

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

2017/HP/1303



B E T W E E N:

CHARLES MULANDO (suing in his capacity
As Chief Liteta)

PLAINTIFF

AND

**MELODY CHITAMBALA
KINGSLEY CHINKULA
DAVID MUKUMBUTA
GEORGE KASWENDE
GEORGE KABWENGA
JESDALA KABWENGA**

**1ST DEFENDANT
2ND DEFENDANT
3RD DEFENDANT
4TH DEFENDANT
5TH DEFENDANT
6TH DEFENDANT**

**Before the Hon. Justice Mr M.D. Bowa the 29th day of June
2020**

*For the Plaintiff: Miss I. Kapotwe Ngonde of Suba Tafeni and Associates
For the Alleged contemnor: Mr. C. Siamutwa with Mrs. L.M Mudenda of
Charles Siamutwa Legal Practitioners*

RULING

Authorities referred to

1. *Subrimanium vs DPP (1956) 1 WLR 965*
2. *Order 52 RSC of England 1999 edition (White book)*



The Plaintiff applied for leave to commence contempt proceedings against the 2nd Defendant on the 22nd of December 2017 which I granted on the 17th May 2018. In the notice of motion for an order to commit the 2nd Defendant for contempt, the Plaintiff alleged-

- (i) *That the 2nd Defendant abrogated this honourable court's ex parte order of interim injunction dated the 4th August 2017 and confirmed on 25th December 2017 in which the Defendants were retrained from inciting the Royal family and or the public to rise against the incumbent Chief being the Plaintiff herein, pending the determination of this matter.*
- (ii) *That costs of and occasioned by this application be paid by the 2nd Defendant in any event.*

The Notice was supported by an affidavit dated 22nd December 2017. The alleged Contemnor responded by affidavit in opposition dated 08th of October 2018. The Plaintiffs affidavit in reply to the affidavit in opposition was in turn filed on the 11th of October 2018.

At the hearing, the Plaintiff Charles Mulando (PW1), testified that he is the current Chief Liteta in Liteta village. He commenced contempt proceedings because of what he asserted transpired during the funeral for the late David Mukumbuta held in the village in 2017 on a date he could not recall. He explained that he was earlier granted an injunction by this Court restraining the Defendants from inciting the public against him. In spite of this, his name was being peddled as the person who caused Mukumbuta's death by General Chinkuli the 2nd Defendant and alleged contemnor.

It was the Plaintiff's evidence that the General was not supposed to utter these words as there was an injunction restraining him from doing so. He was quick to point out that he did not hear the alleged contemnor utter the words personally as he was not at the funeral but was told about what was being said by people who were present. These included Mr Maxwell Foncho and headman Kakubo.

The 2 informed him that the alleged contemnor said he caused the deceased death by dragging him to court. Further that he wanted to hide from the responsibility. He informed the court that the people he had sent for the burial to represent him would

be called as witnesses to give evidence about the precise words that were uttered. He testified further that he had received a video from headman Kakubo who recorded the occasion when the offending words were used.

In cross examination the witness stated that he did interact with Lenje people in his area. He disputed that the people had risen against him. He however insisted that the Royal family members had risen against him with a view of removing him from the throne. He testified further that they did not do so after the funeral as he had brought the matter to court. He maintained that he did serve the injunction on the alleged contemnor after it was granted through his lawyers.

PW2 was Maxon Miangano Foncho a farmer in Chief Liteta's area. He recalled that he attended the funeral and burial of David Mukumbuta though he could not remember exactly when it was. At the time for announcements at the graveyard, General Chinkuli whom he descried as his son was called to address the mourners. In his address, the General stated that he was sorry for the loss of the deceased who he stated had died from depression because of his being dragged to court. He further stated that the Plaintiff was hiding behind a bush. In addition,

that the Plaintiff would be dethroned and the General himself would see to it. Further that several others before the Plaintiff had been dethroned.

According to the witness, there were many people that attended the burial. Everyone remained quiet and all felt ashamed because these words were not supposed to be said at a funeral. The mourners proceeded to their homes feeling dejected and reported the incident to the Chief. PW2 personally went to report the matter in the company of his sisters Rita Kasonde, Juliana Chipatuka, Mr Martin Chumpa and headman Kakubo amongst others.

He testified further that the words used were disheartening in the sense that the timing was wrong as the village was in mourning. The Chief was therefore warned to be careful as there were in his words "enemies around."

When cross-examined the witness acknowledged that he had stated the words used were to the effect that the deceased had died from depression due to a court action. He also accepted that he testified that the alleged contemnor talked about dethroning

the Chief and did not say anything more. His main concern was that the words were being said at a burial.

