

(308)

IN THE CONSTITUTIONAL COURT OF ZAMBIA
HOLDEN AT NDOLA

2017/CCZ/0010
SELECTED JUDGMENT NO. 9 OF 2019

(Constitutional Jurisdiction)

BETWEEN:

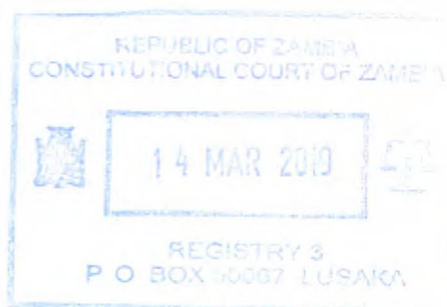
BENJAMIN MWELWA

PETITIONER

AND

ATTORNEY-GENERAL

RESPONDENT



CORAM: Sitali, Mulenga, Mulembe, Munalula, Musaluke, JJC
on 17th July, 2018 and on 14th March, 2019

For the Petitioner: Ms. D. Kapitolo
Makebi Zulu Advocates

For the Respondent: Mr. F.K. Mwale
Principal State Advocate

Mr. M. Hamanyati
Principal State Advocate

Mr. D. Chileshe
Senior State Advocate

J U D G M E N T

Sitali, JC delivered the Judgment of the Court.

Cases referred to:

1. Subramaniam v Public Prosecutor [1956] 1 W.L.R. 965.
2. Mutambo and 5 Others v The People (1965) Z. R. 15.

3. Masiye Motels Limited v Rescue Shoulders and Estate Agency Limited (2010) Z.R. 337.
4. John Kasanga and Wilmingtone Shayawa Kasempa v Ibrahim Mumba, Goodwin Yoram Mumba and Yousuf Ahmed Patel (2006) Z.R. 7.
5. Kenmuir v Hattingh (1974) Z.R. 162.
6. Haonga and Others v The People (1976) Z.R. 200.
7. National Breweries Limited v Philip Mwenya SCZ Judgment No. 28 of 2002.
8. Attorney-General v Mpundu (1984) Z.R. 6.
9. Cobbett-Tribe v Zambia Publishing Company Limited (1973) Z.R. 9.
10. Attorney-General v Kapwepwe (1974) Z.R. 217.
11. Patrick Fungamwango and Zambia Daily Mail v Mundia Nalishebo Appeal No. 133 of 1999.

Legislation Cited:

1. The Constitution of Zambia Chapter 1 of the Laws of Zambia, Article 122 (1) and (2).
2. The Subordinate Courts Act, Chapter 28 of the Laws of Zambia, section 55.
3. The Judiciary Administration Act No. 23 of 2016, sections 8 and 15.
4. The Judicial Service Commission Regulations, 1998 regulation 34.

Other Authorities referred to:

1. Halsbury's Laws of England 4th edition, volume 12, para 1102 and 1112.
2. Halsbury's Laws of England 5th edition, volume 20, para 130
3. Michael Allen and Brian Thompson, Cases and Materials on Constitutional and administrative Law, Seventh Edition, Oxford Messily Press, New York: 2002.
4. Bryan A. Garner, ed. Black's Law Dictionary, Tenth Edition, Thomson Reuters, Dallas, Texas, 2014.

By petition filed into Court on 19th September, 2017, the
Petitioner seeks the following remedies:

(310)

- (a) A declaration that the decision to suspend the Petitioner, Benjamin Mwelwa, made on the 9th August, 2016 by the Acting Chief Registrar, Hon. Charles Kafunda, is illegal and unconstitutional *ab initio* and therefore must be expunged from the Petitioner's employment files.
- (b) Damages for the illegal suspension and embarrassment which are:
 - (i) Punitive damages;
 - (ii) Ordinary damages.
- (c) Damages for the professional reputation damage, odium, anguish and torture caused during the period of suspension.
- (d) Costs.
- (e) Any other relief the Court may deem fit.

The petition was accompanied by an affidavit verifying facts. In his petition, the Petitioner stated that he is a Magistrate of the second class based at the Livingstone Subordinate Court. That on 20th July 2016, he presided over a criminal case between **The People v Milford Maambo and 2 Others** cause number 2L/99/16 which was prosecuted by two prosecutors from the Anti-Corruption

Commission, namely Mr. S. Muchula and Mr. S. Kabambe. As the matter came up for commencement of trial on that date, the prosecution presented a *nolle prosequi* to the Court to discontinue the criminal proceedings against the accused persons.

Defence Counsel however, opposed the entry of the *nolle prosequi* on the ground that the Director of Public Prosecutions (DPP) had not furnished the reasons for the entry of the *nolle prosequi* to the Court as she was required to under Article 180 (4) (c) of the Constitution as amended by the Constitution of Zambia (Amendment) Act No. 2 of 2016 (henceforth the Constitution as amended). He stated that defence counsel urged him, as the trial Court, to either order the prosecution to furnish reasons pursuant to Article 180 (4) (c) of the Constitution as amended or refer the matter to this Court for the interpretation of Article 180 (4) (c) and (7).

The Petitioner went on to state that in his ruling dated 20th July 2016, he determined that the defence counsel's objection had raised constitutional issues and therefore referred the matter to this Court for the interpretation of Article 180 (4) (c) and (7) of the

Constitution pursuant to Article 128 (2) of the Constitution as amended. He further stayed the criminal proceedings pending the outcome of the Constitutional Court's decision on the matter.

He stated that on 9th August, 2016, he received a letter from the Acting Chief Registrar of the Judiciary (Honourable Charles Kafunda) suspending him from employment for referring the said matter to the Constitutional Court. He stated that Hon. Kafunda alleged that he was incompetent and had misconducted himself by referring the matter to this Court for interpretation of the relevant constitutional provisions.

The Petitioner went on to state that he had remained suspended from 9th August, 2016 and that no charges had been leveled against him since then. He stated that, however, despite being on indefinite suspension, Hon. Kafunda had persistently continued to intimidate and threaten him through letters demanding that he should write judgments or be charged with insubordination and failing to obey instructions. The Petitioner contended that he, being a magistrate who had sworn to uphold the Constitution and the law, was not answerable to the Judiciary or to

any other person in the discharge of his judicial functions. He contended that he, therefore, could not be suspended from office for performing his judicial functions, as happened in this case.

The Petitioner further contended that the Acting Chief Registrar's action of suspending him was in breach of the Constitution and interfered with the independence of the Judiciary especially as he was suspended while the matter was being heard by the Constitutional Court. The Petitioner therefore asserted that the Acting Chief Registrar had breached the provisions of Article 122 (1) and (2) of the Constitution as amended, section 55 of the Subordinate Court Act, Chapter 28 of the Laws of Zambia and regulation 34 of the Judicial Service Commission Regulations, 1998. He therefore prayed that he may be granted the reliefs set out in paragraph 11 of his petition.

