

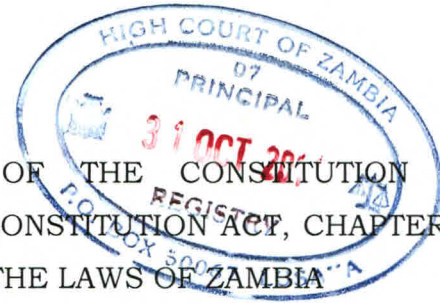
IN THE HIGH COURT FOR ZAMBIA

2013/HP/1778

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



IN THE MATTER OF:

ARTICLE 28 OF THE CONSTITUTION OF ZAMBIA, THE CONSTITUTION ACT, CHAPTER 1, VOLUME 1 OF THE LAWS OF ZAMBIA

IN THE MATTER OF:

ARTICLES 19 & 20 OF THE CONSTITUTION OF ZAMBIA, THE CONSTITUTION ACT, CHAPTER 1, VOLUME 1 OF THE LAWS OF ZAMBIA

IN THE MATTER OF:

ARTICLE 21 OF THE CONSTITUTION OF ZAMBIA, THE CONSTITUTION ACT, CHAPTER 1, VOLUME 1 OF THE LAWS OF ZAMBIA

IN THE MATTER OF:

THE PROTECTION OF FUNDAMENTAL RIGHTS RULES 1969, STATUTORY INSTRUMENT NO. 156 OF 1969

IN THE MATTER OF:

THE CHIEFS ACT CHAPTER 287 OF THE LAWS OF ZAMBIA

Between:

**KELVIN FUNGWE
OLINESS FUNGWE
DORIKA LUSUBA
PETER MUSUBA
LITA SIKABIMBA MUNKOMBWE
ANDREW SIABEENZU
ENESS SIABEENZU
CECILIA BEBBO SIABEENZU**

**1ST PETITIONER
2ND PETITIONER
3RD PETITIONER
4TH PETITIONER
5TH PETITIONER
6TH PETITIONER
7TH PETITIONER
8TH PETITIONER**

AND

LACKSON MUNTANGA *(Sued as His Royal Highness Chief Nyawa IV of the Tonga – speaking people of Kazungula District Southern Province)*

RESPONDENT

**BEFORE HON. MRS. JUSTICE G.C. CHAWATAMA
ON 31ST OCTOBER, 2017 – IN CHAMBERS**

For the Petitioners : *Mr. Kalokoni – Messrs Kalokoni & Company*
For the 2nd Defendant : *Absent*

JUDGMENT

CASES REFERRED TO:

1. *Prince v President of the Law Society of the Cape of Good Hope (2002) 2 SA 394*
2. *Godfrey Kenneth and five Others v The Attorney General and 2 Others*
3. *RV Big M. Drug Mart Limited*
4. *R (Williams) Vs Secretary of State for Education and skills (2005) 2 AC 246*
5. *Christian Education South Africa v Minister for Education*
6. *Kelvin Hangandu V Law Association of Zambia*
7. *Attorney General V Roy Clarke (2008 1 ZR 38)*

AUTHORITIES REFERRED TO:

1. *Article 19 of the Republican Constitution.*
2. *Article 1 (1) of Act No. 2 of 2016 (Chapter 1 of the Laws of Zambia)*
3. *(Article 8 (d) of the Constitution of Zambia (Amendment No. 2 of 2016)*

OTHER WORKS REFERRED TO:

1. *Fundamental Human Right) Article 9 (1) of the European Convention on Human Rights (Sub Article (1) and (2). Article 8 of the African Charter on Human and People's Rights*
2. *Black's Law Dictionary 6th Edition*
3. *Deuteronomy Chapter 18 v 10-12 of the King James Version*
4. *Article 18 of the International Covenant on Civil and Political Rights*

This petition concerns alleged violations of the right to freedom of religion as guaranteed by Article 19 of the Constitution of Zambia

for professing the Jehovah's Witness faith in Musuba village and other rights affected as a result of the alleged violation.

The Petitioners Mr. Kelvin Fungwe, Oliness Fungwe, Dorika Lusuba, Peter Musuba, Lita Sikabimba Munkombwe, Andrew Siabeenzu, Eness Siabeenzu and Cecilia Debbo Siabeenzu filed this petition on their own behalf and on behalf of other congregants.

In the petition dated the 28th November, 2013 and supported by an affidavit verifying facts sworn by Peter Sikabimba the Petitioners seek the following reliefs:-

- a) *A declaration that Chief Nyawa's decision to dissolve Musuba village and to expel the Petitioners from both the village and the Chieftdom on ground of holding different religious views and opinions on Lwiindi Traditional Ceremony constitutes a vicious onslaught upon the Petitioners' Constitutional rights to freedom of Conscience, Thought and Religion.*
- b) *A declaration that the Chief's action of dissolving Musuba village and creating a new Mantanyani village with the stipulation that only those who will support the Lwiindi Traditional Ceremony will be allowed to have their names entered in the Register for the new Mantanyani village constitutes discrimination on ground of one's religious*

convictions and is therefore unconstitutional, null and void to all intents and purposes.