The witness was not re-examined.

PW3 was James Kakubo a peasant farmer and headman in Kakubo village. His evidence was that during David Mukumbuta's burial, he heard the alleged contemnor saying that the deceased had died from depression because of being dragged to court. Further that the one who had taken him to court would be dethroned no matter how long it would take. In addition, that the person who had taken the deceased to court was hiding behind the bush. PW3 explained that this was a Lenje proverb which if put in context meant that the General would execute his plans.

PW3 testified further that everyone present at the funeral heard the alleged contemnor utter these words. He added that the General also stated that he was in the position of dethroning the Chief as others before had been removed from the throne. PW3 had his phone with him at the time so recorded all the speakers that gave speeches at the funeral. He had particularly sought to

record the General at the time because of his standing and service rendered to the country in the past.

A meeting was subsequently held at the Chief's palace where the witness and others present were asked how the funeral went. In response the Chief was informed what transpired in the presence of headmen Shamushinka, Mpande and Kabinda amongst others. In response, the Chief stated that as the matter was before court he would bring the incident to the attention of his lawyers. PW3 accordingly passed on the video recording which was transferred onto a flash disc to the Chief's lawyers.

PW3 testified further that following the incident, things in the village did not move well. He cited the holding of the Kalumba Kubalo traditional ceremony for the Lenje speaking people as an example. He explained that money is expected to be paid towards the ceremony but due to the words that were used people did not pay. Most of the people that were at the burial were disgruntled and generally complaining.

I allowed the production and playback of the video recording in court. In his further evidence in chief after viewing the recording,

PW3 testified that the alleged contemnor is clearly seen addressing the mourners in the video.

When cross-examined the witness testified that he was not far from where the alleged contemnor stood as he recorded the speech. He accepted that the sound effect in the video was not very good. He stated that he could nonetheless hear the words spoken in the video viewed in court. He insisted that the words were audible.

He testified further that the alleged contemnor was using Lenje to address the mourners. When referred to paragraph 7 of the affidavit in support of leave to commence contempt dated 22nd December 2017, he agreed that the words quoted to have been used are presented in English though he did not use that language.

He accepted that the alleged contemnor did not mention the ceremony in his speech. He further accepted that he did not personally rise against the Chief after hearing the General's words. Further that nobody rose against the Chief or dethroned him but qualified that there was confusion in the Chieftom. He was unaware of a proverb in Lenje about a person in mourning.

Further that he was not aware of the saying that one should not look for a person who is in mourning in Lenje tradition.

Cross examined further he stated that he personally made a K120 contribution towards the traditional ceremony. This was the payment expected per village from every headman though he acknowledged people are not necessarily forced to pay it. No person was punished for failure.

When referred to paragraph 7 (b) of the affidavit in support, the witness accepted that the words attributed to the General making reference to the Plaintiff as a small boy do not appear in the video. He accepted that the words reported in 7 (c) of the affidavit are also not in the footage. He testified that he delayed to start doing the recording which would explain why some words were not captured in the video.

When re-examined PW3 stated that the affidavit dated 22nd of December 2017 was not his and was not signed by him. That it was sworn by the Plaintiff, (PW1) who was not present at the burial. The Plaintiff was therefore only deposing to what he was told. He repeated his assertion that he delayed in starting the recording. Further that it was the people present at the funeral

that told the Plaintiff the content of paragraph 7 of the affidavit in support. He insisted that he heard the alleged contemnor uttering the offending words. That the words in paragraphs 7 (a) and 7 (b) were uttered at the burial site as were the ones in paragraphs 7 (c) and 7 (d) of the affidavit in support.

In his defence the alleged contemnor testified as DW1. He categorically denied the contempt charge levelled against him. He recalled that on the 8th of November 2017, the Royal family were burying the late David Mukumbuta also known as headman Chiyaba who passed on a few days earlier. He was asked to say a few words by the family at the burial. He accepted the request as it had been the practice when an important member of the family died to request a senior son to speak at his burial. He testified that his speech was a brief one that lasted 2-3 minutes.

Responding to the specific allegations levelled against him the alleged contemnor testified firstly, that though he was quoted as having spoken in English he addressed the mourners in Lenje. He denied having uttered the words in paragraph 7 (a) (b) and (d) of the affidavit in support of Notice to commence contempt proceedings and dismissed the allegations as pure fabrications and lies.