The Respondent filed an answer and an affidavit in opposition on 14th March, 2018. The Respondent admitted that the Petitioner was a magistrate of the second class at Livingstone Subordinate Court but denied that the Petitioner was suspended on the basis of the ruling he made in the case of **The People v Milford Maambo**

and 2 Others cause number 2L/92/16, wherein he decided to refer the subject matter to the Constitutional Court for its interpretation. The Respondent alleged that the Petitioner was suspended because of a complaint made to the Judiciary by the Anti-Corruption Commission regarding the unethical conduct of the Petitioner of fraternizing with the defense counsel in the case of **The People v Milford Maambo and 2 Others** cause number 2L/92/16 while the matter was actively on-going before him, thereby compromising his impartiality in the proceedings.

The Respondent admitted that the Petitioner was suspended by letter dated 9th August, 2016 written by the Acting Chief Registrar of the Judiciary but denied that the suspension was due to the reference of the matter to the Constitutional Court. He asserted that the Petitioner's subsequent refusal to give effect to the *nolle prosequi* entered by the State was deemed as further evidence of his misconduct complained of by the Anti-Corruption Commission. The Respondent contended that the Petitioner's behavior prior to his refusal to enter the *nolle prosequi* was

unbecoming of a judicial officer and thus necessitated the commencement of the disciplinary proceedings against him.

The Respondent stated that contrary to the Petitioner's assertion in his petition, the Petitioner had remained suspended from office in line with the Judicial Service Commission Regulations. He denied that Honourable Kafunda had issued threats against the Petitioner or that he had breached the Constitution and thus interfered with the independence of the Judiciary by suspending the Petitioner as alleged by the Petitioner. The Respondent asserted that the Petitioner's suspension was lawful and did not breach the Constitution or any other law as alleged. He stated in conclusion that the Petitioner is not entitled to any of the reliefs he seeks or at all.

At the trial of the petition, the Petitioner relied on the witness statement which he filed on 14th December 2017, which statement he adopted as his evidence in chief. In that statement, the Petitioner reiterated the contents of his petition regarding the circumstances which led to his suspension and added that he was shocked by the action taken by the Acting Chief Registrar to

suspend him from office for performing his judicial functions as the action was intended to instill fear in him as a judicial officer and implied that he must consult the Acting Chief Registrar as he made judicial decisions.

The Petitioner contended that the Acting Chief Registrar had no legal authority to suspend a judicial officer from office for performing his judicial functions and that his action in doing so was a gross violation of the provisions of the Constitution regarding the independence of the Judiciary which is expressed through the independence of judges and magistrates as they make judicial decisions. He asserted that to suspend a magistrate for making a judicial decision would interfere with judicial independence and that the country would ultimately have no judicial independence. The Petitioner stated that the Acting Chief Registrar had not charged him before and after he suspended him on 9th August, 2016.

The Petitioner went on to state that whilst on suspension the Acting Chief Registrar had continued harassing him and intimidating him by directing him to write judgments or face more

disciplinary action. To support that assertion, the Petitioner referred the Court to the letters to that effect written to him by the Acting Chief Registrar and to his respective responses on pages 67 and 68 and 93 to 96 of the Petitioner's bundle of documents.

He added that on 9th June, 2017, instead of receiving the charge for the offence he was suspended for, he received a different charge of misconduct by a judicial officer this time from the Registrar-Subordinate Courts (Mrs. Twaambo Musonda). In that letter, Mrs. Musonda informed him that her office had received a complaint against him from the Anti-Corruption Commission concerning his close association with Major Masonga of KBF and Partners, a firm that was representing one of the accused persons in a case involving the Mayor, Town Clerk and a Councillor of the Livingstone City Council. She stated that the case was before him and was being prosecuted by the Anti-Corruption Commission and that it was alleged that on 19th July, 2016 the two prosecutors from the Anti-Corruption Commission had found him with defence counsel at the offices of Messrs. KBF and Partners and further, that

he and the said defence counsel were usually seen together in public places.

The Petitioner stated that the Acting Chief Registrar and the Registrar-Subordinate Courts were referring to the case of **The People v Milford Maambo and 2 Others** cause number 2L/92/16 which he had referred to the Constitutional Court for interpretation. He contended that the Acting Chief Registrar and the Registrar-Subordinate Courts had come up with two different charges from the same facts. He further stated that the two ACC public prosecutors who complained to the Judiciary that they had found him at KBF and Partners instead of complaining to the Judicial Complaints Commission as per law had appeared before him on 20th July, 2016 when they presented the *nolle prosequi* in court and yet they did not bring it to his attention that they had found him at KBF and Partners the previous day but decided to complain in Lusaka.

The Petitioner asserted that he found the charge letter from the Registrar-Subordinate Courts very unclear and so he requested for further and better particulars but that to date the particulars

had not been provided to him. He stated that instead of receiving further and better particulars, on 30th June, 2017 he received a letter from the Registrar-Subordinate Courts directing him to answer to the charges as they were clear as stated. He was further informed that management was awaiting the decision of the Constitutional Court for them to make a decision, which response he found to be absurd. He wondered how management could await the decision of the Constitutional Court to make a decision on his suspension when the said management had found it fit to suspend him from office whilst the matter was still before the Constitutional Court pending determination.

He further stated that he responded to the charge by letter dated 12th July, 2017 which he copied to the Chairman of the Judicial Service Commission and the Attorney-General.

The Petitioner went on to state that this Court in its judgment delivered on 11th July, 2017 on the interpretation of Article 180 (4) and (7) of the Constitution regarding the powers of the DPP to enter a *nolle prosequi*, which matter he had referred to the Court, agreed with him that the matter had raised important constitutional

issues. He stated that despite the judgment of this Court on the matter referred to it, he had remained suspended.

The Petitioner further stated that on 24th September, 2017, he received two letters, one from the Registrar-Subordinate Courts dated 1st September, 2017 in which he was informed that the Registrar-Subordinate Courts had found his exculpation unsatisfactory and had referred the matter to the Chief Administrator for further action. The second letter was written by the Chief Administrator dated 22nd September, 2017. The Chief Administrator informed him that the Registrar-Subordinate Courts had referred the matter to her for further action pursuant to regulation 40 (3) (c) of the Judicial Service Commission Regulations, 1998 and that she would table his case before the Judicial Service Commission. She further informed him that he would remain on suspension pending the determination of the matter by the Judicial Service Commission in terms of regulation 34 of the Judicial Service Commission Regulations, 1998. The Petitioner stated that he was shocked that the Chief Administrator upheld his suspension by the

Acting Chief Registrar and referred the matter to the Judicial Service Commission when he had not been heard.

