FRED MMEMBE , BRIGHT MWAPE v THE PEOPLE AND FRED MMEMBE MASAUTSO PHIRI GOLIATH MUNGONGE v THE PEOPLE (1996) S.J.

SUPREME COURT
NGULUBE, CJ., SAKALA AND CHAILA, JJ.S.
23RD JANUARY AND11TH APRIL ,1996.
S.C.Z. JUDGMENT NO. 4 OF 1996

Flynote
Criminal defamation of the President - Whether section 69 of Constitutional law - Human rights - Freedom of expression - Whether offence of defamation of President under s 69 of Penal Code infringes right to freedom of expression in art.20 of Constitution.
Constitutional law - Human rights - Right not to be discriminated against - Whether offence of defamation of President under s.69 of Penal Code infringes against right against discrimination in s 23 of Constitution.
Criminal law - Defamation of President under s.69 of Penal Code - Offence not amounting to infringement of rights to freedom of expression and not discriminatory.

Headnote
The appellants had been charged in a magistrate's court with contraventions of s 69 of the Penal Code in that they had allegedly defamed the President. They requested the magistrate to refer the matter to the High Court in order to determine the constitutionality of s.69 of cap.146. The High Court heard argument on the E issues whether s 69 contravened arts 20 and 23 of the Constitution and and ruled that they did not. On appeal it was submitted on behalf of the appellants that the criminal provision offended against the right to freedom of expression in art 20 and was discriminatory and thus in breach of s.23 of the Constitution.

Held:
(1) That no one could seriously dispute that side by side with the freedom of speech was the equally F very important public interest in the maintenance of the public character of public men for the proper conduct of public affairs which requires that they be protected from destructive attacks upon their honour and character. When the public person was the head of state the public interest was even more self-evident.
(2) There was nothing in art 20 which immunised defamation: a law met the test of being reasonably required if it had as its aim at least one of the interests or purposes listed in art 20(3).
(3) As to the contention that s.69 did not amount to 'law' as it was overbroad and vague, that s 69 was neither overbroad nor vague. Defamation was a well-known subject - even the criminal type of defamation and when it is appropriate to prosecute is well established under English principles of law. The section was a valid law and the appeal could not be upheld on this basis.
(4) Section 69 was furthermore reasonably required to forestall a breakdown of public order and there was accordingly a proximate relationship between the two as required by the Constitution.
(5) As to whether s 69 was reasonably justifiable in a democratic society, the

Court was of the opinion that it would not be authority for the non-criminalisation of defamation of te President just because there may be other measures to couteract attacks to him. There was no pervasive threat inherent in s 69 which endangered the freedom of expression.

For the Appellant: Messrs. J. Sangwa and R. Simeza - Simeza Sangwa & Co.
For the Respondent: Mr A.G. Kinariwala, Principal State Advocate

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Judgment

NGULUBE, CJ.: delivered the judgment of the court.

There are two appeals which have been heard together. In one case Bright Mwape and Fred Mmembe are facing a charge of defamation of the President, contrary to Section 69 of the penal Code. They requested the learned trial magistrate to refer the case to the High Court under Article 28(2)(a) of the constitution for the senior court to determine the constitutionality of Section 69 of Cap. 146 Chitengi, J. heard arguments, and submissions (to which I will be referring) and in a well-researched and well-reasoned judgment, he held to the effect that Section 69 did not contravene Articles 20 and 23 of the constitution as contended by the accused so as to be caught by the provisions of Article 1(2) of the constitution which nullify any law found to be inconsistent with the constitution.

In the other case, Fred Mmembe, Masautso Phiri and Goliath Mungonge are facing a variety of charges one of which is again defamation of the President contrary to Section 69 of the Penal Code. The learned judge (Mrs. Mambilima,J) summarily adopted the ruling of Chitengi, J, in the other case and sent the case back to the Subordinate Court for the trial to proceed. Apparently, there was neither a proper hearing nor a decision on the merits and such a procedure appears not to be supported by the law or practice. However, since the real issue relates to the constitutionality of Section 69 of the Penal Code and since this has been the basis of the appeal, I say no more about the learned judge's summary disposal of the case.

The real issue is common to both cases.

Section 69 of the penal code was introduced into the statute by the Penal Code (Amendment) Act, No. 6 of 1965, which was assented to on 11th January 1965, just a few months after independence. The Section reads....