- c) A declaration that his royal highness's action of expelling the Petitioners from his Chiefdom amounts to an infringement of the Petitioner's Civil, political and citizenship rights as citizens of the Republic of Zambia and is therefore unconstitutional.*
- d) A declaration that there is no provision in the Chief's Act Chapter 287 of the Laws of Zambia, and let alone the Constitution of Zambia which empowers Chiefs to dissolve a village and expel a Zambian Citizen from his/her village and/or Chiefdom and therefore the Respondent's actions are unconstitutional and null and void.*
- e) Such declaration and Orders as this Honourable Court may deem fit.*
- f) Costs*

The affidavit evidence was expanded on by viva voce evidence. I should add that the Respondent did not attend court, nor did he send a representative to attend on his behalf. The record shows that the Petitioners on several occasions attempted to serve process on the Respondent who the Petitioner say has vowed not to receive any notice of hearing from the court nor will he attend court. Serving of process through the High Court in Livingstone also failed due to lack of co-operation on the part of the Respondent and his representatives or agents. The Petitioners

requested the court that they be heard. On the same day the 6th March, 2017 the court ruled that the court will go ahead and hear the Petitioners having exhausted all means of serving the Respondent including exercising the option of mediation.

The court relied on the holding of ***Kahlid Mohammed V Attorney General 1982 ZR 49***. I went on to state that the Respondent did not sufficiently excuse his absence and has neglected to file his answer when duly called upon, Peter Musuba testified on the same date. It was his testimony that all the Petitioners congregated at Mize Congregation and the Respondent was their Chief. Mr. Musuba went on to say that a decision was made to bring the Chief to court because he disbanded the village called Musuba and brought people to occupy the land that belonged to them.

Mr. Musuba informed the court that the reason for disbanding the village was because the Petitioners did not want to take part in the traditional ceremony called Lwiindi. The Petitioner described the traditional ceremony as one where people are called upon to worship other gods that is like a shrine. The Petitioners' concern was that what they were asked to is against their belief thus they did not want to participate in the ceremony.

The court was informed that during the procession beer is brewed, the dead are worshipped or appeased. This, the

Petitioners pointed out was against their religion and beliefs. The court was referred to Deuteronomy 18 v 10-12.

The Petitioner informed the court that after the village was disbanded other villages replaced it with villages called Mantanyani, Sitimba and Siakwanya. The Petitioners were asked to join Matanyani village which the Petitioners refused to do. The Petitioner further stated that the Chief gave them new rules to follow which they were told they had to agree to. They were requested to append their signatures to abide by these rules and pay whatever contributions needed towards the holding of the Lwiindi ceremony. The Petitioners disagreed with what they were asked to do. They informed the court that their current status was that they settled in Mantanyani village as they await the result of these proceedings.

The court was informed of difficulties that they are facing such as, that the land they had previously occupied was being grabbed. Further that when they were attending meetings at the school their children went to they were not allowed to take part in any school activities both at the school and in the village as per the Chief's directives. An example given on the effect of this pronouncement is that teachers do not want to associate with them. The Petitioner by way of yet another example informed the court that in December, 2016 the Chief announced publicly that

Musuba village was disbanded and the Petitioners should not be engaged in any way on any issue.

PW2 was **Levison Mulena** who was once a village headman for Musuba village. He was told by Chief Nyawa that he was disbanding the village because those who stayed in the village do not contribute nor take part in the Lwiindi ceremony. The reason given for not contributing nor attending the ceremony was because they belonged to the Jehovah's Witness's denomination. The witness admitted that they do not take part in the ceremony. He informed the court that the Lwiindi ceremony is celebrated after a good harvest, local beer is brewed and if there is a funeral beer is poured to thank the dead for giving them a good harvest. The local beer is poured on the grave. All this the Petitioner (s) do not take part in because it is against their beliefs and the bible. The witness likened what takes place to worshipping other small gods.

The witness informed the court that those displaced from the village are in a temporarily place because the Chief disbanded the village and even went as far as renaming it as Mantanyani. **PW2** shared with the court the challenge faced by them to join other villages because of the rules they were expected to follow such as the contributions to the Lwiindi ceremony that they were expected to make.

PW2 informed the court that before the village was disbanded he was called by the Chief. At this meeting the Chief explained that he wanted to disband the village because they do not take part in the ceremony nor contribute towards it. **PW2** recalled explaining to the Chief why they do not take part in the ceremony. According to **PW2** the Chief seemed to understand his explanation. The Chief went on to say truly it was true according to the bible however, that if he did not disband their village others will also stop contributing and that he was just following tradition.

PW2 pointed out that they took part in community works. An example given was the molding of three thousand bricks for the Chief's house in 2008. Each village including theirs was called upon to donate K80.00 to build the Chief's house which they paid. Another construction was of the Chief's court where K60.00 was contributed. Other projects included their contribution towards the roofing of the Chief's court lastly the molding of bricks for a clinic. Disbanding their village has resulted in loss of land especially fields to grow crops.