The Petitioner asserted that the Acting Chief Registrar's action was illegal and unconstitutional as he disregarded the various rights conferred on him (Petitioner) by the Constitution. He contended that if allowed to stand the action would curtail his liberty as a magistrate to refer matters to the Constitutional Court or to the High Court in future for either guidance or interpretation. He therefore urged us to quash his suspension.

In cross examination, the Petitioner conceded that after he was served with the suspension letter dated 9th August, 2016, two other letters were written to him. The first letter was written by the Registrar-Subordinate Courts while the second one was written by the Chief Administrator. Asked to explain what a Court should do when a *nolle prosequi* is entered in criminal proceedings before it, the Petitioner stated that the Court is supposed to discharge the accused person. He conceded that he did not discharge the accused in the case of **The People v Milford Maambo and 2 Others** after the prosecution presented a *nolle prosequi*.

When asked to confirm whether he was found at the law firm of Messrs. KBF and Partners in the company of defence counsel who was representing one of the accused persons in the case of **The People v Milford Maambo and 2 Others**, the Petitioner stated that he could not remember.

When referred to the letter dated 30th June, 2017 which was written to him by the Registrar-Subordinate Courts and which is on pages 101 to 102 of the record of proceedings and asked if he still maintained that the Registrar-Subordinate Courts did not respond to his request for further and better particulars, the Petitioner conceded that the Registrar-Subordinate Courts did respond to his letter requesting for further and better particulars. He stated that he was aggrieved by the decision of the Acting Chief Registrar to suspend him but that his relationship with him prior to that was cordial. He further stated that none of his supervisors had brought the allegations in the suspension letters to his attention and that they had not spoken to him about the allegations prior to writing the suspension letters.

Asked to explain the circumstances in which he was transferred from Sesheke to Livingstone, the Petitioner said that he had requested for the transfer when the Registrar of the Judiciary who was Honourable Justice Matthew Zulu, at that time, and other senior Judiciary staff visited Southern Province in 2014. He admitted that, as a magistrate, he had dealt with a number of cases involving confiscated alcohol but denied that he dealt with a case wherein he ordered that the confiscated alcohol should be distributed to Government departments or that he took most of the alcohol to his own premises.

The Petitioner further conceded that of the four defence lawyers who were representing the accused persons before him in the case of **The People v Milford Maambo and 2 Others**, namely Mr. Nkausu of A. C. Nkausu and Company, Mr. J. Zimba of Makebi Zulu Advocates, Mr. Phillip Mukuka of AMC Legal Practitioners and Major Masonga of KBF and Partners, three of those lawyers were on record as representing him in this matter.

That marked the close of the Petitioner's case.

The Respondent called only one witness, namely Hon. Charles Kafunda, the Chief Registrar of the Judiciary. He testified that the Petitioner had three charges leveled against him. The first charge was misconduct arising from being found with a lawyer who was representing the accused persons who were appearing before his Court at the offices of the law firm, KBF and Partners. The other two charges arose after the first charge and related to material that was scandalizing the Chief Justice and was attributed to the Petitioner.

The witness testified that in August, 2016 the Judiciary received information from the Anti-Corruption Commission that Mr. Silumesi and Mr. Kabambe Sifayaki the two prosecutors from the Commission had found the Petitioner who was presiding over a matter involving Livingstone City Council at the law firm of the lawyer who was representing the accused persons. He denied that he had continued to intimidate the Petitioner by threatening to charge him for insubordination and failure to obey instructions if he did not write judgments despite his indefinite suspension as alleged by the Petitioner. He stated that despite the Petitioner's suspension,

he was still an employee of the Judiciary and that he had written letters to the Petitioner regarding five accused persons who were incarcerated at Sesheke and were awaiting judgment to be delivered by the Petitioner.

The witness further testified that contrary to the Petitioner's assertion that the Judiciary did not respond to his exculpatory letter, the Judiciary had found his exculpation unsatisfactory and had referred the matter to the Chief Administrator for further action in accordance with the Judicial Service Commission Regulations, 1998 and that the Petitioner was accordingly informed.

The witness went on to testify that the Petitioner had a duty to discharge the accused persons after the Director of Public Prosecutions entered a *nolle prosequi* in the matter before him.

In cross examination, the witness denied that the main reason the Petitioner was suspended was because he referred the matter concerning the entry of the *nolle prosequi* to the Constitutional Court. He, however, conceded that the two prosecutors from the Anti-Corruption Commission who were alleged to have found the Petitioner with defence counsel, at KBF and Partners were not

mentioned in the letter in which the Petitioner was charged with the offence of misconduct by a judicial officer, which letter was written to the Petitioner by the Registrar-Subordinate Courts.

He also conceded that the public places in which the Petitioner and defence counsel were allegedly seen together were not stated in that letter. The witness stated that the issue of the specific charges which were to be leveled against the Petitioner according to the suspension letter dated 9th August, 2016 was delegated to the Registrar-Subordinate Courts. He said the charge letter was written to the Petitioner in June, 2017 and not a year after he was suspended.

The witness explained that the procedure which should be followed when there is misconduct by a judicial officer is that a charge should be leveled against the judicial officer who must respond to the charge. After the judicial officer has responded to the charge, the charging officer examines the response and refers the matter to the Chief Administrator, if dissatisfied with the response. The Chief Administrator then tables the matter before

the Judicial Service Commission which determines the matter depending on the circumstances.

The witness conceded that in this case, the Petitioner was not charged in the suspension letter dated 9th August, 2016. He also conceded that the misconduct by the Petitioner alleged in the letter dated 9th June, 2017 was not reported to the Judicial Complaints Commission. The witness explained that after the Petitioner responded to the charge, the Registrar-Subordinate Courts informed him that she was not satisfied with his response and that she had referred the matter to the Chief Administrator. He stated that the Chief Administrator did present the matter before the Judicial Service Commission. The Judicial Service Commission decided to give the Petitioner a hearing and the process was still ongoing.

In re-examination, the Respondent's witness when asked to clarify what he meant when he said in cross-examination that the main reason the Petitioner was suspended was not because he referred the matter of the *nolle prosequi* to the Constitutional Court, said there were two issues that had arisen. He explained that the

first issue was that of the misconduct which was alleged and the second issue was regarding the Petitioner's competence for his having failed to handle the *nolle prosequi*. He stated that in his letter to the Petitioner dated 9th August, 2016, he informed him that specific charges would be brought against him by his supervisor who is the Registrar-Subordinate Courts. That this was done in the letter dated 9th June, 2017 written to him by the Registrar-Subordinate Courts.