> "S.69. Any person who, with intent to bring the President into hatred, ridicule or contempt, publishes any defamatory or insulting matter, whether by writing print, word of mouth or in any other manner, is guilty of an offence and is liable on conviction to imprisonment for a period not exceeding three years."

When the constitutional reference came up before Chitengi, J, it was contended that Section 69 is in conflict with Articles 20 and 23 of the constitution. The relevant parts of Article 20 for the purposes of this case read:

> "20. (1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression that is to say.....freedom to impart and communicate ideas and information without interference. Whether the communication be to the public generally or to any person or class of persons,.....
>
> (2) (N/A)
>
> (3) Nothing contained in or done under the authority of any law shall be held

to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision

(a) that is reasonably required in the interests of defence, *Public safety, public order,morality, or public health*; or

(b) that is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons.....; or

(c) (N/A).....

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

When interpreting constitutional provisions regarding the fundamental rights and freedoms for the purpose of ascertaining the validity of a subordinate law, I find it absolutely necessary to bear in mind the injunction in Article 11 that, far from being absolute the rights and freedoms are subject to limitations " designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest". This much was common ground. I also bear in mind the major object of interpretation is the ascertainment of the intention expressed by the legislature. This indeed is the fundamental rule of interpretation of all enactments to which all other rules are subordinate . Since the court's duty is to find out the expressed intention of the legislature and to construe enactments according to such intent, it follows, as a full bench of this court put it in *Samual Miyanda v Raymond Handahu* S.C.Z. Judgment No. 6 of 1994, that:

> "*When the language is plain and there is nothing to suggest that any words are used in a technical sense or that the context requires a departure from the fundamental rule, there would be no occasion to depart from the ordinary and literal meaning and it would be inadmissible to read into the terms anything else on grounds such as of policy, expediency, justice or political exigency, motive of the framers, and the like.*"

As the quotation from Article 20 shows, the legislature qualified the right to freedom of expression by a number of exceptions if shown to be reasonably required for any one or more of the purposes enumerated. The only exception to this is if "that provision", that is to say, if the challenged law itself or, in the alternative, "the thing done under the authority thereof" is shown not be reasonably justifiable in a democratic society. The ordinary and literal meaning of the reference to "that provision" and to the thing done under the authority thereof" plainly indicates that two situations of possible unconstitutionality should be distinguished: The first is where the legislation or the law is itself clearly in excess of the constitution. The second is where the legislation or the law is clear and within the constitution but the action taken under such law exceeds what is permitted by the Constitution. In the first situation, it is the impugned law itself which would be liable to be struck down. In the second situation, it would be the action taken and not be legislation which should be held to be unconstitutional. In my considered view, the first kind of situation is what lends itself to the type of purely technical and legalistic litigation involved in the instant case while the second situation requires fuller investigation into the facts and circumstances such as one might find at a trial or upon some evidence being tendered.

I have taken the trouble to highlight the distinction between the two situations because, from the way the arguments proceeded both below and here this distinction was blurred. For example, counsel for the accused opened his submissions below by contending quite boldly that truth would not be a defence to a charge under Section 69. This is startling and highly debatable. In any case, it seems to me that the range and scope of the possible defences can

not be a factor to be taken into account at this stage where the section is being considered simply in absolute terms as it stands *viz-a-viz* the Articles of the constitution relied upon. In other words, is Section 69 clearly in excess of the Constitution or not?

At the hearing below, there was an issue whether the accused persons had shown on a balance that their enjoyment of the freedom of expression was, because of the prosecution under S.69, being or likely to be hindered. The learned trial judge found for the accused and in this he followed the decision of the High Court (Blagden,C.J) in *Kachasu v Attorney-General* (1967 Z.R. 145. The learned Chief Justice in that case drew inspiration and support from thirteen cases all decided in a variety of foreign courts and held, among other things, to the effect that even slight degree of hindrance, not necessarily amounting to prevention, sufficed to discharge an aggrieved person's burden of showing a contravention of the constitutional freedoms. I have no reason to disagree with Blagden, C.J. The exceptions in article 20(3) refer to the law in question making provision that is reasonably required for one or more of the objects listed. A question was raised below and answered against the accused whether Section 69 was reasonably required for any of the listed objects. In this appeal, it was argued that the learned judge was wrong to find that the Section was reasonably required for the sake of public order. It was argued that, according to the speeches in parliament as reflected in the relevant Hansard, the provision was more concerned with the dignity of the state than with Public Order. Counsel for the State invited us to consider as significant the fact that Section 69 was inserted in the Chapter of the Penal Code headed " Offences against Public Order."

