

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

2014/HP/1097

CHRISTINE BANDA

PLAINTIFF

AND

INDO ZAMBIA BANK LIMITED

DEFENDANT

**Before Hon. Mrs. Justice J. Z. Mulongoti
on the day of, 2014**

For the Plaintiff: Mr. L. Zulu, Messrs Tembo Ngulube & Associates

For the Defendant: Mr. C. Sianondo, of Messrs Malambo & Co.

R U L I N G

Cases cited:

1. DONOVAN V. GWELOYS LTD (1990) 1 WLR 472
2. HILTON V. SUTTON STEAM LAUNDRY (1946) K.B68
3. STELLA UPTON V. WILLIAM DERECK WALKER (1971) ZR 192 (CA)
4. ATTORNEY GENERAL V. MAJOR SAMUEL MBUMWAE AND 1419 OTHER OFFICERS AND SOLDIERS APPEAL NO 83/2010 (Unreported)(SC)
5. CITY EXPRESS SERVICES LTD V. SOUTHERN CROSS MOTORS LTD (2007) ZR 203
6. BEAMAN V. ARTS LTD (1949) 1 ALLER 465
7. BULLICOAL MINING CO. V. OSBORNE (1899) AC 363
8. KITCHEN V. ROYAL AIRFORCES ASSOCIATION & ANOTHER (1958) ALLER 241
9. SHELDON & OTHERS V. RHM OUTWRIT (1995) 2 ALL ER 558
10. INDO ZAMBIA BANK V. MUHANGA (2009) ZR 266 (SC)
11. INDO-ZAMBIA BANK LTD V. BOAZ KADOCHI CHINKAMBA APPEAL NO. 99/2013 (SC)

Legislation referred to:

1. LIMITATION ACT 1939
2. EMPLOYMENT ACT, CHAPTER 268 OF THE LAWS OF ZAMBIA

The Ruling is for an application to raise a preliminary issue on point of law pursuant to order 14A Rule 1 and order 33 Rule 3 of the White Book. The application was made on behalf of the Defendant by Notice and affidavit in support sworn to by one Christopher Wakung'uma, the Defendant's Chief Manager - Human Resources.

He deposed inter-alia that, the Plaintiff was retired from the Defendant's employ on 30th July 2007 after serving 20 years. That therefore the gratuity, she is claiming ought to have been paid on 31st July 2007. That the Plaintiff commenced this action on 16th July 2014, a period more than six years from the date of cause of action and it is thus statute barred.

The Defendant also filed the Defendant's Skeleton Arguments. It was submitted that a contract of employment is like any other contract and by virtue of *Section 2(1)(a) of the Limitation Act 1939*, which applies to Zambia by virtue of the British Acts Extension Act, the action should have been brought before expiry of six years from the date on which the cause of action accrued.

That paragraphs 3 and 5 of the statement of claim reveals that the cause of action accrued on 31st July 2007 and the six years period elapsed on 31st July 2013. The case of **DONOVAN V.**

GWELOYS (1) was cited that *“the primary purpose of the limitation period is to protect a Defendant from injustice of having to face a stale claim, which he never expected to deal with.”*

It was also argued that in dealing with statute of limitation, the court does not look at the merit of the case as stated in **HILTON V. SUTTON STEAM LAUNDRY (2)** and **STELLA UPTON V. WILLIAM DERECK WALKER (3)**, The Zambian Cases of **ATTORNEY GENERAL V. MAJOR SAMUEL MBUMWAE** and **1419 OTHER OFFICERS AND SOLDIERS (4)** and **CITY EXPRESS SERVICES LTD V. SOUTHERN CROSS MOTORS LTD (5)** were discussed at length in which the Supreme Court upheld the defence of limitation Act. This court has been urged to dismiss the action for being statute barred with costs to the Defendant.

The Plaintiff filed and swore an Affidavit in Opposition. She deposed that the Defendant fraudulently and with intent to deprive her of her entitlement to gratuity which she had already earned and amounting to K994,824.00, concealed the payment to her. She only discovered this in 2009 after a former workmate was paid her gratuity after Judgment in her favour by the Supreme Court. The Plaintiff exhibited the conditions of service, which entitled her to gratuity, marked “CB1-13”.

The Defendant's filed an Affidavit in Reply sworn by the same Christopher Wakung'uma. He deposed that the exhibit "CB1 to CB13" is a contract upon which the Plaintiff seeks to claim her gratuity. And thus it is not possible for the Defendant to have concealed the purported benefit under a contract which the Plaintiff had and continues to have custody and possession. That the Defendant therefore, denies the allegation that it either fraudulently or otherwise concealed any fact in this matter. That the Defendant paid to the Plaintiff what it deemed and continue to deem was due to her. That her former workmate sued for her gratuity within time and the court upheld her claim.

At the hearing of the application learned counsel for the Defendant Mr. Sianondo of Messrs Malambo and Company informed the court that he was relying on the Affidavits in Support and in Reply and the Skeleton Arguments. He submitted that upon perusal of the affidavit in opposition, it was clear that the Plaintiff was not denying that the matter was commenced outside six years but contends that the Defendant fraudulently concealed the Plaintiff's entitlements. He argued that the Plaintiff has produced the contract she intends to rely upon and therefore, it is not possible for the Defendant to have concealed her entitlements which were calculated in accordance with 'CB17' and 'CB12' of the Affidavit in Opposition. According to counsel the allegation of fraud, which requires a higher standard of proof cannot be sustained in view of the fact that the Plaintiff had a

contract. The court was urged to allow the application and dismiss the action.

Learned counsel for the Plaintiff Mr. Zulu opposed the application and relied on the Affidavit in Opposition. He submitted that the Defendant concealed payment of gratuity which was only discovered in 2009. That though the Plaintiff retired in 2007, the time started running in 2009 after she discovered the concealment and thus the period is less than six years to date. Mr. Zulu relied on *Section 26 of the Limitation Act* and argued that where the action is based on fraud of the Defendant, or his agent, or the right of action is concealed by fraud or the action is for mistake, the time will begin running after the Plaintiff discovers the mistake. In addition that section 26(b) provides for right of action where there is concealment of fraud by the Defendant. It was further contended that concealment is an act of refraining from disclosure. He quoted Black's Law dictionary that, ***"fraudulent concealment is affirmative suppression or hiding with intent to deceive or defraud of a material fact or circumstances one is legally or sometimes morally bound to reveal."*** And that is what the Defendant did to the Plaintiff. The Defendant did not inform the Plaintiff at the time she retired in 2007, that she was entitled to gratuity for having served 24 years with the Defendant. Further, this money which is equal to K994,824=00 was retained by the Defendant for its benefit. The Defendant was under moral and legal obligation to

disclose this to the Plaintiff. And that the Defendant by its action breached section 51 of the Employment Act.

The case of **BEAMAN V. ARTS LTD (6)** was cited where it was held that *“the word fraud in section 26(b) of Limitation Act was not confined to fraud which in its nature was sufficient to give rise to an independent cause of action but has same meaning as in the Real Property Limitation Act 1883, Section 26 and in Equity. There could be fraudulent concealment of a right of action which was not subsequent to the act which gave rise to the right of action but acquired its character from the manner in which the act was performed”*.

The court was urged to use equitable principles in defining fraudulent.

Further, that in **BULLICOAL MINING CO. V. OSBORNE (7)**, it was observed that there can be fraudulent concealment even when the person doing so, has not taken active steps to conceal it. And in **KITCHEN V. ROYAL AIRFORCES ASSOCIATION & ANOTHER (8)**, it was held that there can be fraudulent concealment even when there is no deceit or dishonest because it is not confined to such. According to counsel the fact that the Plaintiff had the contract cannot absolve the Defendant of concealment and *section 51 of the Employment Act* mandated it to inform the Plaintiff. The case of **SHELDON & OTHERS V.**

RHM OUTWRIT (9) was cited where the House of Lords held that *“where there has been concealment, the Plaintiff has full or six years from date of discovery of concealment”*.

That the Plaintiff’s case, in casu, is not tainted by the Defendant’s action not to disclose.

In response Mr. Sianondo submitted that in paragraph 5 of her affidavit, the Plaintiff has made it abundantly clear that she served under conditions of service she exhibited. That if she had alleged that she never had sight of the contract, it would have been a different story. In addition that section 51 fell under General provisions and what needed to be explained were changes in the nature of employment like duties to be performed by an employee, not what has arisen in casu.

I have considered the affidavits by the parties and the skeleton arguments and submissions by counsel.

I took time to study the English cases cited by Mr. Zulu. In **BEAMAN V. ARTS LTD**, supra, the Court of Appeal held that under section 26(a) and (b) of the Limitation Act, the period of limitation was postponed because the action was based upon fraud of the company and the right of action was concealed by the fraud. The brief facts were that the Plaintiff who was the owner of four packages deposited with the Defendant from 1935

to 1938, travelled abroad and due to the war was unable to return to England. In January 1940 she wrote to the Defendant asking it to send the packages to her at Athens but this became impossible because Italy also joined the war. The Defendant then in August 1940 examined the contents of the packages and decided to donate them to the Salvation Army and made no attempt to communicate with the owner and made no full entry of it in its books. In 1946, the Plaintiff returned to England and claimed the packages. After being informed of the position, she sued for damages for conversion. This judgment was followed in **KITCHEN V. ROYAL FORCES ASSOCIATION** supra, where it was also observed that the word fraud in section 26(b) of the Limitation Act, 1939, was not confined to deceit or dishonesty.

The Defendant in casu, has denied fraudulently concealing to the Plaintiff that she was entitled to gratuity in accordance with clause 7.0 of her contract of employment. According to the Defendant, the Plaintiff had the contract with her all the time and thus it was not concealed from her.

After a careful read of the English cases cited by Mr. Zulu and the Supreme Court decision in the case of **INDO ZAMBIA BANK V. MUHANGA (10)** of 2009, which led the Plaintiff to discover that she was not paid gratuity when she retired in 2007, I am of the considered view that the Defendant did fraudulently conceal this payment to the Plaintiff. I say so because in 2007 when the

Plaintiff retired both parties thought she had been paid her benefits in full. Indeed the Defendant contends in paragraph 5 of the Affidavit in Reply that what it paid to the Plaintiff is what it deemed and continue to deem due to the Plaintiff. Further, in paragraph 7, that it did not have a duty to advise the Plaintiff of the right she had under the contract of employment as both the Plaintiff and the Defendant were contracting parties. I note also that in the Muhanga case, the Defendant had contended that employees working on permanent and pensionable basis were not entitled to gratuity. The Supreme Court held that the respondent was entitled to gratuity in accordance with clause 7.0 of the contract. It was stated that,

*“if the insertion of words ‘**permanent and pensionable**’, was a result of careless drafting, then under the doctrine of ‘*contra preferentem*’ the document has to be construed against them and in favour of the respondent.”*

The Muhanga decision was followed by the Supreme Court in **INDO-ZAMBIA BANK LTD V. BOAZ KADOCHI CHINKAMBA (11)** of 2014 cited by Mr. Sianondo.

The respondent in that case sued the Bank after the Muhanga decision. Mr. Sianondo, also argued that appeal on behalf of the Bank. He contended inter alia, that the respondent accepted his retirement pay without question and that he understood that he was employed on a permanent and pensionable basis and

therefore not entitled to gratuity. As aforesaid the appeal was dismissed and the Muhanga decision was followed.

It is not disputed that the Plaintiff in casu retired in 2007. And as noted at that time both parties accepted that she was paid her dues in full per exhibit 'CB17'. It is also not disputed that the Plaintiff only became aware that gratuity was not paid to her in 2009. Then she instituted these proceedings in 2014. The Defendant contends that the case is statute barred as the cause of action arose in 2007 in fact 31st July 2007 and being instituted now way beyond six years it should be dismissed in accordance with section 2 of the Limitation Act.

The Plaintiff's counsel contends that there was fraudulent concealment by the Defendant of the Plaintiff's entitlement to gratuity and time only started running in 2009 when the Plaintiff discovered she was entitled to it. Counsel relied on *section 26(b) of the Limitation Act*, which provides for postponement of the limitation period where the right of action is concealed by the fraud of the Defendant or his agent etc.

After a careful analysis of this case, it is not disputed that both parties became aware in 2009 that the Plaintiff who was employed on permanent and pensionable basis, was entitled to gratuity in accordance with clause 7.0 of the contract. This was after the Muhanga decision was pronounced by the Supreme

Court. As earlier intimated, I am inclined to find that there was fraudulent concealment by the Defendant in this case. I note that the Muhanga case was between the Defendant and its former employee Muhanga, such that after the Supreme Court pronounced that Ms Muhanga, who was employed on permanent and pensionable basis was entitled to gratuity, the Defendant had a duty to inform the Plaintiff at that stage and since it did not do so it fraudulently concealed this entitlement. The Plaintiff got to know on her own. I find therefore, that time began running in 2009 not 2007. Accordingly, the Plaintiff's claim is within time. I am fortified by the English cases cited.

It was clearly stated in those cases that the limitation period was postponed due to the fraudulent concealment of facts by the Defendant or its agents.

And as contended by Mr. Zulu and held in the **BEAMAN** case "fraud in section 26(b) of the Limitation Act was not confined to fraud which was sufficient to give rise to an independent cause of action. That on the facts, the Company's conduct, by the manner in which it converted the owners chattel and in circumstances calculated to keep her in ignorance of the wrong it had committed amounted to fraudulent concealment within the meaning of *section 26(b)* and therefore, the period of limitation was postponed under that paragraph of the section."

In casu, the Defendant did not disclose to the Plaintiff after the Judgment in 2009 and to date contends that the Plaintiff was paid what it deemed and continue to deem due to the Plaintiff. Going by the **BEAMAN** case, the Defendant clearly intends not to pay the Plaintiff this money despite the Supreme Court pronouncement in 2009. To me the Defendant's actions amount to fraudulent concealment and as already stated time started running in 2009 when she discovered the entitlement. The Plaintiff acted diligently after discovering the fraudulent concealment and brought the action within time. From 2009 to date it's a period of five years. The action arose out of contract as argued and should have been commenced within six years.

For the foregoing, the preliminary issue is dismissed with costs to the Plaintiff.

Delivered at Lusaka thisday of2014.

J. Z. MULONGOTI
HIGH COURT JUDGE

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

2014/HP/0084

BETWEEN:

**ZAMBIA LEAF TOBACCO COMPANY LTD
APPLICANT**

AND

ZAMBIA REVENUE AUTHORITY (ZRA)

RESPONDENT

**Before Hon. Mrs. Justice J. Z. Mulongoti
on the 21st day of November, 2014**

***For the Plaintiff: Mr. R. M. Simeza assisted by Ms. K Viyuyi of
Simeza Sangwa Associates***

For the Defendant: Ms. C. Kasese, Legal Officer ZRA

R U L I N G

Cases cited:

1. *Royal Trading Ltd V. Zambia Revenue Authority SCZ Judgment No. 39 of 1999*
2. *Turbulent Engineering and Mining Supplies Ltd v. Simwinga and ZRA 2008/HK/354*
3. *Admark Ltd V. ZRA SCZ Judgment No. 9 of 2003*
4. *Mung'omba & Others V. Machungwa & Others (2003) ZR 17 (SC)*
5. *Davies Jokie Kasote V. The People (1977) ZR 75*
6. *Germins Motorways Ltd V. ZRA Appeal No. 118 of 2008*
7. *R V. Medical Appeals Tribunal, Ex parte Gilmore (1957) 1 QB 574*
8. *Kabimba V The Attorney General and Lusaka City Council (1995/97) ZR 252*

9. *Newplast Industries V. Commissioner of Lands (2001) ZR 51 (SC)*

Legislation referred to:

1. *Order 3 Rule 2 of the High Court Rules Chapter 27 of the Laws of Zambia*
2. *Orders 33/3; 33/7, 2/2 and 14 A1 of the rules of the Supreme Court (White Book), 1999 Edition*
3. *Section 164 of the Customs and Excise Act Chapter 322 of the Laws of Zambia*

The Ruling relates to an application by the Respondent for a Notice to Raise a Preliminary Objection on a point of Law. The application was made pursuant to *Order 3 Rule 2 of the High Court Rules Chapter 27 of the Laws of Zambia* and *Orders 33/3; 33/7, 2/2 and 14A1 of the rules of the Supreme Court (White Book), 1999 Edition*. The Notice was supported by an affidavit sworn by one Jubilee Hamwaala, a Senior Collector for Credibility and Controls of the Respondent's Credibility and Controls Customs Services Division.