He explained that the delay in charging the Petitioner was caused because after he suspended the Petitioner, he realised that the issue relating to his handling of the *nolle prosequi* was before the Constitutional Court and so he decided to wait for the decision of the Court on the matter. Whilst waiting for the Court's decision, it was realised that it would not be proper for the Petitioner to remain on suspension indefinitely. It was therefore decided to separate the charges and proceed with the charge relating to misconduct regarding his being found at defence counsel's law firm. He stated that the judgment of the Constitutional Court was to the

effect that the Petitioner ought to have discontinued the matter after the entry of the *nolle prosequi*.

That marked the close of the Respondent's case.

The Petitioner filed written submissions on 10th August, 2018 in which it was submitted that the genesis of this matter was the suspension letter dated 9th August, 2016 which shows that the Petitioner was suspended for referring the constitutional issue relating to the entry of the *nolle prosequi* by the DPP in the case of **The People v Milford Maambo and 2 Others** to this Court for interpretation of Article 180 (4) and (7) of the Constitution as amended. It was submitted that the question was whether the Petitioner had misconducted himself as a judicial officer by referring the matter to the Constitutional Court. To answer that question, counsel cited Article 128 (2) of the Constitution and submitted that according to that Article, whenever a Court is faced with a matter that raises a constitutional issue, the Court must refer the issue to the Constitutional Court for determination.

Counsel further cited the provisions of Article 1 (5) of the Constitution as amended which provides that a matter relating to

this Constitution shall be heard by the Constitutional Court in support. Counsel submitted that it was on that premise that the Petitioner when faced with the objection raised by the defence to the entry of the *nolle prosequi* in the case of **The People v Milford Maambo and 2 Others** referred the matter to this Court for the determination of the constitutional issue raised.

Counsel contended that in doing so, the Petitioner merely followed the law in the discharge of his duties as a judicial officer and that this Court in its judgment on the matter agreed with the Petitioner that the matter had raised an important constitutional issue. It was submitted that the Petitioner therefore could not be said to have misconducted himself by referring the constitutional issue to this Court as stated in the suspension letter.

It was further submitted that although the suspension letter written by the Acting Chief Registrar stated that the Petitioner would in due course be advised of the specific charges against him by his supervisor, no such charges had been brought against him by his immediate supervisor who is the Chief Resident Magistrate

(CRM) based at Livingstone Subordinate Court or by the Chief Registrar as the evidence on record shows.

Counsel went on to submit that it was further wrong and unconstitutional for the Acting Chief Registrar to interfere with the decision of the Petitioner as section 55 of the Subordinate Courts Act, Chapter 28 provides that:

“No action shall be brought against any Magistrate in respect of any act done or order made by him in good faith in the execution or supposed execution of the powers and jurisdiction vested in him.”

And that Article 122 (2) of the Constitution as amended adds that:

“A person and a person holding a public office shall not interfere with the performance of judicial functions by a Judge or judicial officer.”

It was submitted that whereas the Chief Registrar told this Court that when misconduct is alleged against a judicial officer, the judicial officer is supposed to be charged and given an opportunity to exculpate himself before the matter is referred to the Chief Administrator for submission before the Judicial Service Commission, the Chief Registrar admitted in his evidence that no charges were leveled against the Petitioner when he was suspended.

Counsel submitted that the procedure the Chief Registrar outlined to the Court was not followed when the Petitioner was suspended on 9th August, 2016. It was argued that the procedure outlined by the Chief Registrar was erroneous because the Judiciary's role when misconduct is alleged against a judicial officer is limited to submitting a complaint to the Judicial Complaints Commission. That when a recommendation is made by the Judicial Complaints Commission regarding the disciplinary action to be taken against a magistrate, the recommendation goes to the Judicial Service Commission through the Registrar and not through the Chief Administrator unless the accused judicial officer is the Registrar.

It was submitted that the Judicial Complaints Commission is the institution mandated by Article 236 of the Constitution as amended to enforce the Judicial Code of Conduct for Judges and judicial officers and to receive and hear complaints against a Judge or a judicial officer and to make recommendations to the appropriate authority or institution for action. That in this case, the Petitioner being a judicial officer was only amenable to the

jurisdiction of the Judicial Complaints Commission, which institution is mandated to receive and investigate any complaint of any alleged misconduct by a judicial officer.

It was submitted that upon receipt of a complaint of alleged misconduct, the Judicial Complaints Commission contacts the judicial officer and asks him or her to respond to the complaint. That after that the Judicial Complaints Commission will either dismiss the complaint or if it finds that there is need for further action, will call the complainant and the accused judicial officer for a hearing. That it is only after the hearing that the Judicial Complaints Commission will make a recommendation to the appropriate authority for either disciplinary action or other administrative action to be taken against the judicial officer concerned.

It was submitted that according to the Chief Registrar's evidence, the Petitioner was charged with misconduct by a judicial officer based on information which the Judiciary received to the effect that the Petitioner who was handling a matter concerning the Livingstone City Council was found at the law firm of the lawyer

who was representing the accused persons. The information, counsel argued, was inadmissible hearsay in terms of the case of **Subramaniam v Public Prosecutor**⁽¹⁾ wherein it was held that evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. That it is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in a statement. And that it is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The case of **Mutambo and 5 Others v The People**⁽²⁾ was also cited in support wherein it was stated that evidence of a statement made in the presence of a Court witness is inadmissible hearsay if offered to prove the truth of what is contained in the statement but not if offered to prove that it was made.

It was submitted that in this case, the Respondent did not produce the letter of complaint by the Anti-Corruption Commission nor did the Respondent call either of the two prosecutors from the Anti-Corruption Commission who alleged that they found the

Petitioner at KBF and Partners to testify that indeed they found the Petitioner at the law firm.

Counsel submitted, in the alternative, that even if Major Masonga of KBF and Partners were a friend of the Petitioner or even if the Petitioner was found at the said law firm, that would not constitute misconduct. In support of this submission, counsel cited the case of **John Kasanga and Wilmingtone Shayawa Kasempa v Ibrahim Mumba, Goodwin Yoram Mumba and Yousuf Ahmed Patel**⁽³⁾ wherein the Supreme Court, *inter alia*, observed that:

“If Judges were to recuse themselves because a lawyer was known to them, people or society would not get justice. It was not the intention of the legislature in enacting a Judicial (Code of Conduct) Act that any relationship between a judicial officer and counsel representing a party should make a judicial officer disqualified from adjudicating in the matter.”

The case of **Masiye Motels Limited v Rescue Shoulders and Estates Agency Limited**⁽⁴⁾ was also cited in support of the submission that a magistrate cannot be charged with misconduct for being a friend of a lawyer representing a client before the judicial officer.

