

IN THE SUPREME COURT OF ZAMBIA

SCZ APPEAL NO. 41/1995

HOLDEN AT LUSAKA

(Civil Jurisdiction)

B E T W E E N:

CHARLES MUKINKILA CHITENGI

Appellant

and

THE ATTORNEY-GENERAL

Respondent

Coram: Bweupe D.C.J., Chaila and Chirwa JJs

on 25th May, 1996 and 7th February, 1997.

For the Appellant : Mr. C.K. Banda of Chifumu Banda and Associates

For the Respondent: Mr. D.K. Kasote, Assistant Senior State Advocate

J U D G M E N T

Chirwa J.S. delivered the judgment of the Court.

This is an appeal by the appellant against the judgment of the High Court that ruled that the appellant was not a Zambian and therefore could be deported by the Minister of Home Affairs under Section 26(2) of the Immigration and Deportation Act, Cap. 122.

The history of the matter is that on 2nd day of March, 1990 the appellant was apprehended by the Chief Immigration Officer from Inter-Continental hotel and detained at Lusaka Central Prison. On 17th March, 1990 he was served with a deportation order signed by the Minister of Home Affairs on 16th March, 1990 pursuant to Section 26(2) of the Immigration and Deportation Act, Cap. 122 and taken to Kasumbalesa border post for his deportation to Zaire. The Zairean authorities refused to accept the appellant, alleging that he was not a Zairean and he was re-detained.

Following this, he obtained leave to issue a writ of habeas corpus. At the hearing of the writ there was both affidavit evidence and viva voce evidence by the appellant and state witnesses.

The evidence of the appellant was to the effect that he was born at Kalindi village, Kipushi, Zaire of Zambian parents. He went to school there and upon the demise of both parents, the first was his mother when he was very young and his father last in 1962, he was collected by his uncle Bernard Mukinkila who was his witness at the hearing of the writ of habeas corpus. His father's name was Patrick Mukinkila Kasheba from Kasempa and his mother as Harriet Belonge from Chibola. On arrival in Zambia he started working for Botswana Division of the mines. In 1968 he was detained at Lusaka's Central Prison for 14 days but no reasons were given, but they questioned him about where he came from. He also told the court that whilst in Zambia he had been working for State House as an agent tracing smugglers and illegal miners and for this, he and his friends were given BMW cars and houses. He said if they doubted his origins they could not have employed him in such sensitive jobs. On the National Registration Card which he obtained in Kitwe in 1968 bearing the particulars that he was born at Kamwala village Chief Kalilale in Solwezi District, the appellant said that it was not him who gave the particulars but his aunt, the wife of his witness but she had since died. As far as he is concerned, he was born in Zaire of Zambian parents.

The appellant's witness was Bernard Mukinkila who claimed that the appellant was his "son" and he was the son of his elder brother who died in Zaire and that he left for Zaire in 1934. He came to know the appellant in 1964 in Zaire where he was born. He further told the court that his mother was Mangi and that Mabinenu was the elder sister to his (PW2) mother. He said that if Mabinenu says that she only had baby girls, she would be telling lies as she was the mother of Joseph Chitengi and was born at Mundaki village, Chief Kashepa, Kasempa district.

For the respondent, 8 witnesses gave evidence. The first 4 are relatives of PW2, Bernard Mukinkila. DW1 was one of the five daughters of Babinenu and that the father was Ngangula and that they had no boy in their family, and that there was no Joseph Chitangi. She confirmed that PW2 was a son of young sister of her mother and she never knew the appellant.

DW2 confirmed the evidence of DW1 in respect of the number and sex of the children of Babinenu that they were only five girls. He also knew the family of PW2 that there were 7 children, 5 girls and 2 boys and of the 2 boys only PW2 is alive, the other one Yoram died at DW2's village and that he never went to Zaire. He does not know the appellant.

DW3 is another relative of PW2, she too does not know the appellant.

DW4 was Chief Kalilela who denied having a village called Kamwala in his area.

DW5 was registration officer who issued the appellant with the National Registration Card. He gave the procedure required in giving NRC and in this case the appellant produced a school certificate and he endorsed at the back of the certificate. The appellant gave the particulars himself as having been born on 2nd April, 1943 at House No. 6028 Chimwenwe, Kitwe. He issued the NRC on 18th January, 1968 and that there was no need for the appellant to be accompanied by any guardian or parent as he was 25 years old and after the information he supplied was written, he was invited to go through it and he signed.

DW6 was an Assistant Chief Immigration officer who gave evidence that according to their records, the appellant was born at Kalindi in Zaire where he did his schooling and thereafter did a mechanics course in Zaire and came to Zambia in 1966.

They had further information that he comes from Kamwala village in Solwezi and as this information could not be confirmed they concluded that he was a Kairean and made arrangements to deport him.

DW1 was Senior Superintendent in Zambia Police Force who testified that in 1988 he opened a docket on the appellant pertaining to his obtaining a NRC on 18th January, 1968 at Kitwe. The offence he was investigating was giving false information to the Registrar, NRC office where he stated that he came from Kamwala village, Chief Kalilela, in Solwezi. He recorded a warn and caution statement from him which he produced in the court below. Later on 1st March, 1989 the Director of Public Prosecutions issued instructions for the investigations to close as witnesses gave conflicting evidence/statements.