The court was informed that the Chief has appointed his nephew to be in-charge of the village. The witness would like to see the village given back to the original occupants and the boundaries be maintained. The court was informed that a register of the names of those who resided in the village was kept and all the

Petitioners' names appeared in the register. The court was informed that in 2010 the Chief grabbed the registers which are still in the Chief's custody. **PW2** testified that none of the Petitioners' names are registered in any of the three villages. The reason given for not appearing in any register is because they have not signed agreeing to the rules to abide or support all traditional ceremonies.

PW2 pointed out the importance of one's name appearing in the register because traditionally it is known in which family a person is born. Secondly from it, it can be ascertained how long one has lived in the village and thirdly details of one's National Registration Card will include the Chief and village. Apart from which the boundaries of the land owned by a family is also in the register. The boundaries of communal land is also reflected. **PW2** informed the court that the congregation comprises of seventy (70) men, women and children. The number represents thirty households registered.

The court was informed that 285 villages existed when he was headman. The Lwiindi ceremony dates back to 2007. Apart from the pouring of beer at the ceremony, prayers to the dead to appease the dead, appreciating that the dead have given them a good harvest and should continue to provide for the people is carried out. **PW2** informed the court that some people who go to

other churches take part in the ceremony and there were those in other villages who do not take part.

PW3 was **Malita Munkombwe**, she felt as if she was like nomad moving around since the village was disbanded by Chief Nyawa. The reason given by her for the village being disbanded was her refusal to offer gifts and praying to small gods which she does not subscribe to. She informed the court that she belongs to Jehovah's Witness and is not in support of the Lwiindi ceremony because participation was against her belief and worshipping of the only God Almighty.

The decision by Chief Nyawa has affected her and her children. Her and her children have encountered untold sorrow and challenges. It was her testimony that land has been grabbed from them. With her children growing up she did not know what their future held. She lamented that in the near future her children will need land to grow food. In respect of the National Registration Cards she did not know which village to indicate on the card. **PW3** informed the court that their children are not free as they are told that they do not belong to the village. She would like the court to give them back their village so that they can live in peace and enjoy their freedom. Some of the roles performed by women include brewing beer, cooking, dancing and some pour beer on the graves. It was her testimony that children do not take part in the ceremony.

PW4 was **John Chali Musuba** who was related to the Petitioners and those affected by the decision of Chief Nyawa. He described those affected as his nephews, nieces and in-laws. He gave a brief history of how Musuba village came to be. It was established in 1961 by his late father Andreck Musuba. After his death his elder brother took over as headman, his name was Emerson Musuba. When his elder brother aged he handed the headmanship over to his nephew Levison Mulena. After the death of his elder brother, other family members who came to settle in their village were called by Chief Nyawa. It was at this meeting that the village was disbanded, and a headman appointed. The new name for the village was Mantanyani named after the witnesses' late uncle. The headman appointed was David Munyandi. The people called to the meeting were not Jehovah's witnesses it was only those who supported all traditional ceremonies.

PW4 recalled going to the village and asking the Chief why he dissolved the village. What he was told was confirmed by the Chief that the Chief had problems with the villagers who did not want to support traditional ceremonies. He was told that those whose village was dissolved were free to register themselves in the new village Mantanyani or any other village under his chieftdom. Those who register were required to sign that they would abide or support all traditional ceremonies and that all those who refuse to do so will remain without a village. It was

further said that they would not be allowed to participate in any activities such as the construction of schools or clinics.

PW4 informed the court that he asked the Chief that in order to get documents such as the National Registration Card, passport or licences, there are forms to be filled where an address, the name of the village and Chief are required, he wondered what the Petitioners were expected to do in such situations. He was informed by the Chief that the solution lay in abiding with the conditions that he had set. As far as the Chief was concerned he was carrying out his duties given to him by the state thus following the Laws of Zambia. **PW4** informed the Chief that the conditions set by him were impossible for members of the Chieftdom to meet because the same were against their bible based beliefs. **PW4** informed the court that the congregation was registered with the Registrar of Society on the 24th September, 1982.

In his submissions Counsel to the Petitioners referred the court to the case of *Kachasu V The Attorney General (1967) ZR 187*, *Kelvin Hangandu v The Law Association of Zambia 2012 3 ZR 181* on the freedom of religion.

The court was also referred to a number of International Human Rights Conventions that protect fundamental human rights such as the Universal Declaration of Human Rights (Article 18). The

International Covenant on Civil and Political Rights Article 18 (1) (2) and (3). Counsel further referred the court on the refinements introduced by **Article 18 of the ICCPR** the notes of the Learned writer, **Dinah Shelton** that:

“The ICCPR distinguishes between the right to freedom of religion or belief and the freedom to manifest one’s religion or belief. The right to freedom of the religion (freedom to have, to alter, or to adopt a religion of one’s choice) is an absolute right from which no derogation may be made and which may not be restricted or impaired in any manner”
freedom to manifest or exercise one’s religion (individually or collectively, publicly or privately) may be subject only to such limitations as are prescribed by law and are necessary to protect public safety order, health or morals or the fundamental rights and freedoms of others.”