In conclusion, counsel submitted that based on the evidence on record, the actions of the management of the Judiciary in

collusion with the Anti-Corruption Commission were in gross violation of the Constitution and the other law cited which stipulate how a judicial officer ought to be disciplined. That it follows that the purported suspension letter dated 9th August, 2016 written to the Petitioner by the Chief Registrar of the Judiciary was illegal. That similarly, the purported subsequent charges leveled against the Petitioner by the Registrar-Subordinate Courts, her purported referral of the charge to the Chief Administrator for further action and the Chief Administrator's purported reference of the said charge to the Judicial Service Commission were illegal and unconstitutional as the said officers had no legal mandate to do what they did without a complaint being made against the Petitioner to the Judicial Complaints Commission by the Judiciary or the Anti-Corruption Commission. Further, that there were no findings of misconduct against the Petitioner or any recommendation made by the Judicial Complaints Commission for disciplinary action or other administrative action to be taken against the Petitioner.

Counsel thus prayed that the Petitioner be granted the remedies he seeks in his petition.

The Respondent filed written submissions in opposition to the petition on 31st August, 2018. The Respondent submitted that in the reliefs the Petitioner seeks, he had not identified any Article of the Constitution on which he based his prayer that the decision to suspend him was illegal and unconstitutional *ab initio*. That notwithstanding that observation, the Respondent would proceed based on the provisions of Article 122 (1) and (2) of the Constitution as amended which appear to be the only substantive constitutional provisions cited in the header of the petition as the other provisions of the Constitution which the Petitioner alleged were violated in this case fall within the ambit of the High Court's jurisdiction as determined by this Court in its Ruling to that effect dated 30th October, 2017.

After citing the provisions of Article 122 (1) and (2) of the Constitution as amended, counsel submitted that neither the petition nor the evidence led by the Petitioner during examination in chief properly demonstrated any contravention of Article 122.

Counsel contended that Article 122 pertains to the independence of the Judiciary as a whole arm of government being free of interference or control by an external authority, such as the executive. That clause (2) of that Article prohibits any person from interfering with a judicial officer in the execution of the judicial officer's functions.

Counsel contended that it would be a misconstruction of Article 122 (2) of the Constitution to allege that the Acting Chief Registrar interfered with the Petitioner's performance of his judicial functions by suspending him for the serious allegations leveled against him. That the charge letter dated 9th June, 2017 clearly shows that the Petitioner was suspended for fraternizing with counsel representing an accused person in the case of **The People v Milford Maambo and 2 Others** cause number 2L/92/16. It was argued that in cross examination, the Petitioner failed to remove himself from the premises of the law firm of KBF and Partners. That it was prudent for the management of the Judiciary to take action when this information was brought to their attention.

It was contended that the Petitioner's conduct was contrary to the provisions of sections 6 (a) and 11 (1) of the Judicial (Code of Conduct) Act No. 13 of 1999 which prohibits a judicial officer from adjudicating in any proceedings in which his impartiality might be questioned due to the judicial officer's personal bias or prejudice concerning a party, or a party's legal practitioner and from conducting activities outside the office which may bring the integrity, independence and impartiality of the Judiciary into disrepute. The case of **John Kasanga and Wilmingtone Shayawa Kasempa v Ibrahim Mumba, Goodwin Yoram Mumba and Yousuf Ahmed Patel**⁽³⁾ was cited in which the Supreme Court held that it is not only actual bias but also the perception of bias that qualifies a judicial officer from being considered impartial in a matter.

Counsel went on to submit that contrary to the impression created by the Petitioner in his affidavit, this Court in its decision unequivocally held that once the DPP informs the Court of the intention to discontinue criminal proceedings in pursuance of the powers conferred on that office by Article 180 (4) (c) of the Constitution as amended, a Court cannot refuse the exercise of that

power nor require the DPP to furnish reasons for such discontinuance.

Counsel further submitted that this Court must not attach a lot of weight to the Petitioner's testimony because he was insincere in his answers. That this was demonstrated in cross-examination when in answer to the question "Can you confirm that you were not found at the law firm?" he said, "I can't remember". The cases of **Kenmuir v Hattingh**⁽⁵⁾ and **Haonga and Others v The People**⁽⁶⁾ wherein it was held to the effect that a trial Court that has the advantage of seeing the witness can assess their credibility were cited in support.

Learned counsel further submitted that although the Petitioner in his submissions took issue with the fact that he was charged by Hon. Musonda as the Registrar-Subordinate Courts when his supervisor was the Chief Resident Magistrate, that issue was not canvassed at trial nor was it raised in the petition and other documents lodged before Court. That the issue cannot therefore, be raised in the submissions. Counsel thus urged us not to attach any weight to that submission.

It was also submitted that while the Petitioner had gone to great lengths to lay out the procedure on how disciplinary issues against the Petitioner were supposed to be handled, this Court is the wrong forum to determine whether or not the correct disciplinary procedures were followed by the Judiciary. That the right Court to investigate the matter would be the Industrial Relations Division of the High Court. It was contended that in any event, even if this Court were to find that the disciplinary procedures were not followed, that would not amount to a breach of Article 122 (1) and (2) of the Constitution as amended.

In support of that submission, counsel called in aid the case of **National Breweries Limited v Phillip Mwenya**⁽⁷⁾ wherein the Supreme Court held that:

- “(i) Where an employee has committed an offence for which he can be dismissed, no injustice arises for failure to comply with the procedure stipulated in the contract and such an employee has no claim on that ground for wrongful dismissal or a declaration that the dismissal is a nullity.**
- (ii) Having been properly dismissed, the Respondent cannot be deemed to have been retired and he is not entitled to any retirement benefits.”**

Learned counsel contended in response to the Petitioner's assertion that the main charge which was leveled against him was based on hearsay because the complaint made by the Anti-Corruption Commission was not produced in Court, that the evidence on record shows that the disciplinary proceedings against the Petitioner are ongoing. Further, that at the trial of this matter, the Petitioner did not complain about the evidence of the Respondent's witness or even perforate it as hearsay. That even when Hon. Kafunda deposed to the affidavit in opposition stating the reason the Petitioner was suspended, the Petitioner did not file an affidavit in reply. It was argued that it was therefore too late in the day for the Petitioner to argue that the allegation that he was fraternizing with counsel for one of the accused persons was hearsay.

In conclusion learned counsel submitted that it is clear from the evidence on record and from the submissions herein that the reliefs sought by the Petitioner before this Court are untenable. Counsel prayed that the matter be dismissed with costs to the Respondent.

We have considered the contents of the petition, the answer, the affidavits in support of and in opposition to the petition as well as the evidence adduced by the respective parties. We have also considered the submissions by the respective parties and the authorities cited.