DW8 was Senior Superintendent in Lambazi Police Force who investigated the aspect of appellant's claim that he came from Kamwala village, Chief Kalilela, Solwezi. He visited the chief who denied having any village by such a name. The chief's headmen also denied there been any such village.

In considering this evidence the learned trial judge looked at the particulars as given on the national registration card which indicated that the appellant was born in Kitwe and he hailed from Kamwala village, Chief Kalilela, in Solwezi district. Yet his evidence in court was that he was born in Kaire. As to why the information on the card is different, the appellant stated that the particulars were given by the now deceased aunt who was the wife of PW2. After looking at the evidence of PW2 the learned trial judge found that this witness was untruthful and rejected his evidence in view of the evidence of DWs 1-4.

The learned trial judge then concluded that the appellant was not a Zambian and therefore amenable to Section 26(2) of the Immigration and Deportation Act and in essence dismissed the application for habeas corpus and it is this finding, as we earlier said, that the appellant is appealing against.

In arguing this appeal, Mr. Banda advanced one ground of appeal and that was that the appellant was wrongly deported under Section 26(2) of the Immigration and Deportation Act by the Minister in that that Section does not apply to Zambians. A Zambian cannot be deported from his country. As the appellant alleged that he was a Zambian, there should be proof that he was not but because there was no such proof the State attempted to prosecute him for giving false information to the Registrar which also failed as there was not sufficient evidence. Further Mr. Banda submitted that Section 13(1) of the Citizenship of Zambia Act, Cap. 121 applied.

In reply on behalf of the State, Mr. Kasote submitted that the issue was whether the appellant was a Zambian or not and if he was not then the Minister could deport him and have him detained pending deportation. He submitted that the evidence of the appellant and his witness was not reliable. In Court the appellant stated that he was born in Zaire and yet the particulars to the Registrar were that he was born in Chimwenwe Kitwe but that he comes from Kamwala village, Chief Kalilela, Solwezi. Further the particulars of his parents are not clear and these were disputed by the respondent's witnesses. From the evidence, it was submitted that the appellant was not a Zambian, the fact that investigations on his obtaining the national registration card were discontinued on instructions from the Director of Public Prosecutions does not make him a Zambian.

We have considered the evidence and judgment on record and the submissions by counsel before us.

The evidence adduced by the appellant and on his behalf has to be compared with that adduced by the respondent. With regards to evidence in court as to where he was born and that given to the registration officer, it is difficult to accept the differences. When the appellant was obtaining the card in 1968 he was 25 years old, he did not need to have any guardian to accompany him to obtain a card. The evidence of DW3 was very straight forward and it makes sense. The appellant is alleged to have been given an opportunity to read through Form A before he signed and if his alleged aunt gave wrong information as to where he was born, he should have made the corrections before he was issued with the card. Further one wonders why he had to get his aunt to go with him to obtain a card when he says that it was PW2 who collected this mis-information and the evidence of the chief it is clear that there is no village Kanwala in Chief Kalilela's areas.

On the evidence of the appellants father and mother, it came out very clear that PW2 was less honest and therefore untruthful. No reason is apparent on record why DW1-4 should tell lies about their families. DW1 - 3 do not dispute that they are related to PW2 and we do not see that these three witnesses could have conspired against the appellant so as to deny him in court as their relative. These witnesses clearly explained their connections and they denied there ever been someone called Joseph Chitengi or Joseph Musangu Mukinkila. It is also of some interest the names that the appellant gave in his warn and caution statement; the respondent's witnesses never knew them. It is necessary to look at this evidence, firstly taking the appellant's evidence that he was born in Zaire of Zambian parents because if it can be shown that his parents were Zambians and would have been Zambians in 1964 but for their death, the appellant would be a Zambian by descent and therefore cannot be deported.

The Chief gave evidence that there was no Kamwala village in his area. Even village headman Mandaki gave very good lineage evidence which clearly shows that the only brother of PW2 was Yoram who died in the village and not in Zaire. From all this evidence, it is clear that the appellant had not shown that his parents were Zambians, therefore although he was born in Zaire, by virtue Section 3(2) of the Constitution of Zambia (Schedule 2 to the Zambia Independence Order, 1964) he is a Zambian by descent. The only evidence that was acceptable and given by the appellant and his witness is that the appellant was born in Zaire. In the face of this overwhelming evidence adduced by the respondent, we cannot fault the finding of the learned trial judge that the appellant was not a Zambian but a Zairean, therefore the Minister could properly deport him under Section 26(2) of the Immigration and Deportation Act and the appellant can be properly detained pending his deportation. On this basis we would dismiss this appeal.

There was one other aspect alluded to by Mr. Banda and that is that Section 13(1) of the Citizenship of Zambia Act, Cap. 121 applies to the appellant. We saw no evidence on record that citizenship was given to the appellant by the President as a token of honour. This appeal is therefore dismissed with costs to be agreed in default to be taxed.

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B.K. Bwengo
DEPUTY CHIEF JUSTICE

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N.S. Chaila
SUPREME COURT JUDGE

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D.K. Chirwa
SUPREME COURT JUDGE