Other instruments referred to included the United Nations on the Elimination of all forms of intolerance and Discrimination. Based on Religion or Belief (which according to Counsel protects this **Fundamental Human Right**) **Article 9 (1) of the European Convention on Human Rights (Sub Article (1) and (2)**. **Article 8 of the African Charter on Human and People’s Rights** which entitles the freedom of Conscience, Religion and worship.

Counsel referred the court to various decided cases. One such case was the Canadian case of **R V Big M Ding Mart Limited, Charkalson** enunciated freedom of Religion as follows:-

“The essence of freedom of religion is the right to entertain such religious beliefs as a person chooses the right to declare religious beliefs openly and without fear of hindrance or reprisal and the right to manifest religious belief by worship and practice or by teaching and dissemination. The court in this Canadian case emphasized the point that freedom of religion entails not forcing a person to do anything that is against one’s religious beliefs. The court understood this freedom as primarily as individuals’ rights not to be coerced to do anything against her or his beliefs a right to be respected and possibly protected.”

Justice Charkalson went on to elaborate on freedom as follows:-

“This freedom implies absence of coercion or constraint and freedom of religion may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs. This is what the Lord’s Day Act did, it compelled believers to observe the Christian Sabbath.”

The court was referred to a South African case of the *Prince v President of the Law Society of the Cape of Good Hope (2002) 2 SA 394*¹ wherein the Constitutional Court said.

“The court has on two occasions considered the contents of the right of freedom to religion on each occasion, it has accepted that the right to freedom of religion at least comprehends -

- a) The right to entertain the religious beliefs that one chooses to entertain.*
- b) The right to exercise one’s religious beliefs publicly and without fear of reprisal and*
- c) The right to freedom of religion is the absence of coercion or restraint. “Thus” freedom of religion may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs.*

Under the heading position of the Law in Zambia the court was referred to *Part III of the Zambian Constitution and in particular Articles 11, 19, 19 sub Article 5*, Counsel referred the court to the preamble of the amended Constitution in which the declaration of Zambia being a Christian nation is to be found.

Counsel urged the court to find the Chiefs orders and decision as against the Constitution. Counsel submitted that the Chief’s orders contravene *Article 19 (1) of the Zambian Constitution*. Counsel referred the court to the case of *Kelvin Hang’andu V Law Association of Zambia* in which the Petitioner alleged that his freedom of conscience guaranteed under Article 19 of the Constitution of

Zambia was contravened because he was excluded from participating in the professional affairs of the Law Association of Zambia by holding meetings on a Saturday, the Petitioners belonging to a seventh-day Adventist church.

One of the issues that arose in that case is the meaning of **Article 19 of the Republican Constitution**. The court said that:

“Article 28 (1) of the Constitution empowers the Court to grant redress to any person who proves to it that any of the provisions of Article 11 and 26 inclusive, has been , is being, or is likely to be contravened.” Article 28 (1) applies to executive or administrative actions. Exceptionally, it may apply to a private individual or entity. Before an individual has locus standi to seek redress, there must be an actual or threatened action in relation to him. Compulsion by law of acceptance of any creed or the practice of any form of worship is strictly forbidden. The freedom to hold religious beliefs and opinion is absolute.”

The court went on to say that:

“In so far as the protection of freedom of conscience is concerned, the opening words of Article 19 (1) provide that: “except with his own consent, a person shall not be hindered in the enjoyment of his freedom of his conscience.” Therefore, the key or operative word in the context Article 19(1) is the word “hindered.”

The opening words of Article 19 of the Constitution provides that “Except with his own consent a person shall not be hindered in the enjoyment of his freedom of conscience...” these words have been construed to mean that an applicant has to satisfy the court that without his or her own consent, he or she has been, or is being, or is likely to be hindered in the enjoyment of his or

her freedom of conscience. The operative word is hindered. Even a slight degree of hindrance, will be relevant, and may constitute a contravention of Article 19. And the onus is on the applicant to prove that he or she has been so hindered.”

The court further emphasized that:

“The word “hindrance” in the context of Article 19(1) of the Constitution seems to suggest or mean an impediment, obstacle, barrier, bar, obstruction, restraint, restriction, limitation, or encumbrance that tends to abrogate fundamental rights and freedoms that would require judicial intervention and redress. Hindrance being the antithesis of freedom of conscience, an infringement by the Respondent cannot be established without showing to the court that the Petitioner’s exercise of freedom was affected by some constraint, restriction or form of coercion which he was subjected to by the Respondent. That is, a positive act or overt act or threatened action on the part of the Respondent is key to actionable infringement.”

In distinguishing the Hang’andu case with the case at hand, Counsel pointed out that the Petitioners have adduced to show that the Respondent has introduced a directive in his Chiefdom compelling his subjects to finally support Lwiindi Traditional ceremony of the Tonga speaking people of Southern Province. The Petitioners have declined to comply with this directive on account of their bible trained conscience – freedom of thought and religion. For manifesting their beliefs in practice and observance, penalties and sanctions have been imposed upon them by the Chief.