I have considered the submission and let me state also that I have no objections to looking at the Hansard especially if there is some doubt on the backdrop or on the face of the language of an enactment. However, in this instant case, I can see no justification for resorting to the Hansard when answering the question whether Section 69 is within or without the permitted exceptions under Article 20(3). This is because I find the language of Section 69 such that the fundamental rule of interpretation earlier adumbrated is applicable. However, to say that the learned trial judge simply found that Section 69 was reasonably required for the sake of public order does not do justice to the very elaborate and lengthy treatment of the subject in the judgment below. The judge in fact considered the importance of the freedom of expression; he considered the chilling effect of the law of defamation and similar laws on the freedom; he noted how defamation was a crime as well as an actionable wrong and the historical differences between the crime and the civil wrong citing authorities that supported the need to punish in a more public fashion the criminal type of libel where it is in the public interest that criminal proceedings should be brought. The learned judge went on to observe that the accused appeared quite prepared to suffer hindrance of their freedom of expression by civil libel actions but were averse to criminal prosecutions. The learned trial judge then went on to consider who bore the burden of proof under the exceptions and in the process criticised, quite properly in my view, the so-called presumption of constitutionality as applied in *Kachasu* in favour of the more acceptable approach of Magnus, J. in *Patel v Attorney General* (1968)ZR 99.

For the record, I would like to associate myself with the approach of the judge below and I add my own observation: Article 20(3) envisages two scenarios being "shown" to the court, that is, case one where it is shown - no doubt by the one relying upon it such as the state-- that the law in question makes provision "that is reasonably required" (with a sub case where for instance an aggrieved citizen wished to show on balance that it is not reasonably required) and case two where the law or the thing done under it “is shown not to be reasonably justifiable in a democratic society" -- no doubt shown on a balance by for example an aggrieved citizen. After dealing with the burden of proof, the learned judge below proceeded to consider the objective test to be applied in determining the alleged inconsistency of the law with the constitution and also considered the real effect and impact of that law on the fundamental right in question: he discounted any arguments based on the availability or otherwise of defences; and he dealt with the submissions that it was wrong and unnecessary to have a law to protect specially the President by prosecutions for defamation. Speaking for myself, the judge below

was right to reject arguments which sought to consign the President into the general rank and file of the citizenry. He was not in error when he considered that Section 69 was reasonably required, in effect, to forestall a possible unpeaceful reaction from the citizens and supporters and to protect the reputation of the first citizen. I do not consider that there can be any who would seriously dispute that side by side with the freedom of speech is the equally very "important public interest in the maintenance of the public character of public men for the proper conduct of public affairs which requires that they be protected from destructive attacks upon their honour and character." See my judgment in Sata v Post Newspapers Ltd and Another (1992/HP/1395 and 1804 and 1993/HP/821 - Unreported). When the public person is also the Head of State, the public interest is even more self-evident.

The truth of the matter is that there is nothing in Article 20 when immunises defamation. In my considered opinion, a law meets the test of being reasonably required if it has as its aim at least one of the interests or purposes listed in Article 20(3). It is also reasonably required upon the test of proportionality when, as the Court of Appeal of Tanzania put it---

> "*Secondly, the limitation imposed by such law must be no more than reasonably necessary to achieve the legitimate object. This is what is also known as the principle of proportionality*"**-** *see Pumbun v Attorney-General (1993) 2 L.R.C. 317.*