She deposed that the applicant and two other companies namely Alliance One (Z) Ltd and Tombwe Processing Ltd, its Agent made an application for a coefficient with regard to processed tobacco in October 2009. That on 14th December 2009, the respondent approved the coefficient submissions and resultant coefficients relating to processed tobacco for Tombwe Processing Ltd as

shown by exhibit JG4. That the said approval was based on the workings submitted to the respondent by Tombwe Processing Ltd. However, the applicant, without any further consultation with the respondent, has been using the coefficient which was only approved for Tombwe Processing. Consequently, the respondent rejected the applicant's duty drawback claims.

The applicant appealed this decision to the Commissioner General by letter dated 17th April 2013. The Commissioner General rejected the appeal by letter dated 1st October 2013 exhibited as JH6. This prompted the Applicant to commence these proceedings by way of judicial review on 22nd January 2014. The deponent further deposed that any action against the respondent must be preceded by the respondent being given one month's notice of the intention to commence proceedings.

That the applicant never served such notice. In addition that any matter emanating from the Customs and Excise Act, must be brought before Court within three months from the date the cause arose. In casu the cause of action arose on 1st October 2013 and thus a period of

three months had elapsed when the proceedings were commenced.

The respondent also filed Skeleton Arguments in support of the Notice to Raise a Preliminary Objection. Ms. Kasese, the respondents Legal Counsel submitted that the action is irregularly before this court because the Applicant did not follow procedure as stipulated in *section 164(1) of the Customs and Excise Act Chapter 322 of the Laws of Zambia* (the Customs Act), which provides:

“A Writ of Summons shall not be issued against nor a copy of any process served upon the Authority for anything done under this Act or any other law relating to Customs Excise until one month after notice in writing has been delivered to the Authority, by the person, or the person’s legal practitioner, who intends to issue such writ, summons or process.”

According to counsel the section is couched in mandatory terms and failure to adhere to the provision is fatal as held by the Supreme Court in **Royal Trading Ltd v. Zambia Revenue Authority (1)**, that *“a notice of action must be delivered to the Commissioner General who is an officer for purposes of satisfying section 164(1) of the Customs and Excise Act.”*

Learned Counsel also cited High Court decisions in **Turbulent Engineering and Mining Supplies Ltd v. Simwinga and ZRA (2)** and **ZRA v. Africa Beverages Ltd (3)** in emphasising the same point about failure to comply with *section 164(1) and 164 (4) of the Customs Act*, being fatal and that the Court had no discretion in the matter. She also pointed out that subsection 4 provides for every action to be brought within three months after the cause arose.

Further, that in the Royal Trading case it was pointed out that subsection 4 does not give the Court any discretion to extend time within which such an action shall be commenced.

The case of **Admark Ltd v. ZRA (4)** was also cited where the Court held that the provisions of *section 164(4)* were mandatory. It was Counsel's further submission that the action is thus statute barred by virtue of *section 164(4)*. A plethora of High Court decisions were cited to support the argument. And that in the Admark case, the Supreme Court noted that the issue of time limitation can be raised even if it was not pleaded.

The respondent's counsel Mr. Simeza, SC, filed Arguments in Opposition to the Respondent's Notice of Intention to Raise a Preliminary Objection on a Point of Law. Mr. Simeza submits that applications for judicial review are solely governed by *Order 53 of the Rules of the Supreme Court of England* and therefore no other provision of the Law can dictate the procedural aspects of such applications. The case of **Mung'omba & Others V. Machungwa & Others (5)** was relied upon in which the Supreme Court held that:

"It is accepted that there is no rule under the High Court Rules under which Judicial Review proceedings can be instituted and conducted and by virtue of section 10 of the High Court Act, Chapter 27, the Court is guided as to procedure and practice to be adopted. Having accepted that there is no practice and procedure prescribed under our Rules, we follow the practice and procedure for the time being observed in England in the High Court of Justice. The practice and procedure in England is provided for in Order 53 of the Rules of the Supreme Court (RSC). Order 53 is very detailed. In it one will find the law as on what basis judicial review is founded; the parties, how to seek the remedies and what remedies are available. Under the parties, care is taken not only as to who can initially commence the proceedings, but also who can possibly join or be joined. The Order provides the sort and form of evidence required at the hearing.

Once it is accepted that our Rules do not provide for the practice and procedure on Judicial review and we adopt the practice and procedure followed in England, our Rules for the purposes of Judicial review, are completely discarded and there is strict following of the procedure and practice in

Order 53 of RSC. It will be noted from the learned editors of the White Book (RSC), that Order 53 created a uniform, flexible and comprehensive code of procedure for the exercise by the High Court of its supervisory jurisdiction over the proceedings and decisions of inferior courts tribunals and other persons or bodies which perform public duties or functions. The procedure of judicial review enables one seeking to challenge an administrative act or omission to apply to the High Court for one of the prerogative orders of mandamus, certiorari or prohibition or in appropriate circumstances to declarations, injunction or damages. As it is a comprehensive code of procedure on judicial review, our Orders 14 and 18 of the High Court Rules are thus inapplicable. These orders are only relevant to process begun under our rules and when applicable. (The underlining was by way of emphasis by counsel).

The learned State Counsel further submitted that he was alive to the fact that in the Royal Trading case, supra, the Supreme Court held that; “...judicial review is a process and therefore falls within the ambit of section 164(1) of the Customs & Excise Act Chapter 322 of the Laws of Zambia.” Mr. Simeza contends that the Mung’omba & Others case, was decided after the Royal Trading one. And that the Supreme Court took a different position than taken in the Royal Trading as regards applicability of our procedural Rules such as *section 164* to judicial review proceedings. That in Mung’omba, it was held in unequivocal terms that:

“Order 53 is comprehensive. It provides for the basis of judicial review: the parties; how to seek the remedies, what remedies are available and time within which to commence the action and gives the Court discretion to extend such time. It also provides the sort of evidence required at the hearing.”

Accordingly, the holding in the later case takes precedence over the earlier one. Consequently, this Court is bound by the decision in *Mung’omba & Others*. The Courts attention was also drawn to the case of **Davies Jokie Kasote v. The People (6)**, where the Supreme Court held, inter alia

- “(i) The principle of “stare decisis” is essential to a hierarchical system of courts. Such a system can only work if, when there are two apparently conflicting judgments of the Supreme Court, all lower courts are bound by the latest decision.*
- (ii) A lower court is not entitled to say simply because the Supreme Court in a judgment has not mentioned an earlier decision of the same Court that the earlier decision was overlooked and that the later decision was therefore given per incuriam.”*

According to the learned State Counsel, it follows therefore that the decision in *Mung’omba & Others* applies and that therefore the provisions of the Customs and Excise Act cannot be invoked to prescribe procedural aspects of the judicial review proceedings with regard to time for commencement and steps to be taken before

issuing the court process. That in the same way the High Court rules are completely discarded in judicial review proceedings, so are the provisions of the Customs Act thus the preliminary objection is misconceived. Regarding the arguments by the respondent that the application or action is statute barred, it was submitted that after the Commissioner General's decision on 1st October 2013, the Applicant attempted to exhaust administrative procedures within the Department. This was done by way of appeal to the Commissioner General on 30th October 2013 and he only responded on 7th November 2013. Leave for judicial review was obtained on 22nd January 2014. That between 7th November 2013 and 22nd January 2014, about two months had passed and there was therefore no undue delay in making the application to court.

Further, that under *Order 53 rule 4(1) of the RSC*, the application for leave for judicial review must be made within three months from the date when grounds for the application first arose but where there are good reasons the period may be extended. Thus, this court's only

consideration is whether there are good reasons to extend the period, that going by the Mung'omba case that *Order 53* created a uniform, flexible and comprehensive procedure, this Court should employ the flexible provisions afforded by *Order 53*.

On the issue of giving 30 days prior written notice to the respondent, it was submitted that a perusal of *Order 53* merely requires that the application be made within three months unless there are good reasons for the delay when an extension will be allowed and that *Order 53* does not leave room for importation of other provisions of the law to govern the judicial review proceedings. Accordingly, the issue of non compliance with *section 164(1) of the Act* does not arise. That *section 164(3)* provides for limitations when it comes to adducing evidence before the Court in actions commenced against the respondent. That in judicial review application evidence is contained in affidavits and it is concerned with the decision making process not the merits of the actual decision being challenged. Further, that to argue that the applicant first needed to give 30days notice to the respondent would result in a conflict between the provisions of *Order 53* and

the procedural provisions under the Act. Applying *section 164* of the Act to judicial review proceedings would inevitably have the result of ousting mandatory procedure in *Order 53* which was approved by the Supreme Court in the Mung'omba case, which would be an entirely undesirable result.

The learned State Counsel also contends that the cases of **Germins Motorways Ltd v. ZRA (7)** and **Admark Ltd v. ZRA** supra, which also decided that the provisions of *section 164 (4)* of the Act are mandatory, are distinguishable from the instant case in that those two cases were commenced by writ of summons. Therefore, they were governed by the procedural requirements under *section 164 of the Act*. The case in hand is a judicial review application which is governed solely by its own code of procedure under *Order 53 of the Supreme Court Rules (White Book)*.

Learned Counsel also submitted on the question, whether judicial review proceedings are an action or civil proceedings within the meaning in *section 164*. According to Counsel *section 164* is more appropriate to actions involving disputes between parties who seek to

enforce private rights against the Respondent and not to those which involve applications to the Court to review the conduct of the respondent in matters of public Law. That the use of the word '*writ*', '*cause of action*' under *section 164* are indicative of the fact that the said provisions of the Act were not intended to cover applications for judicial review. Accordingly, an application for judicial review is not an action and is not concerned with a dispute between the parties but rather is directed at the decision making process. The case of **Froylan Gilharry SR dba Gilharry's Bus Line and Transport Board and Others (Gilharry's Bus Line)** where the Belize Court of Appeal, considered the issue whether *section 3(1) of the Public Authorities Protection Act (PAP Act)* applied to applications for judicial review, it was held that:

"there can be no question that, as the cases all indicate, there is no lis between the parties in judicial review proceedings. Such proceedings are directed at the decision itself rather than the parties who made it ... What is vulnerable in such proceedings is the decision and not the decision maker. It is in this sense, it seems to me, that Carey JA took the view in Belize Water

Services that an application for judicial review is not a dispute... The PAP Act does not apply, either on principle or on authority, to applications for judicial review ...”

Learned counsel pointed out that section 3(1) and (2) of the PAP Act mirror section 164 (1) and (2) of the Customs Act.

It was also submitted that the prerogative remedies afforded in applicants for judicial review and the applications themselves cannot be placed within the ambit of what is termed a proceeding or an action under any statute. Denning LJ was quoted in **R v. Medical Appeals Tribunal, Ex parte Gilmore (8)** that, *‘remedy of certiorari is never to be taken away by statute except by clear and explicit words.’* Further, that in **Kabimba v. The Attorney General and Lusaka City Council (9)**, the Supreme Court held that:

“of course in some respects an application for judicial review appears to have similarities to civil proceedings between two opposing parties, in which an injunction may be ordered by the Court at the suit of one party directed to the other. When correctly analysed however, the apparent similarities disappear. Proceedings for judicial review in the field of public law, are not a dispute between two parties, each with an interest to protect, for which an injunction maybe

appropriate. Judicial review by way of an application or certiorari, is a challenge to the way in which a decision has been arrived at. The decision maker may appear to argue that his decision or its decision was reached by an appropriate procedure. But the decision maker is not in any true sense an opposing party, any more than an inferior court whose decision is challenged by an opposing party."

Accordingly, that where an action has been brought challenging the decision of the respondent's as a public officer by way of judicial review, the procedure to be followed in those proceedings is *Order 53 of the White Book* which is a comprehensive code of procedure.

In conclusion counsel reiterated that the procedural provisions of the Act have no place in applications for judicial review and the Applicant need not comply with *sections 164(1) and (4) of the Act*. The Preliminary objections therefore lack merit and should be dismissed with costs to the applicant.

At the hearing, Ms. Kasese relied on the affidavit in support and the skeleton arguments. She reiterated her arguments that the matter was irregularly before Court for failure to comply with *section 164(1) of the Customs Act*. Further, that the court process was served outside the three months period provided in *section 164(4) of the*

Customs Act. And that under that section the Court does not have discretion to extend time within which the action shall commence. A plethora of High Court decisions were cited as authorities. It was the Respondents prayer that the matter be dismissed with costs.

Mr. Simeza, SC, submitted, on behalf of the applicant, that the matter is an action for judicial review, a process which is regulated and governed by rules which are unique to itself. He reiterated his skeleton arguments that there are no rules under our jurisdiction that govern judicial review proceedings. The case of Mung'omba & Others, supra was relied upon. He argued that the Royal Trading case relied upon by the respondent had been overtaken by the Mung'omba case and that it dealt with the definition of process, which is not the issue in casu.

The learned SC also reiterated that the three weeks delay in commencing the action within three months was explainable. He submitted that following the decision of the Commissioner General, the Applicant could not come straight to court without exhausting administrative procedures under the Act, which required some form of

appeal. The applicant then made representations on 30th October 2013 and only got a response on 7th November 2013 which was the time the three months started running. And since the action was commenced on 22nd January 2014 a period under two months, the action was not statute barred.

That even the one month notice required in *section 164(1) of the Customs Act* does not come in force in casu because there is no such requirement for judicial review proceedings under *Order 53*.

In response, Ms. Kasese submitted that the Mung'omba case is not on all fours with this case. That the Mung'omba case was not commenced pursuant to the Customs & Excise Act. Though a judicial review action, there were no other statutory provisions which were relevant or applicable to the procedure. She also contended that the Supreme Court in Royal Trading held that judicial review is a process and fell within the ambit of *section 164(1) of the Customs Act*.

And that in the Mung'omba case there was an attempt to use the High Court Rules which was not allowed because

Order 53 provides for the procedure in detail. In casu, there was no application under the High Court Rules, but a prescribed rule that is *section 164 of the Customs Act*.

On the issue of the Applicant exhausting administrative processes, Ms. Kasese contends that the appeal was made to the same office, so administrative channels were exhausted on 30th October 2013 and not 7th November, 2013.

The issue as I see it is whether or not judicial review proceedings are affected by statute providing for mode of commencement or procedure to be adopted when suing an institution such as the respondent.

I have considered the arguments by both Counsel. I wish to state from the outset that the Mung'omba case can be distinguished from the instant case. As canvassed by Ms. Kasese, the Mung'omba case was not dealing with a relevant or enabling Act, as in casu. It was a general case of judicial review which was not affected by any statute. In this case there is the Customs Act which

provides specifically that 30days notice be given before the respondent is sued and also that the action should be brought within three months from the cause of action.

In **Newplast Industries v. Commissioner of Lands (9), Sakala, ADCJ**, as he then was, observed, “that it is not entirely correct that the mode of commencement of any action largely depends on the reliefs sought. The correct position is that the mode of commencement of any action is generally provided by the relevant statute. In addition that “the English White Book could only be resorted to if the Act was silent or not fully comprehensive.”

The Customs Act, in particular *section 164* appears to be quite comprehensive. It provides for the mode of commencement, firstly by 30days prior written Notice which must clearly and explicitly contain the cause of action, the name and place of abode of the person who is to bring the action, how proceedings are to be conducted at trial and that the action is to be brought within three months after the cause arose. I note also and concur with the authorities cited by Ms. Kasese that failure to comply with *section 164(1) and (4) of the Customs Act* is

fatal and that the Court has no discretion to exercise on these matters.

I note also the arguments by SC Simeza and the cases cited that section 3 of the PAP Act which mirrors section 164(1) of the Customs Act, do not apply to judicial review proceedings and that the remedy of certiorari cannot be taken away by statute except by clear and explicit words (per Lord Denning in R v. Medical Appeals Tribunal).

I wish to point out that on the one hand SC argued that he had to comply with the respondent's administrative procedures by appealing to the Commissioner General but on the other he contends that the Customs Act does not apply to this case being a judicial review action. I see a contradiction in this regard. It is like when it suits the applicant it is willing to comply with the respondent's precondition requirements like appealing and when it comes to meeting the precondition of 30 days prior notice before suing it, the Act does not apply. I note that the respondent is actually not saying that the applicant should not have applied for judicial review but that the Act should be complied with. Such that although it is

amenable to judicial review 30days notice should have been given. It is trite law that judicial review does not lie where there is failure to take out a necessary precondition in relation to entitlement to seek review such as the 30days notice in casu.

Consequently, Mr. Simeza, SC's argument that time started running on 7th November 2013 after the response from the Commissioner General, rejecting the applicant's appeal and I do agree with him on this score, cannot aid his case. This is because the applicant did not comply with *section 164(1)* such that even though the action was brought after two months plus following the letter from the Commissioner General, *section 164(1)* requiring the respondent to be given 30days written notice before suing it, was not complied with, which is fatal to the Applicants case. I therefore, am unable to agree with SC's arguments and the cases cited on the PAP Act.