The court was referred to Section 4 of the Registration and Development of villages Act (Chapter 289) which Act specifies when a Zambian citizen ceases to be an inhabitant of a particular village. The court was urged to find that the preconditions for any Petitioners to belong to any village by the Chief tantamount to constraints, restriction or a firm of coercion which will make it impossible for the Petitioners to practice their faith.

The court was referred to the wording found in **Article 1 (1) of Act No. 2 of 2016 (Chapter 1 of the Laws of Zambia** or the supremacy of the Constitution and the case of **Godfrey Kenneth and five Others v The Attorney General and 2 Others²** in which the court held that:

“The Constitution is the Supreme Law from which all other laws trace their validity and no Act of Parliament, by laws or rules of court, will be given interpretation which will conflict with the Constitution itself.”

The court’s attention was drawn to the fact that the Lwiindi Traditional ceremony, as the Petitioners testified, is a form of customary practice. The court was referred to Deuteronomy 18 v 10-11 which scripture forbids any form of communication with the dead.

Counsel submitted that the levying of fees on citizens by the Chief for the Lwiindi Traditional Ceremony contravenes Article

199 of Act No. 2 of 2016. Counsel refers the court to the interpretation of Section of the Constitution, defines tax.

Counsel points out that only parliament, by way of statutes has the powers to impose levies or fees on citizens for traditional ceremonies. Counsel went further to state that there is no law in Zambia which allows Chiefs to do so.

On the dissolution of the Petitioners' village that this has resulted in contravening Articles 8 of Act No. 2 of 2016 and the Registration and Development of villages Act and the National Registration Act. The court was referred to Article 8 which Article provides the National values and principles and Article 9 (1) which provides for when these National values and principles shall apply.

Lastly Counsel urged the court to find that the grabbing of the Petitioners' farmlands constitutes a direct exploitation of their property contrary to Article 16 of the Zambian Bill of Rights. The court was referred to the case of *May Vijayairi Goswani V Dr. Mohammed Anwar Essa and Commissioner of Lands* in support of this.

Prior to the petition being filed the Petitioners lived in Musuba village. All belonged to the Jehovah's Witness faith. All were affected by the decision of the Chief when he dissolved the village they lived in, creating new villages. According to the Petitioners

the reason for the Chief's action was because they held different religious views and opinions on the Lwiindi Traditional Ceremony. It was the Petitioner's case that the Respondent by his actions has violated their rights.

In arriving at my decision I am guided by the principles of human dignity, equity, social justice, equality and non discrimination (**Article 8 (d) of the Constitution of Zambia (Amendment No. 2 of 2016)**) National values and principles.

I further noted that the National Values and Principles shall apply to the –

- a) Interpretation of this Constitution*
- b) Enactment and interpretation of law*
- c) Development and implementation of state policy (Article 9 of the Constitution of Zambia (Amendment No. 2 of 2016)).*

I am also guided by the wording in the preamble where the people of Zambia pledged to:

- 1. Acknowledge the supremacy of God Almighty*
- 2. Declare the Republic a Christian Nation while upholding a person's right to freedom of conscience, belief or religion.*
- 3. Uphold the Human Rights and fundamental freedoms of every person.*

As much as the Respondent did not avail himself in person or through his representatives to this court, judicial notice is taken that firstly the Petitioners are not the only ones living in the Chieftdom, secondly that there are those living in the Chieftdom who are in total support of the holding of the Lwiindi Ceremony through their willingness to participate in its celebration and contribute towards its success.

Hence, my decision will reflect how to deal on one hand with what the Petitioners say is a violation of their rights to freedom of religion and the implication on others based on equality and freedom.

Freedom of Religion is defined in **Black's Law Dictionary 6th Edition** as follows:-

"Freedom to individually believe and to practice or exercise one's belief. In re Elwell, 55 Misc. 2d 252 284 N.Y.S. 2d 924, 930. The first Amendment protection embraces the concept of freedom to believe and freedom to act, the first which is absolute and the second which remains subject to regulation."

In the case I was referred to by Counsel of **RV Big M. Drug Mart Limited³** case (supra) Dickson CJ in considering the meaning of religion observed as follows:-

"A truly free society is one which can accommodate a wide variety of beliefs, diversity of ... and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the

enjoyment of fundamental freedoms and I say this without reliance of Section 15 of the (Chapter (equivalent to Article 19 of the Zambian Constitution). Freedom must surely be founded in respect for the inherent dignity and inviolable rights of the human persona. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses the right to declare religious beliefs openly without fear of hindrance or reprisal and the right to manifest religious beliefs by worship and practice or by teaching and dissemination.”

Freedom of religion meant in a broad sense that subject to such limitations as are necessary to protect public safety, order, health or morals or fundamental rights of others no one is to be forced to act in a way contrary to his beliefs or his conscience.