The next argument advanced on appeal was to the effect that the learned judge was wrong when he failed to consider whether Section 69 was in fact a "law" within the contemplation of Article 20. Criticism of the judge appears to be quite unfounded because this ground appears not to have been canvassed at the hearing below and was only taken up for the first time before this court. There are indeed some authorities which have suggested that the constitutional or similar exceptions to fundamental rights apply only in relation to restrictions "contained in or done under the authority of any law". Accordingly, it is sometimes necessary for the court to determine whether the impugned legislation conforms to this constitutional requirement before the court embarks upon a consideration of whether the restriction is "reasonably required" or shown not to be “reasonably justifiable in a democratic society." In the *Pumbun* case, the Tanzanian Court of Appeal suggested that one of the essential requirements for the validity of the clawback provisions was that “..... such a law must be lawful in the sense that it is not arbitrary." The European Court of Human Rights considered the meaning of the word “law" in the context of permissible restrictions to basic rights in *Silver and Others v The United Kingdom,* judgment judgment of 25 March 1983, series A. number 61. They expressed the view at page 33 that a norm:

> "*..... cannot be regarded as "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail*".

Another case of the European Court which can be mentioned is the *Malone* CASE, Judgment of 2nd August 1984 series A number which suggested that the "law" must be foreseeable and compatible with the rule of law. The court suggested that, although it is impossible to have absolute precision in drafting a law, it should nevertheless, "indicate the scope ... and the manner of its exercise with sufficient clarity."

These are basically the arguments which learned counsel for the accused advanced, although he cited the case of *TOLSTOY* decided by the European Court but whose transcript I have myself not been shown. It was argued that Section 69 of the Penal Code was not a valid law because it is overbroad and vague; it does not say what is defamatory and what is insulting; and that it can catch and criminalise even legitimate expression. The offence of criminal libel elaborately dealt with under Sections 191 to 198 of the Penal Code was quoted as an example

of the type of clarity required. Curiously enough , no constitutional attack is made of this other criminal libel. I do not myself subscribe to the view that S.69 is over-broad or vague. The general rule of interpretation of the Penal Code is that it "shall be interpreted in accordance with the principles of legal interpretation obtaining in England." (Section 3). The fundamental rule to which I had earlier made reference applies to S.69. Defamation is a well-known subject; even the criminal type of defamation and when it is appropriate to prosecute is well established under the English principles of law. As the learned judge below correctly pointed out, there is a big difference between legitimate criticism or other legitimate expression and the type of expression encompassed by Section 69. The section under discussion is a valid law and I would myself not uphold the ground of appeal in this respect.

There was a submission alleging a misdirection in the holding that S.69 was reasonably required to forestall a breakdown of public order; the argument being that there is no rational and proximate relationship between Section 69 and public order. I consider this submission to have been expletive and for the reasons earlier stated when considering whether the section is "reasonably required", I would dismiss this argument.

The last issue raised under the first ground of appeal was whether Section 69 was reasonably justifiable in a democratic society. It was argued that the impact of Section 69 was so vast that, in the language of the Zimbabwean case of Re MUNHUMESO (1994) 1LRC 282, it arbitrarily or excessively took away the freedom of expression. The learned trial judge dealt with this aspect quite extensively since the right of expression is critical in a democracy. I have looked at the arguments below and here on the possible impact of S.69 on the fundamental freedom of expression. It seems to me that a general point can be made about the right of criticism and that it can only be up to the evidence heard in a trial if there was in fact legitimate criticism or unwarranted falsehoods and defamatory allegations or vulgar mere insults not containing anything useful to the free flow of ideas and information. As I observed in the *Sata v Post Newspapers* case, freedom of speech and press can not be synonymous with freedom to defame. I have also considered the authorities which were relied upon below, including the case of *Castell v Spain*, judgment of 23rd April, 1992, series A number upon 236. I would myself not regard it as authority for the non-criminalisation of defamation of the President just because there may be other measures to counteract attacks on him. Mr Castells, an opposition politician representing a Basque separatist coalition in the senate, published in a weekly magazine an article in which, among other things, he accused the government of failing to investigate murders and attacks by armed groups against Basque citizens and accused government of actually supporting and instigating the attacks. He was convicted by the Spanish Courts for insulting the government and sentenced. The European Court made it clear that government are required to tolerate an even greater degree of criticism than the politicians. They were talking about an impersonal attack on democratically elected government and suggested that the "dominant position which the government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media." The court proposed to narrow down drastically the circumstances in which a government may prohibit criticism of itself to the occasions when it is necessary to protect public order and when the accusations are "devoid of foundation or formulated in bad faith." (See paragraph 46 of the judgment). In the event, the court ruled that the government of Spain had violated Article 10 of the European Convention (regarding freedom of expression) on the narrow ground that Mr. Castells was prevented at his trial from offering evidence as to the truth of his allegations. The decision was on the facts and merits; the European Court did not declare the criminal offence as altogether violative of Article 10 of the European Convention but simply suggested to narrow down the circumstances warranting a prosecution. The case is not authority for invalidating the criminal offence itself. Similarly, the case of *New York Times v sullivan* 376 us 254; 11L.ED.2d 686 which was quoted below did not suggest or offer complete immunity from suit but simply imposed fetters on a public plaintiff. It is not authority even by way of analogy for immunizing all attacks on a Head of State nor for