Section 164(1) is categorical that:

"A writ of summons shall not be issued against nor a copy of any process served upon the Authority for anything done under this Act or any other law relating to customs or excise until one month after notice in writing has been delivered to the Authority, by the person, or the person's legal

practitioner, who intends to issue such writ, summons or process.”

I have no right to add to the requirements of the Act nor take from the requirements enacted. The sole guide must be the Act itself.

The Supreme Court in Royal Trading was explicit that “Judicial review is a process and fell within section 164(1) of the Customs Act” as canvassed by Ms. Kasese.

I do appreciate Mr. Simeza’s submissions on stare decisis but as aforementioned the Mung’omba case is distinguishable from the matter in hand.

Accordingly, I find merit in the Respondent’s preliminary objection on a point of law and I uphold it. The matter is accordingly dismissed with costs to the Respondent, to be taxed in default of agreement. Leave to appeal is granted.

Delivered at Lusaka thisday of2014.

**J. Z. MULONGOTI
HIGH COURT JUDGE**

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CRIMINAL JURISDICTION)**

HPA/54/2014

BETWEEN:

THE PEOPLE

APPELLANT

VERSUS

VENANT MWITEREHE

RESPONDENT

**BEFORE Honourable Mrs. J. Z. Mulongoti
on theday of 2014.**

For the Appellant : Mr. K. Muzenga, Chief Legal Aid Counsel,
Legal Aid Board

For the Accused : Mrs. M.M. Bah Matandalo, Senior State Advocate,
National Prosecutions Authority

JUDGMENT

Authority Referred to:

1. Section 341 of the Criminal Procedure Code Chapter 88 of the Laws of Zambia

The appellant was acquitted of **Assault Occasioning Actual Bodily Harm** by the trial Magistrate. The case has come before me as a case stated. The Public Prosecutor has raised five questions which he seeks the opinion of this Court on. Section 341 of the Criminal Procedure Code [CPC] Chapter 88 of the Laws of Zambia, which provides for case stated, reads:

“After the hearing and determination by any Subordinate Court of any summon, charge, information or complaint, either party to the proceedings before the said Subordinate Court may, if dissatisfied with the said determination , as being erroneous in point of law, or as being in excess of

jurisdiction, apply in writing, within fourteen days after the said determination, to the said Subordinate court to state and sign a case setting forth the facts and the grounds of such determination, for the opinion thereon of the High Court.”

It is clear that it is the Subordinate Court which must state the case for the opinion of the High Court. Perusal of the record herein, clearly shows the five questions were raised by the prosecutor for the opinion of the court, which is irregular and against the provisions of the CPC. Further, the said questions are actually grounds of appeal from the way they were drafted. They are not questions on points of law but of facts. If the State wished to appeal against the acquittal, it should have simply done that instead of invoking the procedure for a case stated wrongly.

Accordingly, I dismiss the matter for being irregular and misconceived.

If the State wishes, they are at liberty to commence afresh and let the Subordinate Court (Magistrate) state the case in line with the Section 341 of the Criminal Procedure Code.

Delivered at Lusaka thisday of2014.

**J. Z. MULONGOTI
HIGH COURT JUDGE**

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CRIMINAL JURISDICTION)**

HP/191/2014

BETWEEN:

THE PEOPLE

VS

JOHN MUSONDA

**BEFORE Honourable Mrs. Justice J. Z. Mulongoti
on the 1st day of August, 2014.**

For the People : MRS. C. MWANSA, SENIOR STATE ADVOCATE & MRS.
A.K. MWANZA, STATE ADVOCATE

For the Accused : MS. W.S. MUNDIA, LEGAL AID COUNSEL

JUDGMENT

Cases Referred to:

1. James Chibangu V. The People (1978) ZR 37 (SC)
2. Simutende V. The People (1975) ZR 294 (SC)
3. The People V. Sitali (1972) ZR 139 (HC)
4. Edward Sinyama V. The People Judgment No. 5 of 1993 (SC)
5. The People V. John Nguni (1977) ZR 376 (H.C)
6. Jack and Kennedy Chanda V. The People Judgment No. 29 of 2002 (SC)

Legislation Referred to:

1. Penal Code, Chapter 87 of the Laws of Zambia

Other Works Referred to:

1. Archbold, Criminal Pleading, 36th edition, Paragraph 2499 and 2504

The accused, **John Musonda, 39**, is indicted on one count of Murder contrary to section 200 of the Penal Code.

The particulars of offence allege that on the 29th day of December, 2013, at Chongwe, the accused murdered Goodson Daka, whom I will refer to as the deceased.

At trial, the accused pleaded not guilty. The onus is on the prosecution to prove all the ingredients of murder, as provided

in section 200 of the Penal Code, beyond reasonable doubt. The prosecution called four witnesses, referred to as **PWs**.

PW1, Mathews Nkhoma, 35, testified that on 29th December 2013, he was at Malenga tavern drinking beer. Then Aubrey, the accused's nephew appeared at the bar saying the accused was beating his grandmother and the deceased. When they rushed there, **PW1** said he saw the deceased lying on the ground while the accused slapped and kicked him. The accused also got hold of his grandmother but **PW1** restrained him. After he let go of him the accused got stones and almost stoned him but he failed.

PW1 further testified that the deceased was just lying on the ground, unable to move and he bled from the thumb. When the deceased was asked as to what was happening, he said the accused had hit him with an iron bar. The deceased died later that night. **PW1** identified the accused in court saying he had known the accused prior to the incident.

During cross examination, he testified that he did not know what caused the accused to beat the deceased. And that he would not know if the accused was drinking that day because he was strong and active.

PW2, Evans Musonda, 31, testified that on 29th December 2013, which was a Sunday, the deceased, left him at the farm and went to church. Around 15 to 16 hours, **PW2** received a phone call from a Mr. Chilufya who told him that the deceased had been beaten by the accused and he was unable to walk or stand. **PW2** decided to go and see the deceased and as he was walking to the accused's farm, he met two young men who were carrying the deceased taking him to his farm where they stayed together with **PW2**. The two young men complained that they would not be able to carry him up to his home. **PW2** rushed back home and got a wheelbarrow which they used to carry the deceased. The deceased told him that the accused had hit him with a piece of metal and he complained of painful ribs and chest and had blood on his hands.

Thereafter, **PW2** organised for transport to take him to the clinic and the deceased was just still as he lay on his lap. Upon arrival at the clinic, he was pronounced dead and they were advised report to the Police. They reported at Chongwe Police and after that the body was taken to the mortuary.

PW2 and the Police attempted to go and apprehend the accused but found that he had fled to his girlfriend's place. They asked his workmates where this place was and they were directed. They followed him there and apprehended him around 03:00 am. **PW2** identified the accused and said he had known him prior to the incident.

PW2 also disclosed that the deceased had told him that the accused had found him talking to his grandmother and he accused him of having an affair with her and he then started assaulting him.

In cross examination, he testified that he did not know what caused the fight because he was not present when the two fought. When the statement that he gave to the Police was read

to him, it was put to him that he lied about the deceased saying the accused beat him for having an affair with his grandmother since it was not recorded in the statement.

PW2 insisted that he told the Police as he had testified in court and that what he had stated in court was the truth.

PW3, Dr. Jeffrey Kwenda, 51, testified that on 31st December 2013, he identified the body of his uncle, the deceased, before postmortem. He noticed bruises on the left side of the head and bruises on the chest. It was his testimony that a week prior to his death, the deceased was healthy and the family had met for a celebration of another of **PW3's** uncle who was going to the UK.

PW4, Detergent Sergeant Prosper Kandolo, 44, of Chongwe Police, testified that on 28th December 2013, he and his fellow Police officers were conducting night patrols when they received a report from **PW2**.

The report was that the deceased had been beaten between 15 to 16hours and around 22hours he died on the way to the hospital.

The officers then rushed to Kanakantapa clinic, where they found the body of the deceased. According to **PW4** he noticed that the deceased had swollen left ribs. The body was picked and taken to the mortuary at Chongwe District Hospital. After interviewing **PW2**, he led to the apprehension of the accused. After he interviewed the accused, he was charged with murder which he denied.

PW4 further testified that the Postmortem Report 'P1' was prepared by the Pathologist who did a postmortem on the body on 31st December 2013.

Under cross examination, **PW4** testified that his investigations revealed that the accused beat the deceased after he accused him of troubling his grandmother every time he was drunk. When it was put to him that he was lying because **PW2** gave a different reason, **PW4** insisted that he was telling the truth. He also

testified that although **PW2** had referred to an iron bar being used in the attack, he did not retrieve it. He denied the assertion that this amounted to dereliction of duty, adding that the accused should have led the Police to the iron bar. **PW4** also admitted that he established that the accused was drunk on the particular day.

That was the case for the prosecution. The accused was found with a case to answer. He elected to give evidence on affirmation. He testified that he was a polygamist and on the date in question, the 29th of December 2013, he was supposed to be with the second wife for four days. Around 10 to 11 hours he went to the shebeen in Kanakantapa area where his first wife stayed. He sat alone and bought some kachasu which he took. Then the deceased approached him saying “why are you fond of drinking alone?” He responded that it was to avoid problems. The deceased then told him that he was boastful and yet he had no money and that he was troubling his first wife. The accused told the deceased to leave but he refused and grabbed the kachasu from him. He pushed the deceased and left. He went to buy kachasu somewhere else and returned to drink from the

same place. The deceased continued with his quarrelsome behavior. The Court heard that the accused then decided to go back home. After an hour or so, he heard someone insulting outside his home. He checked and found it was the deceased.

He approached him. The deceased slapped him twice then he retaliated by slapping him and punching him with a fist. The deceased tried to stone him but he missed and the accused then slide tackled the deceased and he fell. He kicked him while he was on the ground and he started bleeding. The accused decided to leave at that point. He informed his children and grandmother that he was going to his second wife.

Around midnight to 01:00 am, the Police apprehended him from there. He denied hitting the deceased with an iron bar. He reiterated that the deceased had provoked him.

In cross examination, he testified that he started drinking kachasu from about 11:00hours or 12 to 13 hours. He admitted that even though he was drinking, he knew what was happening

and that was why he left. He further testified that he stopped beating the deceased when the latter started bleeding.

He denied the assertion that the iron bar caused the fractured ribs and insisted that he only kicked and punched him. That was the evidence on behalf of the accused.

The learned state advocates, submitted that the prosecution must prove the following to sustain a conviction of murder:

1. That the deceased died.
2. The accused caused the death of the deceased by an unlawful act.
3. The accused did so with malice aforethought; and
4. In killing the deceased, the accused had no legal justification to do so.

It was submitted that the first two elements are not in dispute.

Regarding the third element, it was submitted that the accused had malice aforethought as required by section 204 of the Penal Code. That the accused unlawfully assaulted the deceased and had the knowledge that his actions of beating the deceased would cause grievous harm. And that he stated in his defence that he continued hitting the deceased even when he had fallen

to the ground and was bleeding from the nose. In addition, it was contended that the deceased was hit on the chest, supporting the fact that the accused had intention to cause harm to the deceased. The deceased also sustained fractured ribs and the cause of death as indicated in the postmortem report 'P1' shows that the accused had malice aforethought.

It was further submitted that the accused has raised a defence of provocation. That section 205 of the Penal Code, defined provocation and linked the action to what an ordinary person in the community would be expected to do. The case of **James Chibangu V. The People (1)** was cited where the Supreme Court held that *“in Zambia the test for provocation is objective but only in a limited sense, in that it is of a parochial nature, namely, faced with a similar circumstance can it be said that an ordinary person of the accused’s community might have reacted to the provocation as the accused did?”*

That in casu, the mere fact that the deceased slapped the accused, did not entitle him to assault the deceased in the manner he did. It was counsel’s submission that no ordinary

person would react in the manner the accused reacted and his actions do not entitle him to the defence of provocation.

Further, that for provocation to succeed three elements must be met as were summed up in **Simutende V. The People (2)**, as

“Provocation consists of mainly three elements the: the act of provocation, the loss of self control both actual and reasonable, and the retaliation proportionate to the provocation. These elements are not detached.”

It was argued that these elements have not been met in the case before me. That the incident was not one that would make an ordinary person lose self control. However, that if the Court considered it as such, it was argued the retaliation was not proportionate to the provocation. And that the act of continuously hitting the accused even after he fell down and was bleeding, shows the accused knew his actions would grievously harm the deceased. He had every opportunity to retreat and stop the fight but he neglected to do that. Thus, there was no legal

justification in what he did. And that even the defence of self defence was not available to him. That he be found guilty and convicted of murder.

After a careful analysis of all the evidence and submission by counsel, the following are common cause and thus proved:

- (1) On 29th of December 2013, the accused and the deceased had a verbal altercation to do with the accused's grandmother,
- (2) This later culminated into a fight in which the deceased was kicked and punched. He was unable to walk. The fight was at accused's farm and other like **PW1** witnessed part of the fight
- (3) The accused was lifted and taken back to his home and a few hours later, **PW2** organised transport to take him to the clinic, where he was pronounced dead.
- (4) The deceased did however, tell **PW1** and **PW2** though at different times that he was assaulted by the accused.
- (5) A postmortem was conducted which revealed the cause of death as "hemorrhagic shock due to rupture of left lung, spleen and fracture of ribs and due to blunt injuries of chest and abdomen."

The issue for my determination, is whether the prosecution has established that the accused, with malice aforethought inflicted the injuries that caused the death of the deceased.

I concur with the submission by the prosecution that the fact of death is indisputable and that the death was caused by an unlawful act.

To prove malice aforethought, the prosecution relied on the testimonies of *PW1* and *PW2* who testified that the deceased had told them that the accused hit him. *PW1* also witnessed part of the fight, when he rushed to the scene he found the deceased on the ground as the accused hit and punched him. *PW1* and *PW2* testified that the deceased told them that the accused hit him with an iron bar. It was argued that the fractured ribs were caused by this iron bar, which was not recovered. The prosecution also contend that the accused in his defence stated that he continued kicking the deceased after he fell to the ground, which also shows he had malice aforethought.

Malice aforethought being a mental element is difficult to prove. However, it has been held in many cases both foreign and Zambian ones, that it can be inferred from the circumstances of

the case, the nature of the weapon used, the part of the body targeted etc.

From the facts before me it is clear that the deceased was assaulted all over the body that is the chest, and stomach as the postmortem report 'P1' revealed, in line with the accused's testimony that he kicked him as he lay on the ground and only stopped when he noticed that he was bleeding.

In the case of ***The People V. Sitali [1] Muwo, J*** as he then was stated,

“the accused did not only kick the deceased in the face, with a booted foot, causing her to fall to the ground, he severely applied greater force with a kick to the head of the deceased. He proceeded on ferociously and violently, struck her with the stick and brick. In doing so, he should have realised that his act would probably cause the death of, or grievously harm the deceased, though he may not have had intention to do so ...”

In casu, I am inclined to find that the accused had malice aforethought as argued by the prosecution. I have come to this conclusion because I observed **PW1** and **PW2** as they testified. they struck me as candid and were not intent on falsely accusing the accused.

PW1 admitted that he was not there when the fight started but when he arrived at the scene he found the deceased on the ground being beaten by the accused, a fact which the accused confirmed. **PW2** also admitted not being present at the scene at all but the deceased told him it was the accused who assaulted him.

I am inclined to find malice aforethought, whether he used a rod or not, because by kicking and punching him several times when he lay on the ground it proves malice aforethought. He was hit on the chest and stomach and ribs which are delicate parts of the body. Infact the deceased's words to **PW1** and **PW2** that he was hit with a rod are admissible as *res gestae* as elucidated by the Supreme Court in **Edward Sinyama V. The People (3)**, that

if a question has been asked and a victim has replied then the statement is not ineligible as part of the *res gestae*.

Further, in **The People V. John Nguni (4)** that a statement made by a person not called as a witness, could be admitted in circumstances that exclude any possibility of concoction and fabrication for it to be admissible as *res gestae*. I find that the deceased in this case, made the statements to **PW1** and later to **PW2** in circumstances that excluded concoction and fabrication. The statement was corroborated by the postmortem report and **PW1 and PW2** and the accused himself.

Accordingly, malice aforethought has been proved to the hilt. I find, therefore, that the accused caused the death of Goodson Daka by an unlawful act and with malice aforethought.

I am alive to the fact that a defence of provocation has been raised by the accused.