Another case I found useful is the case of *R (Williams) Vs Secretary of State for Education and skills (2005) 2 AC 246*⁴ Lord Nicholls expressed himself as follows:-

“Religious and other beliefs and convictions are part of the humanity and every individual. They are an integral part of his personality and individuality. In a civilized society individuals respect each other’s beliefs. This enables them to live in harmony.”

Yet another case I found useful was the case of *Christian Education South Africa v Minister for Education*⁵ where Sachs J aptly explained the nature of the right to religion and scope of its limitation.

“There is no doubt that the right to freedom of religion, belief and opinion in the open and democratic society contemplated by the Constitution is important. The right to believe or not to believe and to

act or not to act according to his or her beliefs or non beliefs is one of the key ingredients of any person's dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self worth and human dignity which form the cornerstone of human rights. It affects believers' view of society and founds the distinction between right and wrong.

It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epoch and national boundaries."

The court was referred to the case of *Kelvin Hangandu V Law Association of Zambia*⁶ where the Supreme Court held that:

1. "Article 28(1) of the Constitution empowers the court to grant redress to any person who proves to it that any of the provisions of Article 11 to 26 inclusive has been, is being, or is likely to be contravened.
2. Article 28 (1) applies to executive or administrative actions. Exceptionally, it may apply to a private individual or entity.
3. Before an individual has locus standi to seek redress there must be an actual or threatened action in relation to him."

In my view there are five issues for determination

- (1) Whether or not this court is empowered to grant redress to the Petitioners.

- (2) *Whether the right of freedom of religion of the Petitioners as guaranteed by Article 19 of the constitution has been violated.*
 - (3) *Whether the right of freedom of religion in the context of the petition is absolute or it can be qualified.*
 - (4) *Whether traditional and cultural practices common in Ceremonies held in Zambia generally and in particular whether the Lwiindi traditional ceremony has a significant negative impact on the enjoyment of the fundamental human rights of the Petitioners generally and the right of freedom of religion specifically.*
 - (5) *Whether the actions of the Respondent are in conflict with Zambia's International Human Rights obligations.*
- 1) *Whether or not this court is empowered to grant redress to the Petitioners.*

Article 19 provides for the protection of freedom of conscience which Article the Petitioners allege was contravened in relation to them. **Article 19** provides as follows:-

- “19 1. Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of conscience, and for the purposes of this Article the said freedom includes freedom of thought and religion, freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.
2. Except with his own consent, or, if he is a minor, the consent of his guardian, a person attending any place of education shall not be required to receive religious

instruction or to take part in or attend any religious ceremony or observance if that instruction, ceremony or observance relates to a religion other than his own.

3. *A religious community or denomination shall not be prevented from providing religious instruction for persons of that community or denomination in the course of any education provided by that community or denomination or from establishing and maintaining instructions to provide social services for such persons.*
4. *A person shall not be compelled to take any oath which is contrary to his religion or belief.*
5. *Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this provision which is reasonably required-*
 - a) *In the interests of defence, public safety, public order, public morality or public health; or*
 - b) *For the purpose of protecting the rights and freedoms of other persons, including the right to observe and practice any religion without the unsolicited intervention of members of any other religion;*

and except so far as that provision or, the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society.”

There is no doubt that from the wording of **Article 19** this court is empowered to grant redress to the Petitioners.

2) On whether the right of freedom of religion of Petitioners

as guaranteed by Article 19 of the Constitution has been violated and whether or not there was an actual or threatened action in relation to the Petitioners.

The opening words of Article 19 of the Constitution provides that: **“Except with his own consent a person shall not be hindered in the enjoyment of his freedom of conscience.....”**

The Petitioners informed the court that action was taken against them by the Respondent because they held different religious views and opinions on the Lwiindi Traditional ceremony. The Petitioners informed the court that they did not want to participate in the pouring of beer on the grave of the dead nor to thank the dead for a good harvest as it was against their beliefs and the Bible. The Petitioners viewed the requirement of signing that they would support all traditional ceremonies as a furtherance of the violation of their rights.

According to the Petitioners the Chief's actions lead to their village which was established in 1961 being disbanded. Further that the Chief grabbed the registers which contained the information important to them such as the village where they lived. The registers also contained information of the village where one was born

and how long they have lived in that village. Not appearing in the register means that when obtaining a National Registration Card the card will not include the name of the village nor the Chief both are requirements for obtaining such cards. Further the register contains information of boundaries for communal and other land. They no longer appeared in any register as they refused to sign agreeing to the terms imposed by the Chief.

The actions of the Chief led the Petitioners to lose their sense of belonging to a community because they were no longer allowed to participate in any activities such as the construction of schools and clinics, activities which they wanted to participate in whole heartedly.

Since the opening words of Article 19 have been construed to mean that an applicant has to satisfy the court that without him or her own consent; he or she has been, or is likely to be hindered in the enjoyment of his or her freedom of conscience the operative word is hindered even a light degree of hindrance will be relevant and may constitute a contravene of Article 19.