invalidating a section creating a criminal offence.

Mr Sangwa criticised the learned trial judge for describing ours as a young and fragile democracy instead of simply looking at what would be reasonably justifiable in any democracy. He relied on *Patel v Attorney-General* which was a decision of the High Court before the now late Samuel Woolf Magnus, J, who went on to sit in this court before retiring via the county courts in England. The decision in *Patel* did not suggest that the court should not have any regard to our kind of democracy. The learned judge expressed himself thus at pages 128-9:

> "*... I am not for a moment suggesting that Zambia is not a democratic society, but for the purpose of the constitution, I think it is necessary, to adopt the objective test of what is reasonably justifiable, not in a particular democratic society, but in any democratic society. I accept the argument that some distinction should be made between a developed society and one which is still developing, but I think one must be able to say that there are certain minima which must be found in any society, developed or otherwise, below which it cannot go and still be entitled to be considered as a democratic society*". *(Underlining supplied).*

I had occasion in *Sata v Post Newspapers* to comment generally upon recourse to international norms and the decisions of the courts in various jurisdictions. I said:

> "*What is certain is that it does not follow that because there are these similar provisions in international instruments or domestic laws, the courts in the various jurisdictions can have or have had uniform approach. For one thing, as the examples I have quoted show, the right to free expression and free speech is qualified by exceptions, in some cases more heavily than in others. For another, we are at different stages of development and democratisation and the courts in each country must surely have regard to the social values applicable in their own milieu.*"

Quite clearly, it was not a misdirection to have regard to the conditions and the level of democracy in Zambia when testing whether the particular section of the Penal Code was reasonably justifiable in a democratic society. Unlike a provision recently stuck down by the majority decision in *Mulundika and Others*, Appeal No. 95 of 1995, there is in this instant case no pervasive threat inherent in Section 69 which endangers the freedom of expression. The *Mulundika* case also underlined, in the majority decision, the principle that there are minimum attributes in any democracy.

I would myself dismiss the first ground of appeal. The second ground alleged that Section 69 contravened Article 23 which reads in the relevant parts:

> "*Article 23 (1) Subject to clauses (4,(5) and (7), no law shall make any provision that is discriminatory either of itself or in its effect.*
>
> *...*
>
> *(3) In this Article the expression "discriminatory" means, affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.*"

The learned judge held that the section punishing defamation of the President was not discriminatory on any of the grounds listed in the Article which were held to be exhaustive.

The argument by Mr. Simeza was that Section 69 conferred priviledges on the ground of the President's political opinions when all should be equal before the law. This was an attempt-which the learned judge below rejected-- to do not so subtle violence to the language of the Article. How can favourable treatment attributable solely to the office of President be described as attributable wholly or mainly to his political opinions? It was also an attempt to reduce to the common ranks the central executive authority and first citizen of the country. The election of any person to the office of President, I would have thought to be self-evident, has legal and constitutional consequences, quite apart from any other result. The constitution itself ordains that the become Head of State and of Government; that the executive power of the state vest in him and that he can be endowed with the various matters, powers and functions described in the constitution. I do not see how it can be argued that the President should stand before the law equally with the rest of us when, for example, Article 43 grants him immunity from civil or criminal suit while he occupies that high office. If the constitution itself makes the president not equal to everyone else, how can the accused's arguments be maintainable? The second ground of appeal must fail if its own inanition.

For the reason I have given I would dismiss the appeals and order that the trials do proceed before the Subordinate Courts. Because an important constitutional challenge to Section 69 of the Penal Code has been argued in this court for the first time and the matter is of general importance, I would make no order as to costs.

Appeals Dismissed.