He said he used the word “Nkoto” in relation with a discussion he had with the late Mkumbuta. The deceased had invited him to his home and poured out his heart on how he felt neglected in his illness. That he lamented that that he had no food to eat or transport to see a specialist. The word Nkoto in relation to what was discussed translated to depression in English. In his speech therefore the alleged contemnor stated that the old man had died from depression and referred to the lamentations that the deceased had brought to his attention during the visits.

He accepted that he did make use of the word “Chipuka” in his speech which he explained was an expression in reference to the conspicuous absence of Chief Liteta the Plaintiff at the funeral. He explained that the late Mukumbuta was the last in Royalty and it was expected that the Chief as host in the area should have been present. Instead it was the neighbouring Chiefs like Chief Chitanda who took over the performance of rites during the funeral. The other was senior Chief Mukuni who sent his senior adviser to come and convey condolences on his behalf.

He testified further that he had stated that the Chief was hiding in the bush as a figurative expression of him not been present at such a solemn occasion. He added that he watched the video

played back in court. He dismissed the recording as not being clear and that the words he was accused of using were not in the video clip played back in court.

When cross-examined the alleged contemnor maintained that the words allegedly spoken by him were a falsification. He denied blaming anyone for what the late Mukumbuta went through. He maintained he spoke on behalf of the family when he stated that the Chief was conspicuously absent. That it was depressing that he was not present as the person who died was an important member of the family.

He accepted that the word for court in Lenje was “Nkota” He further accepted that the words “Nkota” and “High Court” are heard in the video played back in court. He declined that he used the “bush” expression to mean that the Chief was hiding behind the injunction.

Questioned further, the alleged contemnor accepted he had stated that in terms of the Constitution as amended the government had no role in removing a Chief. He disagreed that he also said that because of this Constitutional amendment he would ensure that the Chief was dethroned.

He maintained that the speech did not relate to the matter before court. He explained that the previous night there was a discussion at the funeral over the Constitution. Elders were asking questions and spoke about it. It was in this context that he made reference to the matter being determined by the High Court and in that sense did refer to the matter before court.

He accepted that he had spoken at other funerals before and did not raise the issue of the Constitution or court cases. He disagreed that the words as interpreted in the affidavit are the same ones that he used in Lenje.

In re-examination the alleged contemnor testified that he respected the Chief which was why he had not done anything to disturb his authority. He testified further that the night before the burial, elders sat to discuss the Constitution that had just been amended so it was topical. People were looking up to him to explain the new set up. He explained to those present that the new order removed authority from the President which is now conferred to family members. He maintained that his discussion had nothing to do with the matter before court.

He testified further that the absence of the Chief at a funeral was unknown to tradition. That the incumbent was expected to be there and it was depressing that he was absent. Funerals presented an opportunity to mend fences and this was lost in this case. He disagreed that any word used was intended to incite the people or attempt to remove the Chief.

DW2 was Akson Goodfellow Mulandu. He testified that the late Mkumbuta passed away on the 6th of November and was buried on the 8th of November 2017. DW2 was chosen by the family to be the master of programme at the burial site. He recalled there were not more than 7 people who gave speeches at the burial. General Chinkuli was one of the speakers and DW2 granted him an opportunity to speak.

The speech was delivered in Lenje language and did not have the words attributed to him in paragraph 7 of the affidavit in support of contempt proceedings. He testified further that the General did use the word "Nkoto" in his speech. In doing so he stated that the deceased person had died at the time that he had a lot of thoughts. He told the mourners that the deceased complained that family members had distanced themselves from him.

It was DW2's further evidence that there were no words used to incite the people present or members of the family. The words were of lamentation to the effect that the community had lost an elderly man who was able to keep the family members in harmony.

He disputed the assertion that people present at the funeral were unhappy. That to the contrary, people understood the context of what the General had stated. He added that people had the confidence in choosing him to be MC and he would have stopped anyone causing confusion at the funeral like he did the night before the burial.

When asked about what incident was about in cross examination, the witness testified that there were some individuals that had wanted to cause confusion the night before the burial. He singled out one Maxon Mayonyano (PW2) as one of the culprits.

He testified that he was present when the alleged contemnor gave his speech. He accepted hearing the alleged contemnor talking about the Constitution. He did not recall the General saying anything about the Chief hiding in the bush. That he

made reference to hiding in a shrub and not a bush. DW2 understood the use of the phrase to mean the Chief was not present and elsewhere when the funeral was taking place. Further that the General stated the Chief was supposed to be present to console the mourners.

He disagreed that the alleged contemnor made reference to the Constitution to incite people to rise against the Chief. He was not aware that there was a video recording of the funeral.