In the main, the Petitioner seeks a declaration that the decision to suspend him from office by the Acting Chief Registrar of the Judiciary on 9th August, 2016 was illegal and unconstitutional and must therefore be expunged from his employment record. In support of this claim, the Petitioner asserted in his petition and in his oral evidence that his suspension by the Acting Chief Registrar, which suspension was conveyed to him by letter dated 9th August, 2016 was caused by the decision he took to refer, to the Constitutional Court, the question whether the DPP still possesses unfettered powers under Article 180 (4) (c) and (7) of the Constitution as amended to enter a *nolle prosequi* in criminal proceedings without advancing reasons for doing so. The Petitioner contended that the suspension having arisen as a result of his decision to refer the matter before him to the Constitutional Court

for the interpretation of Article 180 (4) (c) and (7) in the course of exercising his judicial functions was done in violation of Article 122 (1) and (2) of the Constitution which provide for the independence of the Judiciary.

The Respondent, on the other hand, in his answer denied the assertion that the Petitioner was suspended for referring the matter to the Constitutional Court for interpretation. The Respondent contended that the Petitioner was suspended based on a complaint that was made to the Judiciary by the Anti-Corruption Commission that the Petitioner had been fraternizing with the defence lawyer who was representing an accused person in the case of **The People v Milford Maambo and 2 Others** while the matter was active before him thereby compromising his impartiality in the proceedings. It was the Respondent's position that the Petitioner's refusal to give effect to the *nolle prosequi* entered by the State was considered as evidence of the misconduct complained of by the Anti-Corruption Commission.

The Respondent alleged that the Petitioner's behaviour prior to his refusal to enter the *nolle prosequi* in the case was unbecoming

of a judicial officer and therefore warranted the institution of disciplinary action against him.

The main issue we have to determine in this petition is whether the suspension of the Petitioner from office by the Acting Chief Registrar contravened Article 122 (2) of the Constitution and was illegal and unconstitutional. In determining the issue, we begin by examining the provisions of Article 122 (1) and (2) of the Constitution which read:

- (1) In the exercise of the judicial authority, the Judiciary shall be subject only to this Constitution and the law and not be subject to the control or direction of a person or an authority.**
- (2) A person and a person holding a public office shall not interfere with the performance of a judicial function by a Judge or judicial officer.**

Section 266 of the Constitution as amended defines "judicial officer" as including a magistrate, local court magistrate, registrar and such officers as prescribed.

The provisions of Article 122 (1) and (2) which are set out above are clear and unambiguous in their terms. Article 122 (1) provides for the independence of the Judiciary by stipulating in clear terms that the Judiciary shall not be subject to the control or

direction of any person or authority in its exercise of judicial authority. The Judiciary is made subject only to the Constitution and the law in the exercise of judicial authority. Article 122 (2) of the Constitution goes further to prohibit a person, including a person holding a public office, from interfering with the performance of a judicial function by a Judge or judicial officer. The importance of enshrining judicial independence in the Constitution is that doing so guarantees that Judges and judicial officers are free to decide cases impartially, in accordance with the law and the evidence before them, without fear of interference, control or improper influence from any person or authority.

To that effect, the learned authors of **Halsbury's Laws of England**, Fifth Edition, Volume 20 state in paragraph 130 on page 136 as follows:

"The independence of the judiciary is essential to the rule of law and to the continuance of its own authority and legitimacy. It involves the impartiality, and appearance of impartiality, of judges; and the freedom of judges from political and other pressures in their determination of the law and adjudication of disputes."

The learned authors, Michael Allen and Brian Thompson, in their book entitled Cases and Materials on Constitutional and Administrative Law, Seventh edition, at page 193 also state that:

“The maintenance of the independence of the judiciary is essential if the rule of law is to be respected...independence requires that judges must be free to interpret and apply the law as they see fit subject only to correction on appeal to a higher court.”

The learned authors Michael Allen and Brian Thompson in the same book go on to quote Lord Justice Denning, as he then was, who in his presidential address to the Holdsworth Club in 1950 stated as follows:

“No member of the Government, no Member of Parliament and no official of any government department has any right whatever to direct or influence or to interfere with the decisions of any of the judges. It is the sure knowledge of this that gives the people their confidence in judges...”

It will be observed from the foregoing that independence of the Judiciary entails that in the decision-making process, judges and judicial officers should have the freedom to decide cases impartially, in accordance with their interpretation of the law and the facts. They should be able to act without any restriction or improper influence. They should also act without fear of reprisals

for decisions and orders they make in the course of performing judicial functions.

In determining the issue before us, we have examined the evidence regarding the circumstances in which the Petitioner was suspended with the above guidance in mind. As a starting point, we have examined the contents of the suspension letter dated 9th August, 2016, which letter is at the centre of this action. The letter reads as follows:

RHC/3/1

9th August, 2016

**Mr. Benjamin Mwelwa
Magistrate Class II
Livingstone Subordinate Court
P.O. Box 60110
LIVINGSTONE**

RE: SUSPENSION FROM DUTY – YOURSELF

“It has come to the attention of management that you on 20th July, 2016 refused to give effect to a *Nolle Prosequi* entered by the Director of Public Prosecutions in the case of The People v Milford Maambo, Ziwa Malilo and Chanda Chabala. You instead ordered that the matter be stayed pending determination of Constitutional issues by the Constitutional Court regarding the entry of a *Nolle Prosequi*, a position in brazen disregard of clear and elementary provisions of the law regarding the power of the Director of Public Prosecutions to discontinue cases before the Court.

Following this development, management has deemed it necessary that disciplinary proceedings be instituted against you in relation to your competence or any other facet of misconduct that may be

revealed by your conduct of the case in issue or in relation to your dispensation of justice as a magistrate.

You will, in due course, be advised of the specific charges against you by your supervisor. In the meantime, I find it necessary that you be placed on immediate suspension pending the outcome of the disciplinary process. During your suspension, the following conditions will apply:

(a) you will be on half salary.

(b) you will not be allowed to leave Zambia without permission.

Charles Kafunda

ACTING CHIEF REGISTRAR OF THE JUDICIARY

AND

DIRECTOR OF COURT OPERATIONS" (Emphasis added).

The suspension letter speaks for itself. It is evident from the first paragraph of the letter set out above that the genesis of the suspension was the Petitioner's alleged refusal to give effect to the *nolle prosequi* intended to discontinue the criminal proceedings in the **Milford Maambo** case which the Petitioner was presiding over and his decision to stay the criminal proceedings whilst the matter was referred to the Constitutional Court. In paragraph two of the letter, the Acting Chief Registrar clearly stated that in view of that development, that is the alleged refusal of the Petitioner to give effect to the *nolle prosequi* and his further decision to stay the proceedings until the matter was determined by the Constitutional

Court, the Judiciary management had decided to institute disciplinary proceedings against the Petitioner.

The purpose of the disciplinary action was to examine the Petitioner's competence or any other misconduct which might be revealed by the Petitioner's conduct of the case in issue or regarding his dispensation of justice as a magistrate.