In the Sitali case supra, this issue was also discussed. According to Archbold,

“Provocation is some act or series of acts done by the deceased to the accused, which would cause in any reasonable person and actually, caused in the accused, a sudden and temporary loss of self control, rendering the accused subject to passion as to make him for the moment not master of his mind.”

In casu, the provocation pleaded was that the deceased insulted the accused and told him that he was troubling his first wife, first at the shebeen and later he followed him to his home where he continued with the insults.

According to Archbold, *“to reduce homicide, upon provocation to Manslaughter, it is essential that the battery, wounding etc should have been inflicted immediately upon the provocation being given, for if there is sufficient cooling time for passion to subside and reason to interpose, and the person so provoked*

afterwards kills the other, this is deliberate revenge, and not heat of blood, and accordingly amounts to murder.”

The learned state advocates, in this case, have precisely submitted on provocation in relation to the facts of this case.

That a reasonable person, confronted with the insults the accused alluded to, would not have lost self control and assaulted the deceased as he did.

I concur with the prosecution. The accused from the facts before me, was in control of his mind. And he left after the deceased started bleeding. The insults could not have provoked him to such an extent. Accordingly, the defence of provocation has failed. However, it is available as an extenuating circumstance as held by the Supreme Court in **Jack Kennedy Chanda V. The People (5)** that *“the failed defence of provocation, evidence of drinking etc can amount to murder with extenuating circumstances.”*

I am alive too that the accused stated that he was drinking on the material day and **PW4** confirmed this. As afore stated he was in control of his mental faculties and was not so drunk. I find that drunkenness is not available as a defence but as an extenuating circumstance.

Accordingly, I find the accused guilty of **Murder** with extenuating circumstances and I convict him.

Delivered in Open Court this day of 2014.

**J. Z. MULONGOTI
HIGH COURT JUDGE**

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

HP/198/2014

BETWEEN:

THE PEOPLE

VS.

**ACKIM DAKA
CHARLES TEMBO**

**Before the Honourable Mrs. Justice J. Z. Mulongoti on
the.....day of August, 2014**

**For the State: Mrs. C. Mwansa, Senior State
Advocate and Ms. C. Lupili - State
Advocate, NPA**

**For the 1st Accused: Mr. R. Mukuka, on behalf of LAZ
and**

**For the 2nd Accused: Mrs. M. Marabesa, Legal Aid
Counsel**

J U D G M E N T

Cases referred to:

- 1. SIMUTENDA V. THE PEOPLE (1975) ZR 294 (SC)**
- 2. KENIOUS SIALUZI V. THE PEOPLE (2006) ZR 87 (SC)**
- 3. THE PEOPLE V. SHAMWANA & OTHERS(1982) ZR 122**
- 4. KAMBARAGE MPUNDU KAUNDA V THE PEOPLE (1990-92) ZR 215 (SC)**
- 5. YOTAM MANDA V. THE PEOPLE (1989) (Selected judgment) (SC)**

The Juvenile accused **Ackim Daka**, 17, referred to hereinafter as A1 and the accused **Charles Lungu or Tembo**, referred to hereinafter as A2 stand charged on count one with **Aggravated Robbery** contrary to section 294 (1) of the Penal Code and on count two with **Murder** contrary to section 200 of the Penal Code. The particulars in relation to count one were that on the 5th day of

April 2013, the accused jointly and whilst acting with another person unknown, did steal a motor vehicle Toyota Corolla, Registration No. ABJ 1053, valued at K25,000.00 the property of **Kaleya Chiinda** and that at or immediately before or immediately after such stealing did use actual violence on **Pascal Maboshe**, in order to obtain, retain or prevent or overcome resistance of the said property being stolen.

The particulars on the murder charge allege that the accused, on 5th April, 2013, at Lusaka did murder one **Pascal Maboshe**, hereinafter referred to as the deceased.

At the trial, A1 and A2 pleaded not guilty to both counts. The onus is on the prosecution to prove the case of aggravated robbery and murder beyond reasonable doubt. To do so the prosecution led evidence from seven witnesses.

PW1, Musiwa Simashela, 61, testified that on 5th April 2013, he identified the body of his brother in law the deceased, who died at Levy Mwanawasa Hospital in the ICU. He said he identified him by the scar on his face and dark nails which were a common feature in his family. PW1 observed that the head was swollen. On 9th April 2013 a postmortem was conducted and he again identified the deceased. When the deceased was cut up, PW1 said he noticed that the head was crushed.

PW2, Marvin Chambwa, 45, testified that on 5th April 2013, he was returning from Muyanga village, cycling along Ngwerere road, to his house in Diamondale Farm in Ngwerere. When he neared the bridge and before he crossed it, he saw a grey vehicle approaching. It was a Toyota Corolla, Registration Number ABJ 1053. The vehicle was moving slowly, with the hazards and lights on. It was going in the opposite direction to him, and he stopped to give it way to pass. A few meters after that it stopped. At that point PW2 was also pushing his bicycle because the chain broke.

PW2 testified that he saw the driver of the vehicle come out and two young boys. Then the three of them went to the passenger seat and forcibly removed the man who was seated in the front seat. They pulled him and dragged him to the bush. Then PW2 heard someone screaming, and saying ***“don’t kill me, if you want get the money and the car and leave me”***. According to PW 2 he was about 15 metres away and the time was between 10 and 11 hrs in the morning. He rushed to Chimbwi Farm to get help but only found women there. He decided to rush to the Police and on the way he met a man who he asked to wait at the gate of Chimbwi Farm. This was after he narrated to him everything and that the Toyota Corolla could be seen from the farm. PW2 testified that he fixed his bicycle and got on it and cycled to the police, on the way he met a Landcruiser for the Airport Police. He stopped it and narrated to the police what he had heard and seen that three people were in the bush attacking

their friend. Then he rushed to Chartenel Police and reported the incident.

It was his testimony that he saw the occupants of the vehicle and what they wore. The driver wore a yellow bomber with white stripes and a head sock with the Zambian flag. Then the one who sat directly behind the driver's seat wore a white shirt, the passenger in the front seat wore a green sweatshirt and the one behind him wore a blue sweatshirt and had dreadlocks. PW2 told the Court that the first time he reported the incident he did not describe their dressing to the police but during a follow up, he told them everything. He further testified that not all of them were before Court and that he could identify them because he saw their faces. A2 was identified as the driver and A1 as the one who wore a blue sweatshirt and had dreadlocks.

In cross examination, PW3 testified he saw the accused in the car when it was moving slowly. He conceded that A1 did not now have dreadlocks.

PW3, Marjory Ngulube, 33, testified that on 5th April 2013, she was with her friend returning from the dam. They were walking along a bush path and the time was between 10 and 11 hrs in the morning. When they reached Ngwerere road, PW3 testified that she saw a grey car and a person wearing a white shirt standing in front of it. Then she saw another guy behind the vehicle, who

appeared like he was looking for a stone to put by the tyres, then the driver started revving and hooting continuously. Then she and her friend got a bit scared and started running. They met a man with a bicycle. He asked what they were running from, she said it was because of the way the driver was revving the vehicle. The man asked if they had seen anything else because he had met another cyclist who had told him that the people in the car were killing someone. PW3 then stopped and joined the man, where he was, which was about 50 metres from the vehicle. Then she saw the two young men who were outside the car running towards them. One wore a white shirt and the other one a blue shirt and was shorter than the other. PW3 and her friends also started running, thinking the men were coming to kill them. They by-passed Chimbwi Farm and met a Police vehicle, which they flagged down but it did not stop. They saw the vehicle stop where the Toyota Corolla was and the police started talking to the driver. PW3 and her friends made a u-turn and started running to where the police vehicle had stopped. As they were approaching, she saw the driver talking on the phone and then he ran into the bush. When they reached the police, they told them that the person (driver) was among the group that was in the vehicle and that the vehicle had moved from its original position. They led the Officer to the original position and joined the police in searching for the person who was attacked. They heard groans in the bush. They rushed there and found a person who was badly beat up. His face was swollen and there was blood on his mouth

and cheeks. When he was lifted, PW3 saw a deep cut on the head and lots of blood oozing. The person was rushed to hospital and she went home. Around 16 to 17 hours she heard noises in the neighbourhood and people saying the culprits had been apprehended. She rushed there and found the young men in the police vehicle. She saw that it was the one who wore white shirt and the one with the blue shirt. They were handcuffed and facing backwards such that she could not see their faces.

In cross examination, PW3 testified that she saw three people at the scene, where the vehicle was parked. Two people were outside but the driver, who wore a bomber, with black, white and yellow stripes, was inside. At that point she was very close and were about to bypass the vehicle when she observed the three people. When they were about 50 meters away she saw the trio moving back and forth from the bush to the vehicle.

PW 4, Inspector Emmanuel Chama, 41, of Airport Police testified that on 5th April, 2013, he and his driver, Chabala Noriaus were coming from Enviro flow farm and were driving along the Ngwerere road, which joins Kasisi and Great North roads. A few metres from Chartenel Police, they saw a man on a bicycle, who flagged them down. PW4 ordered the driver to stop. Then the cyclist (PW2) told them that just before Ngwerere stream from Kasisi, he saw three men, one old and two of them juveniles, attacking another old man. That the cyclist further disclosed that

he hid in the tall grass and heard the person being attacked saying, something like **“don’t kill me, if you want the vehicle get it or if it is the money get it”**.

PW4 and his driver rushed to the scene near the stream. On the way they met three women who also flagged them down but they did not stop. Before they could reach the stream, PW4 saw a vehicle parked by the left side. They stopped and he saw a man standing in front of the vehicle and the bonnet was open. The vehicle was a Toyota Corolla grey in colour, ABJ 1053. PW4 approached and asked the man what he was doing and he responded that the vehicle had a problem. That he had brought a customer and on his way back, the vehicle developed a problem. PW4 grabbed the keys from the man and tried to start the vehicle but it failed. As he was doing so, the man escaped and ran into the tall grass. He tried to give chase but failed. He returned to the vehicle and the three women also arrived and told him that the incident happened a few metres ahead. They led him to the scene and a few metres from the road, they saw a body of a man lying in a pool of blood, groaning. The man had a deep cut in the head. He was carried into the vehicle and PW4 drove him to Levy Mwanawasa General Hospital. He left his driver behind. After he left the person at the hospital, he returned to the scene and found that the Corolla had been towed by Ngwerere Police. Around 17 to 18 hours, he learnt that the person had died and that two juveniles had been apprehended and detained at Ngwerere

Police. PW4 informed the Court that he could identify the person he found, standing at the vehicle. A2 was identified as that person.

In cross examination, he denied the assertion that he identified A2 because he spoke to the deceased on the phone.

PW5, Kaleya Chiinda Hamunsakwa, 52, testified that the deceased was employed as his taxi driver. He was employed to drive a Toyota Corolla, ABJ 1053, silver or grey in colour. Prior to his death the deceased had worked for him for three weeks.

The Court heard that on 5th August 2013, about 14 to 14:30 hours, PW5 met with Police Officers who had gone to his home looking for him. They asked about the vehicle, which he confirmed was his. Later he accompanied the police to Levy Mwanawasa Hospital, where he was asked to identify the deceased who was in ICU. PW5 testified that he was unable to identify the deceased because he was very swollen and his face was smashed.

After that he led the police to the deceased's residence in Kaunda Square, where two of his neighbours offered to identify him.

PW5's testimony was that the deceased was fine when he last saw him on 4th April, 2013 except he had burnt scars on his face after water from the radiator splashed on him. And that he was

actually looking for these burnt scars when he attempted to identify him but he failed because the deceased was so badly beaten and was swollen.

PW6, Ephraim Simubali, 29, testified that he was a taxi driver and together with the deceased, they operated from the Hybrid roundabout rank.

On 5th April, 2013, he was with the deceased and Francis Tebulo around 07:00 hours, chatting about how difficult the work had become. Then the deceased said it was not difficult for him and that he had K1,500.00 advance cashing. And that that very day he was going somewhere and was just waiting for a phone call to confirm. Indeed the phone rang after a while and the call was from Charles (A2). The deceased then left PW6 saying he was going to collect chickens from somewhere near Galaun Farms.

The Court heard that after an hour and a half, PW6 saw the deceased coming from the direction he had said he was going. When he approached the roundabout, PW6 also saw Charles (A2) and two young boys in the car with the deceased. The boys were unknown to him but he knew Charles as a fellow taxi driver. The deceased waved at him saying **“bye, bye am going”**.

Around 14 to 16:00 hours, PW6 heard that his friend the deceased was dead. He heard this from others at the taxi rank and that his

body was in Levy Mwanawasa Hospital. He and other taxi drivers went to the hospital to confirm the death. They found the deceased's body. They visited his relatives and before burial, they heard that the assailants had been detained at Ngwerere Police. PW6 decided to visit his assailants and he was allowed to see them. He found two boys in the cells and he asked why they had killed the deceased. They did not answer. He asked if it was them who had killed him and they said yes. After that he left with the Police to attend to the Postmortem.

After a week or two, the officer he had taken to University Teaching Hospital for Postmortem, came to see him at the taxi rank and told him that the two boys had escaped from the cells and asked for him to let the Police know, if the boys were seen.

After three weeks, PW6 testified that he was walking from the car wash to the taxi rank, when he saw the two boys coming, in the opposite direction. He looked at them but it was difficult to see them clearly because of the loads they had carried on their heads. The time was about 9 to 10:00 hours in the morning. After he passed the boys, he stopped and turned to look behind, the boys also did likewise. This confirmed to PW6 that they were the same boys he had seen in the cells and immediately they began to run. PW6 rushed to the taxi rank and got reinforcement from his friends, and they gave chase. They managed to apprehend one. He identified A1 as that person. They

surrendered him to the police, who requested them to continue looking out for the other two. Charles (A2) was later apprehended after another taxi driver spotted him in a line at Levy Mwanawasa Hospital.

PW6 and others followed there and they apprehended A2 and surrendered him to the Police. A2 was identified in court.

In cross examination, PW6 testified that he did not know A1 prior to the incident. He denied the assertion that A1 admitted being in the car with the deceased but not to killing him. He also admitted that A2 did not attempt to run away, when he was apprehended.

PW7, Detective Constable Mike Ngombe, 31, of Kabangwe Police, testified that on 5th April, 2013, he was on duty when he received a message from Chartenel Police which is under Ngwerere Police, about a vehicle which had been abandoned and suspected to have been stolen and that the driver had been attacked. PW7 and other officers rushed to the scene. They confirmed the reports and found the vehicle which had been abandoned, registration number ABJ 1053. The driver had been rushed to the hospital. They found lots of people and one lady showed them where the body was found. He found a spare tyre and saw some blood clots there. He interviewed some people and was told that there were three people were seen, the two boys who ran towards the graveyard and one man, who was not seen

where he had headed. PW7 then rushed to the hospital and whilst there he got a phone call that the two boys had been apprehended. He rushed back to the scene and found the two juveniles Ackim Daka (A1) and Agrippa Daka, who were not related.

They were interviewed and detained. On 11th April, 2013 under warn and caution they denied the charges. The boys later escaped from custody on 4th May 2013. However, A1 was apprehended with the help of PW6 and was again detained. A1, in denying the charge said he was forced by A2. A1 started attending court in December 2013 but a *nolle prosequi* was entered and he was rearrested and jointly charged with A2 after the latter was apprehended. A2 said his names were Charles Lungu now changed to Charles Tembo.

According to PW7, A2 freely admitted the charge, saying he hit the deceased with the spare wheel '**P1**'. Both accused were identified in court.

PW7 further testified a postmortem was conducted on the body of the deceased by a pathologist who also prepared the postmortem report '**P2**'.

PW7 further testified that he charged A1 and A2 with murder and aggravated robbery.

In cross examination, PW7 testified that he never conducted an identification parade because the officer in charge of that was not available. Further, that the witnesses knew the accused and saw them at the scene. He conceded that it was mandatory for the police to have done an identification parade. PW7 also testified that A1 is the one who had dreadlocks the first time he was apprehended although, he was not sure.

And that he never learnt that A2 had stabbed A1 apart from A2 having bought some spirits which he drunk and also took over the vehicle from the deceased as they drove to the farms. PW7, further denied that there was a fight between A2 and the deceased which A1 was trying to break and in the process was stabbed by A2.

Under further cross examination, PW7 testified that he never investigated the deceased's phone and that A2 told him that the two boys got the same phone and K1,500.00 cash from the deceased. He admitted that A2's phone was with the police at Bennie Mwiinga Police Post but denied that it was used to confirm that A2 had called the deceased on the night in question. When asked what value the A2's phone added to the investigations, PW7 said none because he actually was using a different number at the time. And that he never investigated which number was used then because the deceased was found without a phone and A2 said the boys had taken the deceased phone. In response to a

question from the Court, PW7 said the duo were charged with aggravated robbery for theft of the phone, K1,500.00 and the vehicle.