The Chief should have known that by forcing the Petitioners to take part in the Lwiindi ceremony, further by grabbing the registers which are already stated

contained vital information important to the Petitioners and forcing them out of the village (and disbanding the same) for what he termed as their disobedience, he was in contravention of Article 19 of the Constitution.

*The right to believe or not to believe and to act or not to act according to one's beliefs or non beliefs is one of the key ingredients of any person's dignity which even God the Creator of heaven and earth respects. For the Petitioners their relationship with God is central to all their activities. Using in part the words of Lord Nicholls in the **R (Williams) V Secretary of State for Education and Skills (2005) 2 AC 246.***

“Religious and other beliefs and convictions.....are an integral part of every individual, of his personality and individuality. In a civilized society individuals respect each other's beliefs. This enables them to live in harmony.”

The onus is on the Petitioner to prove that he or she has been so hindered.

I am satisfied that this court is empowered to grant redress to the Petitioners should they prove that their right to freedom of religion was violated. The Petitioner's right that they claim was violated falls within Article 11 to 26 inclusive. In their case their claim falls within Article 19 of the Constitution.

Further, I am satisfied that the Petitioners have proved that they were hindered in the enjoyment of their freedom of thought and religion in community. Furthermore that this was done without their consent. The Chief has no authority to compel Petitioners to take part in the Lwiindi ceremony nor to make this a condition for them to continue living in his Chieftdom. The Respondent was wrong to inflict hardship on the Petitioners by disbanding their village, making it difficult to obtain documents such as licences, National Registration Cards and passports which require an address, the name of the Chief and village.

The action of the Chief caused the Petitioners severe hardship as the Petitioners could no longer access their land. To deny a group of people who want to participate in activities such as the construction of schools or clinics and even the Chief's house denies them an opportunity to belong to their community. It is clear that the actions of the Respondent have also resulted in the Petitioners being shunned. The actions of the Respondent have also impacted school going children negatively.

3) On whether the right of freedom of religion in the context of the Petitioners is absolute or it can be qualified.

The right to freedom of conscience, religion and belief and opinion is two faceted that is the right to hold religious and other beliefs and to change them which is

an absolute right that shall not be limited and the right to manifest that religion or belief thought worship; teaching, practice, observance including observing the day of worship either alone or with other people.

The testimony of the Petitioners was clear that by forcing them to participate in the Lwiindi ceremony they were being asked to worship and give gifts to small gods. That to do so was against their Bible based beliefs and worshipping of the God Almighty. Thus the same is absolute. The second part of the right to manifest ones religion or belief is the one that is qualified and may be limited if it is in the interest of public safety, in prosecution of public order, health or morals and in the protection of the rights and freedom of others but such limitation must be justified.

However the Petitioners do not want to take part or contribute towards the holding of the Lwiindi Traditional ceremony. They are not saying that the traditional ceremony should be banned, merely that it can be done without their participation and that should be respected.

There is no doubt that the right to freedom of conscience, religion and belief and opinion is an

absolute right that the Respondent has no authority to limit.

- 4) *On whether traditional and cultural practices common in many ceremonies held in Zambia and in particular whether the Lwiindi traditional ceremony has a significant negative impact on the enjoyment of a fundamental human right of the Petitioners generally and the right of freedom of religion specifically.*

Traditional ceremonies are said to reflect the culture of citizens. Most have a deep meaning and commemorating them keeps customs, social life, rituals, history and spiritual culture of the people alive. It is also said that traditional ceremonies promote unity, identity and dignity. This can be viewed as good and positive. The issue is whether this is always the case.

Some traditional and cultural practices common to many Zambian communities are not only spiritual but have a significant and often a negative impact on the enjoyment of fundamental human rights. Some practices affect a certain group more than others, such groups often are women and children.

It is that spiritual dimension though not always considered to be religious that is the crux of this case.

It is common knowledge that the Lwiindi Traditional ceremony is an annual festival of thanks giving and connected to praying for rain.

In the petition before me the Petitioners informed the court that the thanksgiving was to thank the dead (ancestors) for giving them a good harvest.

It is common knowledge that the Lwiindi ceremony like most Traditional Ceremonies in Zambia involves visiting shrines for among other reasons asking for rain from ancestors.

*The Petitioners suggest that the Lwiindi Traditional Ceremony has a significant negative impact on the enjoyment of their fundamental human right as provided for in Article 19 of the Constitution. The Petitioners went on to quote from the Bible from the book of **Deuteronomy Chapter 18 v 10-12 of the King James Version** which states that:*

“There shall not be found among you anyone who turns his son or daughter as an offering, anyone who practices divination or tells fortunes or interprets omens, or a sorcerer or a charmer or a

medium or a necromancer one who enquires of the dead. For whoever does these things is an abomination to the Lord. And because of these abominations to the Lord your God is driving them out before you.”

The Petitioners’ position is that what the Respondent is asking them to do as an abominable practice that would offend the God they serve.