Although the Chief Registrar denied that the main reason the Petitioner was suspended was because he referred the matter of the *nolle prosequi* to the Constitutional Court, his letter made it clear that that was in fact the case. This is evidenced by his scathing remarks that the decision taken by the Petitioner with regard to the *nolle prosequi* was, to use his words, in "*brazen disregard of clear and elementary provisions of the law regarding the power of the Director of Public Prosecutions to discontinue cases before the Court.*" These comments were unwarranted as the Petitioner in his ruling dated 20th July, 2016 gave clear reasons why he had referred the matter to the Constitutional Court and stayed the criminal proceedings before him. The stay was not indefinite. It was pending the determination of the matter by the

Constitutional Court. As we observed earlier in this judgment, the Petitioner was entitled to make a decision on that matter according to his interpretation of the law and the facts.

For the Acting Chief Registrar to have based the suspension of the Petitioner on his handling of the issue of the *nolle prosequi* which was presented in criminal proceedings before him was to have directly interfered with the performance of the Petitioner's judicial functions. It is paradoxical that the Acting Chief Registrar who is a judicial officer in the Judiciary which the provisions of Article 122 (1) and (2) protect by enshrining non-interference with the performance of its judicial functions, would breach the protective provisions by taking disciplinary action against another judicial officer for a decision taken in the course of performing his judicial functions as mandated by the Constitution.

Further, although the Respondent stated that the Petitioner was suspended for his unethical behaviour involving his alleged fraternizing with defence counsel who was representing an accused person in the case of **The People v Milford Maambo and 2 Others** which was before him, the Respondent has not cited any

law which empowered the Acting Chief Registrar to suspend the Petitioner from office.

The Judiciary Administration Act No. 23 of 2016 which, inter alia, relates to the administration of the Judiciary and the appointment of judicial officers, stipulates the functions of the Chief Registrar in section 8 (2) as follows:

“(2) The Chief Registrar shall-

- (a) facilitate the performance of judicial functions;**
- (b) coordinate judicial matters;**
- (c) synchronise and produce a comprehensive performance report of the judicial functions;**
- (d) provide the link between the Judiciary and the Commission on the appointment, promotion and disciplinary matters of judicial officers;**
- (e) be the Secretary of the Commission; and**
- (f) advise the Court on matters relating to the judicial profession.”**

None of the functions of the Chief Registrar set out above empower the Chief Registrar to suspend a judicial officer.

Section 15 of the Act vests power to discipline persons appointed under the Act in the Judicial Service Commission. It provides as follows:

“15 (1) The Commission shall exercise its powers with respect to the dismissal, disciplinary action or termination of appointment of a person appointed under this Act in accordance with regulations made by the Commission.”

An examination of the Judicial Service Commission Regulations, 1998 also reveals that the Regulations do not vest any power in the Chief Registrar to suspend a judicial officer.

As the law does not vest any power to suspend a judicial officer in the Chief Registrar, it follows that his suspension of the Petitioner from office lacked legal backing and was therefore illegal.

Further, section 55 of the Subordinate Courts Act, Chapter 28 of the Laws of Zambia expressly protects magistrates from actions arising from an act done or order made by the magistrate in the execution or purported execution of their powers. Section 55 reads:

“No action shall be brought against any magistrate in respect of any act done or order made by him in good faith in the execution of the powers and jurisdiction vested in him.”

In view of this clear provision of the law, there was no justification whatsoever for the Acting Chief Registrar to have taken the unwarranted and unprecedented decision to suspend the Petitioner based on an order he made in the execution of the

jurisdiction and powers vested in him by Article 128 (2) of the Constitution as amended to refer a question relating to the Constitution to the Constitutional Court.

As the immediate reason for the Petitioner's suspension was his alleged refusal to give effect to the *nolle prosequi* in the matter before him, it follows that the suspension was done in clear contravention of Article 122 (2) of the Constitution which prohibits a person holding a public office or any other person from interfering with a Judge or a judicial officer in the performance of their judicial functions.

Based on the evidence before us, we find as a fact that the Petitioner's suspension was based on the manner in which he, as trial magistrate, handled the *nolle prosequi* in criminal proceedings in the **Milford Maambo** case which he presided over. We therefore hold that the suspension was illegal and unconstitutional as it contravened Article 122 (2) of the Constitution. We therefore grant the declaration as prayed and order that the suspension meted out to the Petitioner by the letter dated 9th August, 2016 be expunged from the Petitioner's employment records.

Having said that, we note from the evidence on record that, on 9th June, 2017 the Petitioner was charged by the Registrar-Subordinate Courts with the offence of misconduct by a judicial officer. The charge letter which is on pages 262 and 263 of the record of proceedings states that the charge was based on a complaint made against the Petitioner by the Anti-Corruption Commission to the effect that the Petitioner closely associated with Major Masonga of KBF and Partners, a law firm which was representing one of the accused persons in a case involving a Mayor, Town Clerk and Councillor at the Livingstone City Council. The case was being prosecuted by the Anti-Corruption Commission before the Petitioner.

It was alleged that on 19th July 2016, the two prosecutors from the Anti-Corruption Commission found the Petitioner with defence counsel at the offices of Messrs KBF and Partners. This charge of misconduct by a judicial officer, although related to the **Milford Maambo** case, is a different charge and is unrelated to the suspension of 9th August, 2016 relating to the entry of the *nolle prosequi*. The charge is therefore not the subject of this petition.

We say so because in his petition filed on 19th September, 2017 the Petitioner only challenged the illegality and constitutionality of his suspension under the letter dated 9th August, 2016. He did not challenge the charge of misconduct by a judicial officer leveled against him under the letter dated 9th June, 2017 although he alluded to it in his affidavit verifying facts. The charge of misconduct by a judicial officer was subsequently endorsed by the Chief Administrator in line with the provisions of regulation 34 of the Judicial Service Commission Regulations, 1998 in her letter to the Petitioner dated 22nd September, 2017. In that letter, the Petitioner was notified of his suspension from office pending the determination of the charge of misconduct by a judicial officer by the Judicial Service Commission.

That being the case, this judgment does not affect the proceedings which are currently on-going before the Judicial Service Commission relating to the charge of misconduct by a judicial officer or the suspension that was meted out against the Petitioner by the Chief Administrator effective 22nd September,

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2017. We have accordingly not addressed any of the arguments relating to the charge of misconduct by a judicial officer.

Turning back to the matter before us, the Petitioner has claimed for both general and punitive damages for the illegal suspension and embarrassment suffered at the hands of the Acting Chief Registrar. He also seeks damages for the damage caused to his professional reputation, odium, anguish and torture caused to him during the period of suspension.