That was the prosecution's case. I found A1 and A2 with a case to answer on both charges. When called upon to defend themselves, A1 opted to give evidence on oath and A2 elected to remain silent.

A1 also referred to as DW1, testified that on 5th April 2013, he was at home when his school mate Agrippa Daka visited him. Agrippa asked if he was interested in doing some piece work to which he agreed. His mate told him they had to escort a taxi driver and help him collect chickens from Ngwerere to Mtendere Market. The two of them went to Mtendere Market where they met A2, who he was told was the boss in charge of the work. A2 asked Agrippa if he (DW1) was strong for the job. The Court heard that A2 was not known to PW1 and was meeting him for the first time that day. He identified A2 as the boss. A2 then phoned the deceased and told them that he was phoning the taxi driver. After the deceased arrived, they all jumped in his vehicle and started off for Ngwerere. They drove along Great East road and stopped near Hybrid for fuel. Then they joined a dusty road and when they reached at a bar, A2 got out and bought some beers which he and the deceased drunk as they continued on their journey. Then A2 asked the driver to stop so he could urinate.

They both urinated while DW1 and Agrippa remained in the vehicle. Then A2 and the deceased started fighting. He got out and tried to break the fight, but A2 got a knife and stabbed him on the wrist and punched him on the mouth. DW1 then decided to run away from the others. He ran into the bush. He found some gardens and four people who accused him of stealing their vegetables. They apprehended him and took him to some building where they found some police officers. Then he saw Agrippa also being brought in by a group of people. Later a police vehicle came and took them to Ngwerere Police where he was detained in cells. Agrippa was taken to Kabangwe Police. They police interviewed him and he explained as he has testified but they did not believe him. They beat him and later took him also to Kabangwe Police where he was detained with Agrippa up to close to a month.

Later five criminals were brought in and detained in the same cell. In the night, the criminals broke the door of the cell and escaped. It was then that they too decided to escape. They went to Agrippa's sister in Garden, where they stayed for two weeks. After that DW1 returned home and found that his mother was admitted in University Teaching Hospital. He then decided to go to his uncle's place in Chongwe. When he reached Hybrid area he was surprised to hear people shouting **"thief who killed a certain person"**. He stood by the roadside and the taxi driver (PW6) came and apprehended him. He was handed over to the

police and started appearing in court. He was later jointly charged with A2.

He reiterated that he never hit the deceased but A2 did. And that at one point the deceased fell to the ground and then A2 hit him with a spare tyre he got from the vehicle.

In cross examination, he testified that the deceased was never pulled and forcibly removed from the vehicle but he came out on his own. He also testified that he never saw any women pass by. At the time he decided to run, he left Agrippa standing by the vehicle and that he Agrippa never told him how he was apprehended. He admitted seeing PW6 at Ngwerere Police but clarified that he was alone in the cells at the time. He branded as lies PW6's testimony that he met him and Agrippa and that they admitted to killing the deceased. He denied having dreadlocks but said it was his friend Agrippa who had them. When cross examined by Mrs. Mwansa, DW1 testified that he did not know why he was apprehended and that the police detained them because Agrippa told them that he knew where to find A2. The police promised to release them once A2 was found. He denied that they went into hiding in Garden after escaping from the cells but said it was because Agrippa had suggested it and his sister agreed to help them apprehend A2 and then surrender him to the police.

When shown the tyre 'PI' and asked if it was the one A2 hit the deceased with, he said he could not tell because he did not look at it closely and just saw the former hit the latter with a tyre. He also testified he did not know where the knife or spanner was that the A2 stabbed him with.

He confirmed that he wore a blue shirt on the day in question. He conceded being apprehended by PW6 and others on his way to Chongwe but that he was with a cousin of his who had carried a bag with books and not Agrippa. This was the case on behalf of A1.

The learned State Advocate submitted that it is trite law that where an accused person does not give evidence, the court has to draw the proper inferences from the evidence before it as was held by the Supreme Court in **SIMUTENDA V. THE PEOPLE (1)** and restated later in **KENIOUS SIALUZI V. THE PEOPLE (2)** that

“there is no obligation on an accused person to give evidence, but where he does not give evidence, the court will not speculate as to possible explanation for the event in question. The Court’s duty is to draw the proper inferences from the evidence it has before it”.

That in *casu* since A2 opted to remain silent, the only proper inference that can be drawn from the facts is that the accused

persons stole the motor vehicle and later murdered the deceased person. That the prosecution has proved both cases beyond reasonable doubt.

That the evidence was clear that the Toyota Corolla was stolen. That A2 had told PW4 that the vehicle was his and he had car trouble after dropping a client.

That PW5 was the owner of the said vehicle and not Accused 2. Accordingly A2 and A1 stole the vehicle from the deceased who PW5 had employed.

That they killed the deceased after he resisted its being stolen. Further, that the Accused also stole K1,500.00 and a mobile phone from the deceased. It was contended that the accused used threats or violence to steal from the deceased. They were armed with the tyre '**P1**' which A2 hit the deceased with and PW2 saw them forcibly remove the deceased from the vehicle.

Regarding the murder charge, it was submitted that the prosecution had proved malice aforethought. That PW2 testified to seeing the accused persons and a third person pull the deceased and later he heard him screaming and telling them to spare his life but take the car and the money. That the use of the tyre to assault him also shows the intention to cause grievous harm to the deceased.

The Court was urged to find the accused guilty and convict them accordingly.

After a careful analysis, the following are common cause:

- 1) The accused persons and one on the run, hired the deceased's taxi to take them to Ngwerere.
- 2) On their way, the deceased was attacked.
- 3) He was found by PW3, PW4 and others lying in a pool of blood, groaning and bleeding profusely. Prior PW2 had seen three people killing a fourth person in the bush.
- 4) PW4 rushed him to Levy Mwanawasa Hospital where he died a few hours later.
- 5) The accused persons were apprehended at different dates.

At trial, they both denied the charges of murder and aggravated robbery.

It is trite that the burden to prove the guilt of the accused lies with the prosecution. The prosecution must prove all the elements of the charges of aggravated robbery and murder beyond reasonable doubt.

The issues for my determination are:

- i. whether A1 and A2 acting with another person on the run, stole the motor vehicle registration No. ABJ 1053, a Toyota

Corolla silver in colour, K1,500.00 and a phone from the deceased and

- ii. whether at the time of such stealing the accused were armed with offensive weapons which were used to inflict injuries on the deceased; when he resisted or prevented the properties from being stolen.
- iii. whether the accused with malice aforethought inflicted the injuries that caused the death of the deceased.

It is not in dispute that the deceased is dead as revealed by the postmortem report '**P2**'. The cause of death was subdural hemorrhage due to blunt head injury. Undoubtedly, the people who inflicted the head injury had malice aforethought, as required by section 204 (1) of the Penal Code. Similarly, it is clear that the people who inflicted the head injury did so unlawfully.

I note also that the deceased was driving the vehicle in question, which belonged to his boss PW5. The vehicle was later found at the scene where the deceased died, with A2 in possession.

The critical issue for my determination is whether the accused committed the two offences i.e. of murder and aggravated robbery. Have the prosecution discharged its burden of proving they are the culprits beyond reasonable doubt?

The prosecution witnesses especially PW2, PW3, PW4, and PW6 linked the accused to the heinous crimes. I observed the two witnesses who were at the scene first PW2 and PW3. They were candid and corroborated each other very well even though they never met on that day. Both testified about the man, PW2 met and told to wait at Chimbwi farm while he rushed to the police. PW3 met this same man and he told her what PW2 had told him that he saw three people dragging a man into the bush and later heard someone screaming about his life being spared and that the attackers should take the vehicle and the money. Both PW2 and PW3 placed PW4 at the scene whom they met in the Landcruiser for Airport Police thought at different times. PW4 corroborated the two. He confirmed meeting PW2 and stopping to talk to him. He confirmed meeting PW3 and her friend that he did not stop when they flagged him down because he was rushing to the scene to check on PW2's report. Then PW3 and her friends followed him there.

A1 was identified by PW2 and PW6. PW2 said he saw the people in the vehicle as it drove past him very slowly then stopped a few metres ahead and he saw three people get out and then drag the fourth person out. PW2 described what all the four people wore. He said A1 wore a blue shirt and was a juvenile.

Although PW3 did not identify A1 in court she said she saw three people. Two were youngmen one wore a blue shirt, the other one

a white one. And that one of the youngmen had dreadlocks. PW3 therefore corroborated PW2 to the extent of what the people were wearing and that there were two juveniles. PW6 identified A1 as one of the two he met at Ngwerere Police cells and the one he and his friends apprehended near the hybrid taxi rank after he had escaped from police custody.

I find that these were credible witnesses and accept their testimonies. I am of the firm view that the prosecution witnesses positively identified A1. In the circumstances of this case the issue of mistaken identity does not even arise. If anything, A1 confessed to the commission of these crimes except to blame it all on A2. I do not accept his version for the following reasons. First, he was seen running from the scene by PW3, a fact he acknowledged. Second, he confirmed that A2 hit the deceased with a tyre which PW7 picked from the scene. Third, according to PW7, A2 told him that A1 and Agrippa got the K1,500.00 the deceased had and also his phone. PW6's testimony was that the deceased had K1,500.00 advance cashing that morning and he had a phone which he used to talk to A2. Fourth, he wore a blue shirt as testified by PW2 and PW3, which he confirmed and that his friend Agrippa had the dreadlocks. Fifth, I discern that that he and Agrippa ran from the scene when the vehicle failed to start. They panicked after killing the deceased and of course he saw PW3 and others run away, and sensed danger.

I therefore, find as a fact that A1 was at the scene that day and acting jointly with others, they brutally attacked the deceased and stole from him.

Coming to A2, he elected to remain silent and I am guided by the case of **SIMUTENDA** cited by the State Advocate, in this situation. I shall draw inferences from the evidence before me. I note that he was positively identified by PW2, PW4 and PW6.

As aforesaid I found the prosecution witnesses to be credible and they had no motive to lie. PW2 was corroborated by PW3 and PW4 as to what transpired at the scene. PW2 and PW3 both testified to seeing three people and described their clothing. Both said A2 was the driver and wore a black striped bomber. PW4 spoke to A2 as he inquired what was wrong with his vehicle. The incident occurred in broad daylight and I accept the testimonies of the three witnesses and find that they positively identified A2 and there is no Act. PW6 also testified to seeing the deceased in the company of A2 and two young boys, that fateful day. He knew A2 as a fellow taxi driver. PW3 and PW4 discovered the deceased's body near the place where PW3 saw the three guys and A2 was continuously revving the vehicle and hooting. A2 was found by PW4 a few metres from where the deceased was found. I have no doubt in my mind whatsoever, that A2 together with others attacked and robbed the deceased and left him to die in the bush. PW7 picked the spare tyre '**P1**' from the scene and A1

said that A2 hit the deceased with a tyre. And that he was armed with a knife. A2 ran from PW4, which can only mean one that he is guilty.

The accused ought to have known or foreseen that hitting the deceased with a tyre would cause grievous harm or death. The prosecutions have therefore proved malice aforethought beyond reasonable doubt. Further, I find that the cause of death was an unlawful act. Regarding aggravated robbery PW5 testified that the vehicle was his and he had employed the deceased to use it as a taxi. PW4 said A2 told him he was coming from dropping a customer and then on his way back the vehicle gave him problems and could not move.

PW2 saw A2, A1 and another person pull the deceased out of the vehicle and drag him into the bush where he begged them to spare his life and get the car and the money.

On the facts of this case, I find that A1 and A2 acting jointly with another person on the run, whilst armed with a knife and the spare tyre '**P1**' attacked and hit the deceased and stole the taxi he was driving including the K1,500.00 he had and his phone. These are items capable of being stolen and to which the accused had no claim of right.

I find that all the ingredients of the offence of aggravated robbery have been proved. In fact A2 was found in possession of the motor vehicle. I note that the particulars of offence on the charge of aggravated robbery, as stated in the Information, does not include the K1,500.00 and the phone.

Accordingly, I amend the Information to include theft of K1,500.00 cash and the deceased's mobile phone items stolen from **Pascal Maboshe** on 5th April 2013 at Lusaka. I am fortified by the case of **THE PEOPLE V. SHAMWANA & OTHERS (3)**, where it was observed that,

“the High Court has the power to amend an Information to fit the evidence given without application by or consultation with the parties involved provided no injustice is caused to the accused such as may result when the substantive charge is altered.....”

In **KAMBARAGE MPUNDU KAUNDA V. THE PEOPLE, (4)**, the Supreme Court held that

“a Court has power either on its own motion, or at that of either the prosecution or the defence to amend an indictment by upgrading the offence originally charged, or even including an additional charge or even an offence not previously charged”.

In *casu* there is evidence from PW6 that the deceased, on the day in question, had K1,500.00 and his cell phone which items were not found on him.

PW6 later saw the deceased in the company of A2 and the two juveniles driving, towards Galaun Farms, where he had told him he was going to collect chickens. A2 was aware of this and I infer this was the motive of luring the deceased and later attacking him. Although the items were never recovered and PW6 was a single witness on this issue apart from PW7's testimony on what A2 told him, I have found PW6 to be a credible witness without a motive to lie and his other pieces of evidence were corroborated by others including A1. I have considered that A1 was apprehended the same day and there was no evidence that these items were found on him. However, I note that A2 was apprehended after some weeks and I infer he could have disposed of the items. I am fortified by the Supreme Court in **NYAMBE V. THE PEOPLE (6)** that circumstantial evidence is evidence from which a Judge may infer the existence of a fact in issue, but does not prove existence of the fact directly. I therefore, find as a fact that the deceased had this money and the phone and that the same were stolen by A1 and A2 acting jointly with another person.

I am guided also by the Supreme Court decision in **YOTAM MANDA V. THE PEOPLE (5)** that,

“A Court can only draw an inference of guilt if that is the only irresistible inference that can be drawn on the facts”.

I am of the considered view that on the facts before me, that is the only irresistible inference; that of guilt.

I am alive that the identification parade was not conducted. I am of the considered view that in the circumstances of this case, this is not fatal to the prosecution’s case.

It is noted that PW6 was involved in the arrest of both A1 and A2. A2 was known to him prior. PW2, PW3 and PW4 saw them at the scene during daylight and mistaken identity does not arise. And A1 placed all of them at the scene as testified by the prosecution witnesses.

On the totality of the evidence, before me, I make a finding of guilty, in relation to the Juvenile A1, both for aggravated robbery in count one and murder in count two. I shall deal with him later after the Social Welfare Report.

I find A2 guilty of aggravated robbery in count one and murder in count two. I convict him on both counts accordingly.

Delivered in Open Court this..... day of.....2014.

**J. Z. MULONGOTI
HIGH COURT JUDGE**

**IN THE HIGH COURT FOR ZAMBIA
HOLDEN AT CHIPATA**
(Criminal Jurisdiction)

HJ/165/2014

BETWEEN:

THE PEOPLE

Versus

**MOSES AINELA PHIRI
BERNARD TEMBO
WALAZA ZULU
SERGEANT SHAMUTETE**

***Before the Honourable Mrs. Justice J. Z. Mulongoti
in Open Court on the 15th day of December, 2014***

For the State: Mr. R. L. Masempela, Senior State Advocate & Mrs. S. Kachaka, State Advocate, NPA

For the Accused: Mr. J. Phiri, Senior Legal Aid Counsel & Ms. M. Simataa, Legal Aid Counsel, Legal Aid Board

Ruling

Cases referred to:

1. *Matthews Kalaluka Mate, Charles Mwala Mbumwae and Christopher Mwala v. The People (1995-97) Z.R. 135*
2. *Mushoke v. The People SCZ Appeal No. 148 of 2010*

This ruling relates to a trial-within trial which was conducted in respect of **Moses Ainela Phiri**, 32, **A1**. The said trial was necessitated by an objection by defence counsel to the admission of a confession statement which is said to have been recorded from A1 by Detective Inspector **Mike Kasumba**, 39, who is PW7 in the main trial. Counsel objected to the admission of the statement on the ground that it was not freely and voluntarily given by A1.

Two witnesses were called by the prosecution to support the assertion that the confession statement was freely and voluntarily given. One was PW7 himself while the other was Detective Woman Constable **Sandy Mwanambuyu**, 25, (PW8) who is said to have witnessed the recording and signing of the statement.

The testimonies for the two witnesses were substantially the same. They both gave detailed evidence to show that the environment was peaceful when the statement was recorded and that A1 was not forced or induced in any way to make the confession. Both witnesses, thus, asserted that the confession statement in issue was given freely and voluntarily. It was their evidence that they and A1 signed the statement in their respective capacities after it was recorded.