Article 19 provides that their consent is needed and that they shall not be hindered in the enjoyment of their freedom of conscience. My finding is that what the Respondent expected of the Petitioners was a hindrance in the enjoyment of their freedom of conscience and was without consent. The Respondent had no right to force them into making the choices that he imposed on them.

5) On whether the actions of the Respondent are in conflict with Zambia’s International Human Rights obligation.

*The Supreme Court of Zambia in the case of **The Attorney General V Roy Clarke (2008 1 ZR 38)**⁷ held that:*

“In applying and construing **Zambian Statutes, courts of law can take into account international instrument to which Zambia is a signatory. However, these instruments are only of persuasive value unless they are domesticated in the laws.**”

*The Republic of Zambia is a member of the United Nations and African Union. It has ratified many United Nations Human Rights conventions and thus has made binding International commitments to adhere to the standards laid down in these Universal Human Rights documents. The United Nations recognized the importance of freedom of religion or belief in the 1948 Universal Declaration of Human Rights. Counsel in his submission referred to this. **Article 18** states that:*

“Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his /her choice”.

Article 18 of the International Covenant on Civil and Political Rights provides as follows:-

1. *“Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to either individually or in community with others and in public or private, to manifest this religion or belief in worship, observance practice and teaching.*
2. *No one shall be subjected to coercion which would impact his freedom to have or to adopt a religion or belief of his choice.*
3. *Freedom to manifest one’s religion or belief may be subject only to such limitations as are prescribed by law and are necessary to protect public safety order, health or morals or the fundamental rights and freedom of others.*
4. *The state parties to the present covenant undertake to have respect for the liberty of parents and, when applicable legal guardians to ensure*

the religions and moral education of their children in conformity with their own convictions.

Another instrument counsel referred me to is the Declaration on the Elimination of all forms of Intolerance and discrimination based on religion or belief (1981) while the 1981 Declaration lacks any enforcement procedure, it remains the most important contemporary codification of the principle of freedom of religion and belief.

The 1981 declaration contains eight articles, three of which (1, 5 and) define specific rights. The remaining articles act in a supportive role by outlining measures to promote tolerance and / or prevent discrimination based on religion belief, and freedom of conscience.”

Counsel also referred the court to the ***African Charter on Human and People s Rights. Article 8*** provides as follows:

“Freedom of conscience the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms”.

Thus when a member or non member State of the United Nations ratify a covenant and became a State Party to it, they are willfully accepting a series of legal obligations to uphold the Rights and provisions established under the text in question.

When a State ratifies one of the covenants (and Zambia has ratified a number) it accepts a solemn responsibility to apply each of the obligations embodied therein to ensure the compatibility of their national laws with their international duties

in a spirit of good faith. It goes without saying that Zambia has willfully accepted to uphold a series of legal obligations to uphold the rights and provisions referred to. Further the ratification of the covenants referred to raises a question which question is whether or not what the Respondent asked of the Petitioners was in compatible with their rights as provided for by the International Legal Instruments on one hand and more importantly the Zambian Constitution.

The use of the words freedom and choice in the United Nations Human Rights Convention, the use of the words choice, freedom (either individually or in a community) and the fact that no one shall be subjected to coercion which would impact his freedom of his choice on the International Covenant on Civil and Political Rights. Further still the use of the terms promote tolerance and/or prevent discrimination based on religion (Declaration on the Elimination of all forms of intolerance and Discrimination based on Religion or Belief). Lastly in the African Charter on Human and People's Rights, the use of the words such as profession and free practice of religion. (Which no one subject to law and order be submitted to measures restricting the exercise of these freedoms), serves to strengthen the position of the Petitioners as the wording contained in the International Human Rights Conventions is the same as the Zambian Constitution.

There is no doubt that the actions of the Respondent is in conflict with Zambia International Human Rights obligations.

I make the following declarations:

- 1. That Chief Nyawa's decision to dissolve Musuba village and to expel the Petitioners from both the village and the Chiefdom on ground of holding different religious views and opinions on Lwiindi Traditional Ceremony constitutes a vicious onslaught upon the Petitioners' Constitutional rights to freedom of Conscience, Thought and Religion.*
- 2. That the Chief's action of dissolving Musuba village and creating a new Mantanyani village with the stipulation that only those who will support the Lwiindi Traditional Ceremony will be allowed to have their names entered in the Register for the new Mantanyani village constitutes discrimination on ground of one's religious convictions and is therefore unconstitutional, null and void to all intents and purposes.*
- 3. That His Royal Highness's action of expelling the Petitioners from his Chiefdom amounts to an infringement of the Petitioners' Civil, Political and Citizenship rights as citizens of the Republic of Zambia and is therefore unconstitutional;*
- 4. That there is no provision in the Chief's Act Chapter 287 of the Laws of Zambia and let alone the Constitution of Zambia which empowers Chiefs to dissolve a village and expel a Zambian Citizen from his/her village and/or Chiefdom and*

therefore the Respondent's actions are unconstitutional and null and void.

DELIVERED AT LUSAKA THIS 31ST DAY OF OCTOBER, 2017.


**G.C.M CHAWATAMA
HIGH COURT JUDGE**