We shall consider the Petitioner's claim for general damages for illegal suspension, mental torture and anguish and for damage to his professional reputation and odium in that order. In considering the claim for general damages regarding the illegal suspension, we note that the facts of this case are that although the Petitioner was suspended from office in rather unprecedented circumstances, he was not dismissed from employment. Rather, following his suspension, he was placed on half salary. It therefore follows that he should be paid the half salary that was withheld from him during the period of suspension following our decision that the suspension was illegal. The suspension period was from

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9th August, 2016 to 21st September, 2017. We say so because according to the suspension letter dated 22nd September, 2017 which was written to the Petitioner by the Chief Administrator, the Petitioner was suspended from office effective 22nd September, 2017 for the offence of misconduct by a judicial officer. We accordingly order that the Petitioner be paid the half salary withheld from 9th August, 2016 to 21st September, 2017. In awarding him general damages for the illegal suspension meted out to him by the Acting Chief Registrar by letter dated 9th August, 2016, we shall take that fact into consideration.

As regards the claim for damages for anguish and torture caused during the period of suspension, we are alive to the fact that damages for mental torture may be awarded in an appropriate case. In the persuasive case of **Attorney General v Mpundu**⁽⁸⁾ which was cited by the Supreme Court in the later case of **Cobbett-Tribe v Zambia Publishing Company Limited**⁽⁹⁾, it was held that damages for mental distress and inconvenience may be recovered for breach of contract. In that case, Silungwe CJ, as he then was, stated as follows:

"In this case, it is quite clear that the respondent did suffer some mental distress and inconvenience as a result of the wrongful suspension for a prolonged period of time brought about by the appellant. In our opinion, the correct measure of damages to which the respondent was entitled, taking into account the fact that the breach of contract in his case did not amount to termination of contract, is K2,000.00".

Similarly, in the present case, it is evident that the Petitioner did suffer some mental distress and inconvenience as a result of the illegal suspension for a prolonged period of time caused by the Respondent's servant, the Acting Chief Registrar.

As the suspension did not result in the termination of his employment, we award the Petitioner the sum of K10,000.00 as general damages for illegal suspension and for mental torture and anguish.

Turning to the claim for damages for damage to his professional reputation and odium caused to him during the period of suspension, we note that the claim for damages under this head suggests that the Petitioner was defamed and suffered damage to his professional reputation as a result of his suspension. However, the Petitioner did not adduce any evidence before us to show that the Respondent publicized his suspension

to any other person and therefore caused damage to his professional reputation. As regards the allegation that the Petitioner suffered odium as a result of the suspension, there was no evidence that he was subjected to hatred and contempt as a result of his suspension from office.

Black's Law Dictionary, Tenth edition, defines the word "odium" as:

"the quality, state, or condition of being hated; a state of disgrace, usually resulting from detestable conduct; or hatred or strong aversion accompanied by loathing or contempt."

It is settled that allegations of that nature must be proved to the requisite standard as the party who makes the allegation bears the burden of proof. In the absence of any evidence that the Petitioner suffered damage to his professional reputation or that he was subjected to odium as a result of the suspension, we find no basis to award him damages under this head.

We shall now consider the claim for punitive damages. Punitive damages or exemplary damages, as they are commonly known, can be awarded where the conduct of the defendant merits

punishment, which is only considered to be so where the defendant's action is wanton, as where it discloses fraud, malice, violence, cruelty, insolence, or the like, or, as it is sometimes put, where he acts in contumelious disregard of the plaintiff's rights as was held in the case of **Corbett-Tribe v Zambia Publishing Company Limited**⁽⁹⁾.

The learned authors of **Halsbury's Laws of England**, Fourth edition, volume 12, at page 416, in paragraph 1112, regarding exemplary or punitive damages, state that:

In certain circumstances the court may award more than the normal measure of damages, by taking into account the defendant's motives or conduct, and the damages may be "aggravated damages", which are compensatory, or "exemplary damages", which are punitive."

In **Attorney-General v Kapwepwe**⁽¹⁰⁾ Doyle CJ, as he then was, stated that:

"Exemplary damages are given for the purpose of bringing home to a defendant the error of his ways. In the case of Government it is impossible to award a sum that would hurt the Government pocket. The use of the award of exemplary damages is to induce Government to discipline its servants whose action has resulted in loss to Government, and so to serve as a deterrent for future cases."

On the facts of the case before us, we do consider that this is a fit case to award the Petitioner exemplary damages in order to bring home to the Respondent the error of his servant's ways. The conduct of the Acting Chief Registrar was totally unacceptable as he acted in contumelious disregard of the Petitioner's rights, so to speak. We say so because the Chief Registrar is a judicial officer and is aware of the provisions of Article 122 (1) and (2) of the Constitution as amended which protect the independence of the Judiciary and prohibit interference with the performance of a judicial function by a Judge or judicial officer. He is also aware of the provisions of section 55 of the Subordinate Courts Act, Cap. 28 which clearly prohibits the taking of an action against a magistrate for an order made in the course of performing judicial functions.

Further, at the time the Acting Chief Registrar suspended the Petitioner from office on 9th August, 2016 he was aware of the reason why the Petitioner referred the matter to the Constitutional Court because the Petitioner had delivered a ruling on the matter on 20th July, 2016. That notwithstanding, the Acting Chief Registrar in wanton disregard of the status of the matter

proceeded to suspend the Petitioner from office because of a decision he made in the exercise of his judicial functions without leveling any charges against him.

As though that were not enough, the Chief Registrar has to date not charged the Petitioner with any offence regarding his reference of the constitutional question regarding the power of the DPP to enter a *nolle prosequi* in criminal proceedings that arose in the **Milford Maambo** case to the Constitutional Court for determination. By ignoring the fact that the Petitioner was exercising his judicial functions when he referred the matter to the Constitutional Court, the Acting Chief Registrar failed to protect the Petitioner's independence as a judicial officer who was entitled to determine cases according to his interpretation of the law.

In assessing damages under this head we have considered earlier cases in which exemplary damages were awarded by other courts. In the case of **Attorney-General v. Kapwepwe**⁽¹⁰⁾ the Respondent was awarded K15,000,000.00 at that time as exemplary damages. In the case of **Patrick Fungamwango and Zambia Daily Mail v Mundia Nalishebo**⁽¹¹⁾ the Respondent was

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also awarded the sum of K15,000,000.00 at that time. Given the facts of this case, we award the Petitioner K15,000.00 as exemplary damages.

The sum of K10,000.00 for general damages and the sum of K15,000.00 for exemplary damages shall attract interest at the average of the short term deposit rate from the date of the petition until judgment and thereafter until payment, interest shall accrue at 6% per annum.

We, therefore, enter judgment for the Petitioner against the Respondent in respect of the Petitioner's claims which have succeeded. Costs will follow the event and are to be agreed and taxed in default of agreement.



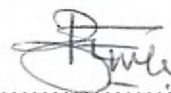
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A.M. Sitali,
CONSTITUTIONAL COURT JUDGE



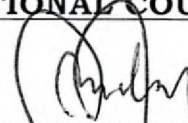
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