When he was called upon to give his side of the story, A1 testified himself and called no witnesses. A1 asserted that he was physically tortured by the police. He also gave a detailed account and even demonstrated to the Court how he was tortured. According to him he was tortured from about 08:00hours to 12:00hours.

Contrary to his lawyers' contention in raising the objection which necessitated the trial-within-trial, A1 went on to testify that he did not even give the alleged confession statement which is before Court. His evidence was that he was forced to affix his thumbprint to a statement which was prewritten in a small notebook. The witness expressed ignorance about the origin of the statement which is before Court. And denied the assertion that he signed and wrote his names on the said statement.

In my considered view, the trial-within-trial was rendered otiose and redundant by this turn of events. It is trite law that the purpose of a trial-within-trial is to ascertain the voluntariness or otherwise of a confession statement before a decision to admit or exclude it can be made. Therefore, if the objection was on the basis of A1's allegation that he did not make the statement in issue, it would not have been necessary to conduct a trial within-trial.

The statement which necessitated the trial-within-trial shows that A1 signed it after it was recorded. It does not show that he affixed his thumbprint. As such, the Court cannot talk about the statement which was allegedly written in a small notebook since the content thereof, if at all it exists, is not known. Apparently, not even A1 knows its content as he alleged to have merely been forced to affix his thumbprint. Further, the fact that the alleged statement is not before Court, in itself, makes it a non-issue. In any event, the prosecution has not expressed any intention to rely on it or knowledge of it.

Since A1 alleges that he did not give the confession statement which is in issue, the question of whether or not he was beaten is immaterial for the current purpose. The allegation that no such statement was made does not raise the issue of voluntariness despite the alleged beatings. It only raises the question of credibility which can only be properly determined on the totality of evidence in the main trial.

I am fortified in so holding by the case of ***Matthews Kalaluka Mate, Charles Mwala Mbumwae and Christopher Mwala v. The People (1)***. The second appellant in that case had alleged during the trial within trial that he did not make any statement to

the police. In delivering the judgment on appeal, this is what the Supreme Court had to say:

*“The objections to the admission of the statements were based on allegations of physical torture. In evidence during the trial within a trial, Mate and Christopher Mwala alleged that they were beaten to force them to sign statements prepared by the Police whose contents they did not know. Mbumwae alleged in evidence that he never made any statement at all. It seems to us that it is time to repeat the advice that we gave in Zeka Chinyama and Others v The People (1). We draw attention to the dangers of “rolled up” objections and our remarks in Tapisha v The People (2) to the effect that a trial within a trial is only held to determine the issue of voluntariness. **An allegation that no statement was made despite beatings does not raise the issue of voluntariness, but raises a question of credibility as one of the general issues.** Mbumwae’s statement fell to be considered in this light and the learned trial judge correctly determined the issue. The admission of his statement cannot be faulted.”*

Also in the recent case of **Mushoke v. The People (2)**, the Supreme Court reiterated that if voluntaries of an alleged confession is not in issue, a trial-within-trial is not necessary in that event the question of whether the accused made or signed

any statement becomes a general issue to be decided in the main trial on the basis of the totality of the evidence by the court.

Similarly in this case, A1 alleged that he did not make the statement in issue. I will, therefore, admit it as 'P22'. The issue of whether or not the statement was in fact made will be determined on the totality of the evidence that will be adduced before me.

Delivered at Chipata this 15th day of December, 2014

J. Z. Mulongoti
HIGH COURT JUDGE

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

2013/HP/0129

IN THE MATTER OF ARTICLE 94 (7) OF THE CONSTITUTION OF ZAMBIA

AND

**IN THE MATTER OF AN APPLICATION FOR STAY OF CRIMINAL PROCEEDINGS
AGAINST THE PETITIONER *PEDENTE LITE* THE PETITION**

BETWEEN:

HAKAINDE HICHILEMA

PETITIONER

AND

ATTORNEY GENERAL

1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS

2ND RESPONDENT

**Before the Hon. Mrs. Justice J. Z. Mulongoti, in Chambers
on the 30th day of June, 2014**

For the Petitioner: Mr. S. Sikota, SC of Central Chambers and Mr. M. Muchende of Dindi and Company

R U L I N G

Cases Referred to:

1. *Golden Daka v The People (2011) Z.R vol.1 350 (HC)*
2. *Kambarage Mpundu Kaunda v The People SCZ Judgment No.12 of 1991(SC)*
3. *C and S Investments Ltd, Ace Car Hire and Sunday Maluba v Attorney General (2004) Z.R 216 (SC)*

Legislation Referred to:

1. *The Constitution of Zambia, Chapter 1 of the Laws of Zambia*
2. *The Criminal Procedure Code, Chapter 88 of the Laws of Zambia*

This is an application by the Petitioner for an *ex parte* order *Pendete lite* for interim directive for stay of Criminal Proceedings against the Petitioner in the case of *The People v. Hakainde Hichilema* cause no. CRMP/045/2012. The application was made pursuant to Article 94(7) of the Constitution of Zambia. The application was by summons and affidavit in support deposed to by the Petitioner dated 25th June, 2014. He deposed inter alia that:

- (i) That on 1st February, 2013 I filed a Petition in the High Court for various reliefs challenging my arrest and the indictment issued against me on the belief that my freedom of expression as enshrined under Article 20 of the Constitution are being and will continue to be contravened. Now shown to me and marked exhibit 'HH2' is a copy of my Petition dated 1st February, 2013.
- (ii) That among the reliefs sought was an interim directive pursuant to Article 94(7) of the Constitution of Zambia for the Criminal Proceedings against the Petitioner (myself) in the case of *The People v Hakainde Hichelema (myself) Case No. CRMP/045/2012* to be stayed pending determination of this Petition.
- (iii) That I have been informed by my lawyer Mr. Marshal Muchende that my Petition will only be heard on 16th September, 2014. Now shown to me and marked exhibit 'HH3' is a copy of the Notice of Hearing issued by the Honourable Court.
- (iv) That unfortunately for me, the Magistrate seized with conduct of the criminal case which I am challenging through

this Petition has set the 3rd of July, 2014 as the date for the commencement of trial.

- (v) That I verily believe that if the Magistrate Court is not directed to stay the criminal proceedings against me in Cause No. CRMP/045/2012, my petition before this High Court will be rendered otiose, nugatory and a mere academic exercise.

I set the 26th of June 2014 as the hearing date for the application, *exparte* considering that it was accompanied by a Certificate of Urgency.

At the hearing the Petitioner was represented by the learned state counsel (SC) Mr. Sakwiba Sikota of Central Chambers and Mr. Marshal Muchende of Dindi & Company. Mr. Sikota SC, submitted that the application was for stay pending hearing of the Petition and was premised on Article 94(7) of the Constitution which is couched as follows:

“The High Court shall have jurisdiction to supervise any civil or criminal proceedings before any subordinate court or any court martial and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by any such court.”

He amplified that the Court has power under that Article to supervise the Criminal Proceedings before the Subordinate Court and that it is necessary to do so to ensure justice is duly administered as is envisaged by the Article quoted.

It was the learned state counsel's further submission that if the stay is not granted it could render the Petition nugatory and would mean the Subordinate Court would have frustrated the High Court jurisdiction to hear the Petition.

He disclosed that the Petition has been set for hearing by this Court on 16th September, 2014 and that in the circumstances, a stay would not be unreasonable.

In addition to Mr. Sikota SC's submission, Mr. Muchende submitted that the Petitioner was relying on the affidavit in support which demonstrated that he had filed a Petition before the Court for enforcement of the fundamental freedom of expression. That in the said Petition, the Petitioner was challenging his indictment before the Subordinate Court under *Section 67 of the Penal Code Chapter 87 of the Laws of Zambia*.

Further, that given the fact this Court has scheduled the hearing of the Petition on 16th September, 2014 and the Magistrate is set to hear the criminal matter on 3rd July, 2014, the Petitioner found it fit to move this Honourable Court for a directive under Article 94(7) of the Constitution to stay the criminal proceedings in the Subordinate Court *pendete lite* the Petition.

In conclusion he stated that he could not imagine any case more befitting for this directive of the High Court to the Subordinate Court than in this particular case.

Before I proceed to consider the application, I wish to give a brief background on the Petition because the application has been made on the basis that I have set the 16th day of September 2014 as the hearing date by which time the criminal trial would have commenced. Perusal of the record reveals that the Petition herein was filed on the 1st of February 2013. Among the exhibits to the Petition was 'HH3' which is a copy of the charge relating to the criminal proceedings referred to herein. The Petition was filed by Dindi and Company as advocates for the Petitioner.

On 13th February, 2013, a notice of hearing was issued informing the parties that the petition would be determined by Judge Sichinga, on 6th March 2013. The advocates appeared before Judge Sichinga, the Petitioner was represented by Ms. Mushipe of Mushipe and Associates who sought an adjournment in order to serve court process and to file written submissions. She also stated that the Respondents were not served because the Petitioner's lawyers (from about seven law firms as the record would show), were all in Livingstone attending to a criminal case where the members of the United Party for National Development (UPND) were facing a murder charge. Further, that only her firm was issued with the notice of hearing.

The learned Chief State Advocate confirmed that indeed process was not served on the Respondents and prayed for costs for that appearance. The Court ordered that process be served on the Respondents within seven days. The matter was adjourned to 29th April, 2013 for a status conference. On that date only the Chief State Advocate appeared and she confirmed to the Court that process was served and that they had written to the

Petitioner's advocates to amend the Petition by sequencing the paragraphs after which the Respondents would then respond. The Court then adjourned the matter to 9th September, 2013 for another status conference.

On 17th May, 2013 the amended petition was filed and on 5th September, 2013 the Respondents filed their Answer. On 9th September, 2013 when the parties appeared before Judge Sichinga, Ms. Mushipe for the Petitioner, requested for an adjournment on grounds that the Petitioner was unable to proceed since the Respondents only served them with their Answer on 6th September, 2013 in the afternoon. The matter was adjourned to 9th January, 2014 at 14:30 hours and on that date the record reveals that none of the parties attended Court. The Judge did not set any date and none of the parties made a follow up although a notice of hearing was later issued for 10th June 2014.

On 5th May 2014, the matter was allocated to me following Judge Sichinga's transfer to Kitwe. On 14th May, 2014 a notice of hearing was issued for 16th September, 2014 per exhibit

‘HH3’. Then on 25th June 2014 the Petitioner filed the application in hand to stay the criminal proceedings *pedente lite* the petition herein.

I thought it was imperative to give this background to demonstrate that the Petitioner has contributed to the delay of the disposal of the Petition. Not only did his advocates delay to serve process on the respondents but as far back as 13th February, 2013, Ms. Mushipe informed the Court that they would file written submissions and yet none have been filed to date despite the respondents filing and serving their Answer on 5th September, 2013. The Petitioner’s advocates also sought adjournments whenever the matter was scheduled for hearing.

It is also worth noting that from the 9th of January, 2014 the matter was in abeyance and the Petitioner never made any follow up only to file the present application after trial date was set in the criminal case. On the 9th of January, 2014 both parties did not attend Court and yet they were present when the date was set. It is clear from the record that the Petition would have

been disposed of but for the inaction or delays through adjournments by the Petitioner.

Be that as it may, I have thoroughly perused Article 94 (7) of the Constitution upon which this application is premised. I am of the considered view that the application to stay criminal proceedings pursuant to this Article is misconceived and untenable at law. The supervision of the Subordinate Court envisaged by that Article is by way of review, appeal and confirmation of sentence etc. I am persuaded by and do concur with the decision of Matibini, J, as he then was, in the case of **Golden Daka v The People** (1) that *“there are four ways in which the decision of a Magistrate Court can be supervised. Namely: by appeal or case stated, committal to the High Court for sentence, review and confirmation of sentence.”*

I opine that this is in line with *Sections 337 and 338 of the Criminal Procedure Code*. The supervisory power of the High Court is not in any way intended to be exercised so as to stop the Subordinate Court from performing its duties in matters which are pending hearing or are ongoing and for which it has

jurisdiction as in this case. I do not see how the Magistrate in performing her mandate is frustrating the jurisdiction of this Court as argued.

To give effect to the learned counsel's arguments and to allow this application would make criminal proceedings grind to a halt. In **Kambarage Mpundu Kaunda v The People (2)**, the Supreme Court observed that "*the whole criminal process would come to a standstill, if the state or the accused were at liberty to lodge interlocutory criminal appeals*".

I am alive to the fact that there is no criminal appeal in casu but I am of the firm view that the interlocutory application for stay of the criminal proceedings as prayed would have the same effect. In fact in **C and S Investments Ltd, Ace Car Hire Ltd and Sunday Maluba v The Attorney General (3)**, the Supreme Court elucidated that civil proceedings cannot be used to arrest criminal proceedings, which I would be doing if I granted the application for a stay herein.

In view of the foregoing, the application for a stay of criminal proceedings *pedente lite* the petition is denied with costs in the cause. Leave to appeal is granted.

Delivered this day of2014.

**J. Z. MULONGOTI
HIGH COURT JUDGE**

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA
(CIVIL REGISTRY)**

2011/HP/EP/016

**IN THE MATTER OF: ARTICLE 72 (1) (A) OF THE CONSTITUTION OF THE REPUBLIC OF
 ZAMBIA**

AND

IN THE MATTER OF: SECTIONS 22, 104 (6) OF THE ELECTORAL ACT NO. 12 OF 2006

AND

**IN THE MATTER OF: AN APPLICATION FOR THE ENFORCEMENT OF THE JUDGMENT
 OF THE SUPREME COURT SITTING AT LUSAKA IN ITS APPELLATE
 JURISDICTION AND DATED 10th DAY OF OCTOBER, 2013**

BETWEEN:

CHRISTABEL NGIMBU

PETITIONER

AND

**KAKOMA CHARLES WAHUNA
ELECTORAL COMMISSION OF ZAMBIA**

**1st RESPONDENT
2nd RESPONDENT**

**Before the Honourable Mrs. Justice J. Z. Mulongoti
on the 11th day of August, 2014.**

**For the Petitioner : Mr. K. Kaunda of Ellis and Company.
For the 1st Respondent : Mr. J. Mwiimbu of Muleza, Mwiimbu and
Company.

For the 2nd Respondent : Mr. K. Mweemba of Keith Mweemba Advocates.
Mr. G. Phiri of PNP Advocates.
Mr. E. M. Kamwi, In house Counsel.**

J U D G M E N T

Cases Cited:

1. Caltex Oil Zambia vs. Teresa Transport Ltd (2002) ZR 97 (SC)
2. General Nursing Council of Zambia vs Ing'utu Milambo Mbangweta (2008)
ZR 105 (SC)
3. Paul John Firmino Lusaka vs. John Cheelo (1979) ZR (HC)
4. Aaron Micheal Milner vs. Denny Kapandula 1979/HP/EP/11 (unreported)
5. Amock Israeal Phiri vs. John Chiwala bunda 1978/HP/EP/3 (unreported)

Legislation Referred to:

1. Electoral Act No. 12 of 2006, Sections 3, 22 and 104
2. Supreme Court Act, Chapter 25, Sections 9 and 25
3. The Constitution, Chapter 1, Articles 72, and 91(2)

By Notice of Motion pursuant to Order 3 rule 2 of the High Court Rules Chapter 27 of the Laws of Zambia and Section 9 of the Supreme Court Act Chapter 25 of the Laws of Zambia, the Court has been moved for determination of the following questions:

Whether or not on a true construction of Sections 3 (1), 22 and 104 (6) of the Electoral Act No. 12 of 2006, read together with Section 9 of the Supreme Court Act, Chapter 25 of the Laws of Zambia, and in view of the finding by the Supreme Court that the 1st Respondent committed corrupt and illegal practices in connection with the Parliamentary elections held in respect of Zambezi West Constituency on 20th September, 2011:

- (i) It is incumbent on the High Court to prepare, and for the Registrar to deliver a report to the 2nd Respondent and the Director of Public Prosecutions on the finding that the 1st Respondent committed corrupt and illegal practices in

connection with the parliamentary election held in respect of Zambezi West Constituency on 20th September, 2011.

- (ii) The 1st Respondent be barred to contest any Parliamentary election in Zambia in the period of Five (5) years from the date of the report [to be] prepared by the High Court.

- (iii) It is incumbent on the 2nd Respondent to enforce the Electoral Act No.12 of 2006 and more particularly the disqualifications provisions for election to the National Assembly, and also the Director of Public Prosecutions to prosecute the 1st Respondent for corrupt and illegal practices under the Electoral Act No.12 of 2006.

