreme Court Practice, 1999 (White Book) of England ....***

Rules are enacted with a purpose in mind, which purpose the rules must actually serve. The Introduction to the Rules of the Supreme Court (White Book) 1999, states in Part 1 that "...

> ***[T]the Rules have the Overriding Objective of enabling the court to deal with cases justly. Whenever the court exercises a power under the Rules or interprets them, it must seek to give effect to this Overriding Objective by trying to ensure that the parties are on an equal footing... All this must be done to ensure that the case is dealt with expeditiously and fairly..."***

In general, rules are necessary to enable the parties to anticipate their role in legal proceedings and make sense of the litigation process. The

common law adversarial system which is the foundation of our legal system is founded on procedural justice as the means to and manifestation of substantive justice. By following prescribed rules, the Court is held to an objective standard. Justice is not only done, it is seen to be done. We are therefore of the view that the rules of procedure in criminal trials as a whole, are not in themselves technicalities and Article 118(2)(e) is not intended to turn them into technicalities that fall within its ambit.

Having interpreted Article 118(2)(e) in relation to the rules of procedure in criminal trials, we now turn to the specific rules of the CPC, namely sections 207 and 208 impugned in this action. We have already stated that we shall deal with the second and third prayer simultaneously. The second prayer is whether the refusal by the trial court to grant the application to have a subpoenaed witness testify before the accused person by virtue of sections 207 and 208, amounts to having undue regard to procedural technicalities contrary to Article 118(2)(e). The third prayer is whether section 207 and 208 of the CPC can continue to exist in view of the provisions of Article 118(2)(e). Read together, are sections 207 and 208 technicalities and if so have they been accorded undue regard? Our short answer to both questions is 'no'. Sections 207 and 208 cannot be isolated from the rest of the CPC and indeed no such intent is discernible in the

Constitutional Court Rules. The two sections are an integral part of the CPC and what we said above about the rules of law and the CPC in particular stand.

Sections 207 and 208 are intended to guide in mandatory terms, the manner in which an accused person is to present his evidence. If the accused chooses to testify then he must do so before calling his witnesses to the stand. Counsel for the Applicant, has argued spiritedly, that this requirement constrains the accused person's ability to defend himself and serves no purpose. In his view doing away with the requirement would not prejudice the prosecution's case. Counsel for the Respondents on the other hand has vehemently opposed this view and gone to great lengths to draw our attention to the prejudice that will be occasioned to the prosecution should the order of presenting defence witnesses be changed. He has argued that a manifest injury would be done to our criminal justice system as a basic means of establishing the truth, because the hearing of testimony and testing the cogency of such testimony would be compromised.

We agree. The Applicant's argument is not sustainable. Whether a particular provision is a technicality may be determined from its form, its content and its application in the peculiar circumstances of the issue before

the court. The form, content and application of the two provisions - section 207 and 208 point to the substantive rather than technical. Nothing in the two rules is a hindrance to the hearing and determination of a criminal trial. In our view the rules actually facilitate a fair trial by providing guidance to the parties and ensuring an orderly process. Complying with the prescribed order of presenting witnesses for the defence is a well tested way of adducing evidence. It is in no way a focus on form at the expense of substance. It is our view that sections 207 and 208 are necessary rules of procedure and not mere technicalities.

As rightly argued by the Respondents, the two sections facilitate the process of finding the truth, without which, it would not be possible to render justice. The rules achieve this by enabling witness testimony to be presented in an untainted fashion. Each witness testifies to the facts as they perceived them, unaffected by another witness's perceptions or statements. And each witness's standalone statement can be cross-checked against other statements, which when read together provide cogent and reliable evidence.

Rather than obstruct the process of hearing a case on the merits, sections 207 and 208, facilitate the process of hearing a matter on the merits in an orderly and objective way that promotes the likelihood of establishing the

truth. The provisions are an integral part of the process of hearing a matter on the merits. As rules of procedure and not technicalities, they cannot be done away with. In fact they are essential for an orderly, neutral system well suited to protecting the right to be heard. The trial court's position cannot be faulted.

Whilst we agree with the Applicant that it is important to understand the purpose of Article 118(2)(e) in relation to rules of procedure in criminal trials, we cannot agree with him that sections 207 and 208 of the CPC amount to technicalities or that they should be expunged. To be absolutely clear, we wish to point out that even if we had come to the conclusion, that sections 207 and 208 are technicalities, the Applicant would still have had to convince the Court that the provisions are not only technicalities, they are technicalities that hinder due process to the extent that they ought to be disregarded in the interest of justice. Although the Applicant did not argue this point in any significant way this is the full and correct meaning of Article 118(2)(e). Article 118(2)(e) does not direct courts to disregard technicalities. It enjoins courts not to pay undue regard to technicalities that obstruct the course of justice.

It is this Court's decision that sections 207 and 208 of the Criminal Procedure Code are not technicalities and do not offend Article 118(2)(e). They are rules of procedure which are necessary for the just disposition of criminal matters before the courts. The trial court's adherence to them is therefore correct and does not in any way constitute undue regard. In enacting Article 118(2)(e) the framers of the Constitution did not intend to throw out our rules of procedure or indeed technicalities; it was to avoid undue regard being accorded to technicalities in a situation where such undue regard prevents gratuitously, the just disposition of cases before the courts. Sections 207 and 208 are still good law.

A final word on costs. Since this case has raised important matters of interpretation necessary for the development of our procedural law, each party shall bear their own costs.

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A M Sitali

Constitutional Court Judge

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M. S. Mulenga

Constitutional Court Judge

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Prof. Justice M. M. Munalula

Constitutional Court Judge