Cross examined further DW2 agreed that there was reference made to the High Court in the speech. However that what was said was meant to console people. It was in the spirit of consolation and not to embarrass anyone. He recalled a lot of people asked about the Chiefs whereabouts at the time the mourners were going for burial and the General was aware about the questions being asked. He personally was not happy that the Chief, who was also his uncle, had not come though he could not speak on behalf of the others. He denied that the alleged contemnor discussed the court case in his speech.

In re-examination the witness clarified that he did hear the General mention the High Court in his speech but that he

qualified his statement to say he could not talk at length because the matter was in the High Court. Further that he appealed for calm and peace among the mourners.

The witness maintained that it was not true that the alleged contemnor's speech was intended to ridicule the Chief. He did not hear him say anything that amounted to wrong doing. That the General rather appealed to people to mourn in peace. DW2 further clarified that the Chief was required to be present at the funeral. That it was the Chief as eldest nephew, who was supposed to speak at the funeral, spread millet on the grave and give words of solace to the people.

That was the close of the alleged contemnor's case.

I have carefully considered the evidence before me. It is trite that order 52(1) of the RSC of England 1999 edition grants the court power to punish for contempt of court. It is not in dispute that the court issued an interim injunction on the 3rd August 2017 which amongst other things sought to restrain the Defendants, their agents or servant from inciting members of the Royal family and or public to rise against the incumbent Chief pending the final determination of this matter or further order of this court. It

is common cause that the injunction was confirmed on the 29th December 2017 after interparties hearing.

It is not disputed that the 2nd Defendant and others were served with the injunction and subsequent notice for contempt proceedings thereby satisfying the requirements of order 52/3/1 of the Rules of the Supreme Court on the need for personal service on the alleged contemnor.

I find as a fact that one David Mukumbuta passed away in Liteta village and a funeral was held in Chief Liteta's area. It is further not in dispute that the alleged contemnor was called upon to address the mourners and proceeded to deliver a speech. What I am to resolve is whether the words in his speech were calculated to incite the people to rise against the Plaintiff hence in contempt of the court for disregarding the injunction on record.

It is common cause that the Plaintiff was not present at the funeral so a lot of what is contained in his affidavit in support is hearsay to the extent that he proposes the truth in the statement and not that it was made to him. In the celebrated case of **Subramanian v. DPP**¹ Lord Radcliffe settled the law in the following terms:

“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. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. 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.”

That said, 2 witnesses were called on behalf of the Plaintiffs case. Both testified that the words used by the General were calculated to incite the people and there was a general feeling of despair by the mourners at the funeral as a result what he said. A video was recorded by PW3 which was played back in court. I noted that in spite of the Judiciary’s IT department’s best attempts to enhance the volume with the aid of speakers the recording was hardly audible.

The language used to address the mourners was Lenje and the parties did not avail an interpreted transcript of the recording despite having undertaken to do so by consent. Therefore all that I have before me is a recording which confirms that the alleged contemnor addressed the funeral but not what he said. The case thus turns on which version of the competing witnesses’ evidence I accept to be true. Demeanour becomes an important consideration in this regard. Needless to say I had the

opportunity to closely observe all the witnesses testimonies. I noted that PW3 the person who recorded the occasion was evasive when responding to questions on his understanding of Lenje tradition and the context in which the expression and reference to the hiding in the bush was used. He also avoided eye contact with the court in making his responses. I also found shifty his responses regarding the obligation to pay for the ceremony and the words attributed to the General on removing the Chief from the throne. I therefore raised doubt in my mind about the sincerity of his testimony.

I found the explanation given by the alleged contemnor to be reasonably plausible. He does not deny addressing the crowd and explains the context in which he made reference to the "court", Constitution and use of expression about the Chief hiding in the bush. I accept that the primary concern was in expressing concern about the Chiefs absence at the funeral in spite his position. I do not find that the words were meant to cause the people to rise against the Chief.

I found DW2 to be a credible witness who testified that his role as elder and MC was to regulate the burial. That he would have stopped the General in his tracks if he had said anything that he

deemed was calculated to cause despair among the people. I do not find compelling the evidence by Pw2, describing how the people present at the funeral felt about the alleged contemnor's speech. I conclude that the alleged contemnor did utter some words which were misunderstood but evidence is inconclusive to suggest he went against the order of injunction granted earlier.

I would therefore find the alleged contemnor not guilty of the alleged contempt of court and dismiss the proceedings with costs to be taxed in default of agreement. The parties respective bundles of pleadings and documents having been filed, I order that this matter be set down for trial on the 17th September and Monday 7th December 2020 at 09:00 hours. I will sit the whole day on both dates.

Dated at Lusaka the 20th day of June 2020.



JUDGE.