The Notice was supported by an affidavit sworn to by the Petitioner, in which she swears, inter alia, that after this Court dismissed her petition, she appealed to the Supreme Court. And that the Supreme Court by its Judgment of 10th October, 2013 found that the 1st Respondent committed corrupt and illegal practices. Accordingly, his election as Member of Parliament for Zambezi West Constituency was nullified. That by its Judgment of 3rd July 2014, the Supreme Court held that its Judgments bind the Republic and take precedence over those of the High Court and that enforcement of the Judgment be pursued in the

High Court. The Petitioner further deposed that she had been advised by her advocates that the High Court is supposed to prepare a report for submission to the 2nd Respondent and the National Prosecutions Authority and that the 1st Respondent is disqualified for election to the National Assembly for a period of Five years.

The Petitioner's advocates also filed Skeleton Arguments in support of the Notice of Motion. It was submitted that following the Supreme Court's Judgment of 10th October, 2013 which found the 1st Respondent to have engaged in corrupt and illegal practices in relation to the Parliamentary election held on 20th September, 2011 and that in line with Section 9 of the Supreme Court Act as read with Sections 22 and 104 of the Electoral Act No. 12 of 2006, the High Court is obliged to enforce the Supreme Court Judgment by preparing a report containing the findings of corrupt and illegal practices. Section 104 (6) and (7) was relied upon. The Section 104 (6) provides that:

“(6) where it appears to the High Court upon the trial of an election petition that any corrupt practice or illegal practice has been committed by any person in connection with the election to which the election petition relates, the High Court shall, at the conclusion of the proceedings, prepare a report stating-

(a) the evidence given in the proceedings in respect of the corrupt practice or illegal practice;

(b) the names and particulars of any person by whom the corrupt practice or illegal practice was, in the opinion of the Court committed:

Provided that the Court shall not state the name of any person under this paragraph unless the person has been given an opportunity of appearing before the Court and of showing cause why that person's name should not be so stated".

And "(7)The Registrar shall deliver a copy of every report prepared by the High Court under subsection 6 to-

(a)the Commission; and

(b) the Director of Public Prosecutions."

The case of **CALTEX OIL ZAMBIA vs. TERESA TRANSPORT LIMITED (1)** was cited, where it was held that that "judgments and orders of the Supreme Court are to be enforced in the High Court as there is no provision to conduct running litigation in the Supreme Court".

That this position was restated, in casu, by the Judgment of 3rd July 2014, where the Supreme Court advised the Petitioner to pursue the enforcement of the Judgment in the High Court which has original and unlimited jurisdiction. It was further submitted that whilst the High Court did not make findings of corrupt and illegal practices, it is incumbent on the High Court, on the basis of the afore stated law, to enforce the Electoral Act. And that on the basis of Order 3 rule 2 of Chapter 27, the High Court should prepare a report and deliver the

same to the 2nd Respondent which has the obligation under Section 3(1) to enforce the Electoral Act and particularly the disqualification provisions such as Section 22 which provides:

“In addition to the persons disqualified by the Constitution-

- (a)an election officer shall not be qualified for election as member of the National Assembly; and**
- (b)any person who is convicted of any corrupt practice or illegal practice by the High Court upon the trial of an election petition under this Act shall not be qualified for election as a member of the National Assembly for period of five years from the date of the conviction or of the report, as the case may be.”**

The 1st Respondent filed an Affidavit in Opposition to the Notice of Motion sworn by himself. He deposed, inter alia, that paragraph 5 of the Petitioner’s Affidavit in Support to the effect that the Supreme Court by its Judgment of 10th October, 2013 found that he had committed corrupt and illegal practices and nullified his election, is within the Petitioner’s peculiar knowledge and she would be put to strict proof. He further deposed that he had been advised by his advocates that the said Supreme Court Judgment is incapable of enforcement through the High Court and that the purported advice of the Supreme Court was *orbiter dicta*. That the purported report should have been prepared by the trial Judge at the conclusion of the election petition trial, on the Court’s own motion and not under the direction of,

or at the behest of the Supreme Court. Regarding paragraph 9 of the affidavit in support, he deposed that it contained serious falsehoods as he was not disqualified for election to the National Assembly for five years as he has never been convicted of any corrupt practice or illegal practice by the High Court upon trial of an election petition.

The 1st Respondent's advocates also filed Skeleton Arguments in Support of the Affidavit in Opposition of Notice of Motion. It was argued that the Petitioner's application was misconceived as the alleged corrupt practices or illegal acts complained of are Statute barred and therefore not prosecutable pursuant to the provisions of Section 129 (5) of the Electoral Act No. 12 of 2006 which provides: **"No prosecution for an offence against this Act shall be commenced after the lapse of one year from the date on which the offence is alleged to have been committed"**. On this limb alone this application must fail.

Further, that the Petitioner has premised her application on Sections 3(1), 22 and 104 (6) of the Electoral Act No. 12 of 2006 as read together with Section 9 of the Supreme Court Act Chapter 25 of the Laws of Zambia, with regard to the construction of Section 104 (6) of the Electoral Act, the general rule on interpretation of Statutory provisions is as was laid in the case of **GENERAL NURSING COUNCIL OF ZAMBIA**

vs. ING'UTU MILAMBO MBANGWETA (2) that "the primary rule of construction or interpretation of Statutes is that enactments must be construed according to the plain and ordinary meaning of the words used, unless such construction would lead to some unreasonable result, or be inconsistent with, or contrary to the declared or implied intention of the framers of the law, in which case the grammatical sense of the words may be extended or modified."

Arising from this authority, the provisions of Section 104 (6) of the Act must be construed according to the plain and ordinary meaning of the words used. It was pointed out that an exact replica of this Section was Section 28 (6) in the repealed Electoral Act, Cap 19, the predecessor to the current Electoral Act. In the case of **PAUL JOHN FIRMINO LUSAKA vs. JOHN CHEELO (3)** Cullinan J, considered Section 28 (6) of the repealed Act (now Section 104 (6) of the Act) in relation to the Representation of the Peoples Act (1949) (England) from where it was borrowed, He held that : **"The provisions of Section 28 (6) apply to any person involved and emphasis is placed not so much on the liability of the person involved, but the degree of culpability. The provisions of Section 28 (6) (b) of the Electoral Act, Cap 19 are discretionary and in a proper case the High Court in making its report, may decline to state the name of a person found to have committed a corrupt or illegal**

practice.” Accordingly, it is indisputable that the requirement of the High Court to prepare a report where it finds that any corrupt or illegal practice has been committed is mandatory, while the requirement to name and provide particulars of concerned persons is discretionary. It was argued that the latter part of Section 104 (6) (b) of the Electoral Act, is effected after the High Court has given opportunity to the concerned persons to show cause why they should not be so mentioned. And that it is for this reason why in **Lusaka vs. Cheelo**, a report was given on a corrupt practice but the Court declined to name the person.

Arising from the foregoing, the principle of ***Audi Alteram Partem*** meaning “Hear the Other Side” is implicit in Section 104 (6). The hearing of the 1st Respondent before rendering of a report would attain the following:

- (i) whether the 1st Respondent personally committed any corrupt or illegal practice;
- (ii) whether it was the 1st Respondent’s election agent or other agents who the Respondent is vicariously liable to; or
- (iii) whether the alleged corrupt practices or illegal acts complained of, which are statute barred and therefore not prosecutable pursuant to the provisions of Section 129 (5) of the Electoral

Act No. 12 of 2006, can legally be referred to in the purported report for prosecution when the offence does not exist.

That the conundrum to be resolved by this Court, should it be minded to go by the arguments of the Petitioner, is a procedural one. Further, that given that no adverse report was made by the trial court against the 1st Respondent at conclusion of the election trial, how then can an adverse report sought by the Petitioner be generated? Will the 1st Respondent be heard on the accusations arising from the election from the petition? That these questions have been posed to highlight the incompetence of the application, aside the fact that it should not even have been brought to court in light of the provisions of Section 129 (5) of the Electoral Act No. 12 of 2006.

The Court was urged to take special note of the tenor of Section 104 which is to the effect that it, need not only be the parties to the election petition who can be reported guilty of corrupt or illegal practices but any other person including a witness. In these premises, the concerned party in a petition hearing may not have addressed their mind to give reasons as to why they should not be reported during the hearing of the election petition. It was argued that it is unmistakable that if a Court determines that there might be need to report any

corrupt or illegal acts in an election, it conducts hearings after the determination of the election petition. That the High Court has in the past followed this procedure in the cases of **Aaron Michael Milner vs. Denny Kapandula 1979/HP/EP/11** and **Amock Isreal Phiri vs. John Chiwala Banda 1978/HP/EP/3**.

It was contended that the Judgment of the Supreme Court delivered on 3rd July, 2014 cannot be enforced as though it was a Judgment of the High Court, as erroneously argued by the Petitioner. That the procedure followed by the High Court in the past, when it had rendered a report upon conclusion of the election petition, was that the concerned party must be heard in subsequent proceedings of the High Court. In addition, that pursuant to Section 104 (1) and (6) of the Electoral Act, it is the same High Court Judge who heard the election petition who should prepare the report. And that the report must be compiled at the conclusion of subsequent proceedings after hearing the concerned parties as Section 104 (6) uses the word “**shall**”.

In conclusion, it was argued that clearly the Supreme Court Judgment of 3rd July, 2014 cannot be assumed to be proceedings out of which the High Court should render a report. That it was also clear that this action

is statute barred on the authority of Section 129 (5) of the Electoral Act and it be dismissed with costs.

At the hearing of the Motion on 1st August, 2014, learned counsel for the Petitioner, Mr. Kaunda, relied on the Affidavit in Support of the Notice of Motion and the Skeleton Arguments all filed on 10th July, 2014. It was his prayer that the Motion be answered by the Court.

The 1st Respondent's counsel, Mr. Phiri, relied on the Affidavit in Opposition and the Skeleton Arguments all dated 30th July, 2014. He submitted regarding the first question posed by the Motion that this very Court in its Judgment delivered on 16th March, 2012 and at J60 and 61 found that the donation of the payphone was not an illegal act. Now the same Court is being urged, pursuant to Sections 22 and 104 of the Electoral Act, to render a report on a matter the Court categorically stated was not an illegal practice. Further, that the Supreme Court did not order but suggested to the Petitioner to pursue the issue of enforcement of its Judgment in the High Court, at J27 that the Supreme Court stated in *orbiter dicta*, that **“we strongly suggest that the applicant may pursue the issue of enforcement of our Judgment in the High Court which has original jurisdiction if they so wish.”**

That the Petitioner has decided to take on this suggestion, which amounts to exploring if the Court is ready to change its mind on a matter it clearly pronounced itself on at J61 of its Judgment. Learned counsel contended that if this Court was of the view that the issue of the payphone or any of the other issues like slaughtering of the cow etc, were illegal then according to Section 104 (6) of the Act, the Court would have proceeded, upon conclusion of the trial, to hold subsequent hearings against persons found to have committed corrupt or illegal practices. Then the cited persons would have been given a chance to be heard and upon hearing them, the Court would have rendered a report. That this was the procedure as envisaged by Section 104 (6). That nowhere in the Electoral Act was it alluded to that a report had to emanate from the Judgment of the Supreme Court. It was contended that should the Court be minded to agree with the Petitioner, it would entail the Court was changing its mind. The net effect of which would be a very serious issue on the integrity of the Court unless this matter was handled by another Court.

It was further contended that Section 104 (6) refers to the **High Court** and that it had to appear to the **High Court** that there was an illegal practice and not to the **Supreme Court** which is not a trier of facts. The

case of General Nursing Council of Zambia, supra, was cited for interpretation of Section 104 (6) of the Act.

Mr. Mweemba also for the 1st Respondent, submitted on Section 129 (5) of the Electoral Act. He contended that Article 72 clause 2 of the Constitution is restricted in terms of any appeal in matters of law and not facts. That this Court pronounced itself on question of facts and if it is being urged to change its earlier position that would be unconstitutional and an assault to Article 91 (2) of the Constitution. That this Court shall not be subject to the Supreme Court but the Constitution. Counsel acknowledged that this was not the intention of the Supreme Court but it had been misconstrued as such by the applicant.

According to Mr. Mweemba, rendering of a report was also not tenable without hearing the affected party as required by the fundamental principle of the rule of Natural Justice: “*audi alteram partem*” meaning hear the other side. That Section 129 (5) of the Act was elaborate and provided for a time limitation, rendering the action statute barred and not tenable at law. That the provision was provided by Parliament in its

own wisdom and looking at public interest, of which election matters are. And that under Section 104 (6) not only the Member of Parliament who had been petitioned who affected but any other person. Accordingly, the application was misconceived and it be dismissed with costs.

Learned counsel, Mr. Mwiimbu also for the 1st Respondent, submitted that the application is canvassing the production of a report to be submitted to the Director of Public Prosecutions (DPP) and the 2nd Respondent pursuant to Section 104 (6). That the Section 104 was specific pertaining to procedures to be invoked. He contended that in the event that the Court found favour with the Petitioner's arguments, it would entail recalling the 1st Respondent and any other persons alleged to have committed corrupt practices, meaning the process would start de novo, which procedure is not canvassed anywhere in the Electoral Act and Rules of the Court. He quoted from J21 of the Supreme Court Judgment of 3rd July, 2014, as follows:

“Both parties agree as we do, that on the clear and plain meaning of Section 104 (6), it reposes the power to generate the report, in the High Court, and not in this Court. It specifically refers to proceedings in that Court. The issue before us, therefore, is whether this Court can order the High Court to generate the statutory report under Section 104 (6); or indeed, whether this Court can order the High Court to perform that statutory function under the Electoral Act...”

Counsel contended that my findings were clear and if I render a report, it should be based on my findings and not the findings of the Supreme Court, as was emphasized by the Judgment of 3rd July, 2014.

Mr. Kamwi, for the 2nd Respondent informed the Court that he had considered arguments by both the Petitioner and the 1st Respondent. And that bearing in mind that the 1st Respondent is a public institution whose hallmark is impartiality, he had decided not to offer any arguments, considering the background of the matter. Further, that the 2nd Respondent takes note that the electorates have had no representative for close to a year which is not healthy in a democracy. Thus, it was left to the Court to determine.

In response, learned counsel for the Petitioner, submitted that whilst this Court did not make findings of the 1st Respondent having committed an illegal practice, the Supreme Court which is a superior Court and whose decisions bind this Court did find so, to that effect reliance was placed on Section 9 of the Supreme Court Act, which he

contended, had been omitted by the 1st Respondent's counsel in their submissions.

Regarding Section 129 (5) of the Act, he submitted that it relates to criminal prosecution, in the event that the DPP in his discretion, decided to initiate criminal prosecution. Counsel contended that relying on this Section to urge the High Court not to prepare a report was a misconception because the report was not only delivered to the DPP but the 2nd Respondent as well, which does not conduct criminal prosecutions. Cullinan, J as he then was, was quoted in the **Lusaka vs. Cheelo case**, supra, that:

“The effect of the High Court Report under Section 28 (6) is that the Person reported is disenfranchised under Section 6 and disqualified for nomination for election as a Member of National Assembly under Section 8 (3) of the Act for a period of five years. If he is already a Member of the National Assembly, he is unseated under Article 71 (2) (e) of the Constitution.....”

Further, that

“it may expose the person reported to criminal sanctions, if not furnished with a Certificate of Indemnity under Section 27 and if the DPP, in his discretion, decides to initiate a prosecution.”

According to counsel the above quote clearly confirms that the report serves two purposes and for criminal prosecutions, it was in the sole discretion of the DPP, after studying the report. Accordingly, the argument of limitation is premature and can only be raised before a court of criminal jurisdiction after the DPP has decided to initiate criminal prosecution. And Section 37 of the Interpretation Act, in relation to extension of time.

In relation to Section 22, it was submitted that it gave two grounds upon which a person could be disqualified for election as an MP or be unseated. The first relates to a person convicted of any corrupt or illegal practice. The conviction relates to or follows trial in a Court exercising criminal jurisdiction. The second one relates to any person who is reported guilty of any corrupt or illegal practice upon an election petition. That the word **guilty** relates to the finding that this Court or the Supreme Court makes of a person who committed an illegal or corrupt practice. It does not imply the verdict of guilty entered after trial in a criminal court. If that were the case there would be no need for the High Court to deliver a report to the DPP. Thus, by the Supreme Court Judgment the 1st Respondent was found to have committed an illegal practice.

It was further submitted, regarding Section 104 (6) (b), that the Court will only decline to name the person under certain circumstances such as, where the person heard had not been heard at trial. And that in the **Lusaka vs. Cheelo** case, supra, it was held that **“it will be seen from the above provisions that the requirement to provide a person with an opportunity of being heard, does not apply to a party to the petition nor a candidate on behalf of whom the seat is claimed by the Petitioner. It could be said such exception emphasizes the mandatory nature of the above provisions, that is, that the provisions envisaged that the evidence of the parties or the particular candidate, may well be heard or at least that they will be provided with an opportunity of being heard at the trial itself. And that they will therefore, be no need to further hear them, or to provide any such further opportunity.”**

And that **“I cannot but see that the reappearance of a party or witness before the court in the hope of affecting his liability is an exercise in futility.”** The case of **Phiri V. Chiwala Banda**, supra, was cited in which the Respondent’s agent was stated as the one who committed an illegal practice. He was not given a second opportunity to be heard because he was a witness at trial. Accordingly, in casu, there was no need to hear the matter de novo. And that in the two cases cited, the reports were prepared by the High court immediately because there was no

appeal unlike in the case in hand. It was his prayer that the Motion and its questions be granted as it is properly before court.

I thoroughly perused the Supreme Court Judgment of 3rd July, 2014 on the basis of which the Notice of Motion was filed in the High Court on 10th July, 2014.

It is noteworthy that these were the same questions that were posed in the Motion before the Supreme Court, which are subject of the said Judgment. At page J21 of the said Judgment the Supreme Court stated, as submitted by Mr. Mwiimbu, that on the clear and plain meaning of Section 104 (6), the power to generate the report was reposed in the High Court. That the Section specifically refers to proceedings in the High Court. Further, that **“whereas we hold that Section 104 (6) of the Electoral Act reposes the power to generate the report which triggers further due process in an Election Petition in the High Court, we do not in any way, suggest that this Court has no powers to deal with post election matters where there is a finding of an act of bribery or a corrupt act having taken place”**. The Supreme Court then quoted Section 25 of the Supreme Court of Zambia Act, which provides the powers of the Court on an appeal in civil matters. That the Section was

predicated on the condition that there must be a Judgment or Ruling appealed against.

The Supreme Court also observed that the Motion before it sought to enforce its Judgment of 10th October, 2013 by virtue of Section 9 of the Supreme Court Act without taking any further step or recourse to the High Court which has ostensible jurisdiction to generate the report under Section 104 (6) of the Electoral Act. And that the effect of Section 9 was explicitly stated in **Caltex Oil Zambia Limited vs. Teresa Transport**, supra, that

“The effect of this Section is that our Judgments and Orders are to be enforced in the High Court as there is no provision to conduct running litigation in this matter”.

I am alive to arguments by Mr. Kaunda that this Court must enforce the Supreme Court Judgment as provided in Section 9 of the Supreme Court Act. Effectively, that the Court must base its report on the Supreme Court Judgment which found that the 1st Respondent had committed an illegal practice. I perused the Electoral Act. It is clear that the report is to be prepared at the conclusion of the trial of the election petition. This was not done and the matter proceeded on appeal, resulting in the Supreme Court Judgment of 10th October, 2013, which nullified the election of the 1st Respondent for committing an illegal

practice. Hence the contention by the Petitioner that the report should be based on the Supreme Court findings. Of course the 1st respondent contends otherwise. Unfortunately, the Electoral Act does not provide for what is to happen in a scenario as has unfolded in casu, where there is a Judgment of the Supreme Court.

I must confess I am in a bit of a quandary, as the situation is now open to conjecture as revealed by the opposing arguments. Mr Kaunda argued that this Court is bound by the Supreme Court Judgment and must enforce it by making a report based on the findings of the Supreme Court. On the other hand, Mr. Mwiimbu and his co-advocates argued that should the Court prepare the report based on the Supreme Court findings, this Court will be changing its position since I found that the 1st Respondent did not commit an illegal practice, by donating the payphone, in line with the government programme.

As aforementioned the Electoral Act is silent regarding the situation in casu. My reading of the Judgment of 3rd July, 2014 is that the Supreme Court observed that **“...on the clear and plain meaning of Section 104 (6), it reposes the power to generate the report, in the High Court, and not in this Court. It specifically refers to proceedings in that Court.....”**

I am thus of the considered view that if I have to prepare a report it will be based on proceedings before me, at the time I heard and determined the election petition, resulting in my Judgment of 16th March 2012. I do not agree that the issue of preparing the report is statute barred. Regarding the issue of enforcement, I opine that the Judgment of 10th October, 2013 has been partially enforced in that the 1st Respondent ceased to be an MP the moment his election was nullified by the said Judgment. The Judgment is binding on this Court and the Republic. The issues arising in this Motion are new and either party is free to appeal against this Judgment, if dissatisfied. I am fortified by the Judgment of 3rd July, 2013 as the Supreme Court stated that:

“Whereas we hold that Section 104 (6) reposes the power to generate the report which triggers further due process in an election petition in the High Court, we do not in any way, suggest that this Court has no powers to deal with post-election matters where there is a finding of an act of bribery or a corrupt act having taken place.”

The Court then quoted Section 25 of the Supreme Court Act which provides for its powers on an appeal in civil matters, and observed that, ***“therefore, Section 25 of the Supreme Court Act is predicated on the condition that there must be a judgment or ruling appealed against and that there is no procedural impropriety.”***

That the Motion arose out of an appeal that had already been heard and fully determined and the Court could not exercise its powers under Section 25.

The Court also observed that the Motion sought to enforce the Judgment of 10th October, 2013 without recourse to the High Court which has ostensible jurisdiction to generate the report.

Accordingly, the parties are free to appeal against this Judgment as guided by the Supreme Court.

I will therefore, render a report based on the proceedings before me at the time I heard and determined the election petition. Therefore, the first question which purports that the report be based on the Supreme Court findings, fails.

Regarding the second question, Mr. Kaunda argued that once the report is rendered it will effectively bar the 1st Respondent from contesting elections for five years. He relied on the case of **Lusaka vs. Cheelo** and Section 22 of the Electoral Act. In addition that Cullinan, J in that case also held regarding Section 28 (6), now 104 (6) that “**it will be seen from the above provisions that the requirement to provide a**

person with an opportunity of being heard does not apply to a party to the Petition nor a candidate on behalf of whom the seat is claimed by the Petitioner..” According to counsel, the 1st Respondent was heard at trial of the election petition and there is no need to provide him with an opportunity of being heard again and that such would be an exercise in futility. And that in **PHIRI vs. CHIWALA BANDA** case, where a report was prepared and the name of the Respondent’s Election Agent was stated as the one who committed an illegal practice but was not given a second opportunity because he was a witness at trial.

The 1st Respondent’s counsel argued that this Court did not make any findings of corrupt and illegal practices by the 1st Respondent. It was argued that the provisions of Section 104 (6) must be construed according to the plain and ordinary meaning of the words used. The **Lusaka vs Cheelo** case was also relied upon and accordingly that the requirement by the High Court to prepare a report where it finds that any corrupt or illegal practice has been committed is mandatory, while the requirement to name and provide particulars of concerned persons, is discretionary. That the latter part of Section 104 (6) is effected after the High Court has given an opportunity to the concerned persons to show cause why they should not be so named. And that that was why

in the **Lusaka vs Cheelo** case, the High Court gave a report but declined to name the person.

I thoroughly read the **Lusaka vs Cheelo** case, which both parties have extensively relied upon, though with different arguments. Cullinan, J as he then was, discussed at length the interpretation of Section 28 (6), now 104 (6). He posed the following questions: **“what is the interpretation to be placed on the above proviso in s.28. Does it mean that the court shall not arrive at its conclusion that a person committed a corrupt or illegal practice without first giving that person an opportunity of being heard; or does it mean that the court, though satisfied that a person committed a corrupt or illegal practice may nonetheless, in the exercise of its discretion, for good cause shown, decline to state the name of that person in a report?”**

After a lengthy discussion of the submissions by counsel, some English cases, including the quotes referred to by Mr. Kaunda, Cullinan, J acknowledged the difficulty raised by the proviso. He then concluded that, **“the provisions of s. 28 (6) must in the least be said to give rise to doubt in the matter of their interpretation. They are penal in effect and in the absence of express words, I consider that the court should be slow to construe them against the Constitutional rights of franchise**

and election of the individual. For that reason, I hold that the provisions of s. 28 (6) are discretionary and in a proper case the High Court in making its report may decline to state the name of a person found to have committed a corrupt or illegal practice”.

I must state that I am persuaded by the reasoning of the Judge in that case. I am thus inclined to go by the arguments advanced by the 1st Respondent’s counsel, especially in light of the fact that this Court did not find that the 1st Respondent had committed an illegal practice or corrupt practice. It is cardinal that the 1st Respondent, be at least, afforded an opportunity of being heard before his name and particulars are stated in a report as being found guilty. That is the gist of the judgment in the **Lusaka vs. Cheelo** case, now crystallized thus:

- “(i) The provisions of s.28 (6) (b) of the Electoral Act, {now 104 (6) (b)} are discretionary, and in a proper case the High Court, in making its report, may decline to state the name of a person found to have committed a corrupt or illegal practice.
- (ii) Conviction of an illegal practice as distinct from that of a corrupt practice is not penal, and does not have the effect of unseating a member of Parliament or disqualifying him from nomination for election.
- (iii) The provisions of s.28 (6) apply to any person involved, and emphasis is placed not so much on the liability of the person involved, but the degree of culpability”.

In view of the foregoing, the second question has equally failed.

The third question which in some respects is related to the second question, was stated as follows: **“it is incumbent on the 2nd Respondent to enforce the Electoral Act No.12 of 2006 and more particularly the disqualification provisions for election to the National Assembly, and the DPP to prosecute the 1st Respondent for corrupt and illegal practices under the Electoral Act No. 12 of 2006”**. Indeed this is as stipulated in Section 3(1) of the Electoral Act that the 2nd Respondent shall administer and enforce the Act. Section 104 (8) provides that the Commission, the 2nd Respondent in this case, shall once it receives the report under 104 (7), instruct an officer to prosecute any person stated in the report. Clearly, the 2nd respondent can only act when a person is mentioned in the report.

I am equally alive to arguments on behalf of the 1st Respondent that going by the provisions of Section 129 (5), the action is statute barred. I am inclined to hold that it is premature for me to consider whether the action is statute barred or not as canvassed by the Petitioner’s counsel. Section 22 (b) of the Electoral Act provides for two stages, the conviction and the report of guilty as argued. The issue of criminal prosecution is in the discretion of the DPP. These arguments can be

made at that stage, if the DPP initiates criminal proceedings. The issue of the report of guilty is as stated above in relation to the second question. I am therefore, inclined to find that the third question has succeeded as is stipulated by law.

Having found that the first and second questions of the Motion have failed and this being a Constitutional matter, I order each party to bear own costs. Leave to appeal to the Supreme Court is granted.

Dated this 11th day of August, 2014.

J. Z. Mulongoti
High Court Judge

IN THE HIGH COURT FOR ZAMBIA

2013/HK/446

AT THE KITWE DISTRICT REGISTRY

HOLDEN AT KITWE

(PROBATE JURISDICTION)

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO
APPLY FOR JUDICIAL REVIEW UNDER THE PROVISIONS OF
ORDER 53 RULE 53/1-14/30 OF THE SUPREME COURT
RULES**

AND

**IN THE MATTER OF THE ESTATE OF MERVIN KAUFMAN
(DECEASED)**

B E T W E E N:

MERILYN KAUFMAN

APPLICANT

AND

PEGGY MELEKA

RESPONDENT

**By Her Duly Appointed Attorney Under a Power of Attorney
Dated the 22nd August, 2013**

Before the Honourable Justice Mrs. J.Z. Mulongoti

In chambers on the 21st day of March, 2014

**For the Applicant : Mr. W.M. Forrest of Forrest Price &
Company**

**For the Respondent: Mr. D. Mulenga of Messrs Derrick
Mulenga & Company**

R U L I N G

A. CASES REFERRED TO:

*NEW PLAST INDUSTRIES V COMMISSIONER OF LANDS AND ANOTHER, SCZ
JUDGMENT NO. 8 OF 2001 (SC)*

*BP ZAMBIA PLC V ZAMBIA COMPETITION COMMISSION AND OTHERS, SCZ
JUDGMENT NO. 22 OF 2011*

ATTORNEY GENERAL V TALL AND ANOTHER (1995-97) ZR 54 (SC)

CHARITY OPARAOCHA V DOROTHY MURAMBIWA (2004) Z.R 141 (SC)

B. LEGISLATION REFERRED TO:

1. *THE SUPREME COURT RULES, 1999 Edition, Vol. 1*

2. *THE INTESTATE SUCCESSION ACT, Chapter 59 of the Laws of Zambia*

3. *LOCAL COURTS (ADMINISTRATION OF ESTATES) RULES, Chapter 29 of the
Laws of Zambia*

The Ruling relates to an application by the Respondent to raise preliminary issues on a point of law pursuant to **Order 14A of the Rules of the Supreme Court of England 1999 edition**, as follows:

Did the Applicant follow the right procedure in applying for Judicial Review against the order made by the Local Court?

Did the Applicant follow the right procedure by not citing Peggy Meleka as a party to the proceedings, when in fact the purported applicant intended to quash the decision of the Local Court which appointed the Respondent in this matter, as Administrator of the deceased's estate?

The application was by Notice supported by an affidavit. The affidavit in support was sworn by one Peggy Meleka, the Respondent. She deposed that the Applicant had obtained an order of certiorari quashing the decision of the Local Court appointing her as Administrator of the estate of her late husband Mervin Kaufman, per exhibit 'PM1'. That she had been advised that the proceedings were wrongly commenced by Judicial Review instead of by way of appeal.

She further deposed that she had not been cited as a party to the proceedings when she had sufficient interest in the matter, being the deceased's wife and administrator of his estate, per exhibit 'PM2'.

The Respondent's counsel, Mr. Mulenga, also filed Skeleton Arguments in support of the Notice of Intention to Raise Preliminary Issues on a point of law. He gave a brief background as follows:

This is a matter in which the estate of the deceased Mr. Mervin Kaufman is to be determined. It is not in dispute that the respondent in this matter, Peggy Meleka Kaufman was married to the deceased aforesaid until his death on 24th day of November, 2012. It is also not in dispute that in the Power of Attorney to take

administration executed in the Republic of South Africa dated 23rd August 2013, the Respondent aforesaid is named as surviving spouse to the deceased.

Further that on 12th September 2013, Merilyn Kaufman, the Applicant herein, filed into this Court, an application for leave to apply for Judicial Review under the provisions of Order 53/1-14/30 of the Supreme Court Rules, supported by an Affidavit in Support of Ex-parte Notice of Motion for leave to apply for Judicial Review and the Certificate of Exhibits. Thereupon, an Ex-parte Order granting leave to apply for Judicial Review was granted by this same Court on 26th day of September, 2013, thus the Skeleton Arguments of Notice of Intention to Raise Preliminary issues on the point of law pursuant to Order 14A of Rules of the Supreme Court, 1999 edition.

The Law and the Arguments

It was submitted that the question which required to be inquired into was whether the Applicant followed the right procedure by moving this Court by way of Judicial Review, seeking an order of certiorari with a view of quashing the

order of the Local Court which appointed the Respondent aforesaid as Administrator of the estate of the late Mervin Kaufman.

According to counsel, the answer seemed to lie in **section 45 of the Intestate Succession Act**, (hereafter referred to as the Act) which provides:

“An appeal shall lie to the High Court in respect of any order of decree made by a Subordinate Court or a Local Court and the decision of the High Court on it shall be final”.

That section 45 was mandatory and failure to follow the laid down procedure was null and void ab initio to the extent of the inconsistency.

The case of **NEW PLAST INDUSTRIES V COMMISSIONER OF LANDS AND ANOTHER [1]**, was cited as authority that, a matter having been brought to the High Court by way of judicial review, when it should have been commenced by way of appeal, the Court had no jurisdiction to make the reliefs sought. The case of **BP ZAMBIA PLC V ZAMBIA COMPETITION COMMISSION**

AND OTHERS [2], was also cited. Where the Supreme Court held that:

“the mode of commencement of any action depends generally on the mode provided by the relevant statute. Since the dispute leading to the appeal arose from the decision of the Commission, which was exercising this power under the Competition and Fair Trading Act, the applicable statute was this Act and not Order 53 of the Rules of the Supreme Court because the statute prescribes the mode of commencement. It was further stated that where any matter under the Competition and Fair Trading Act is brought to the High Court by means of judicial review, when it should have been by way of an appeal, the Court has no jurisdiction to grant the remedies sought.”

Did the Applicant follow the right procedure by not citing the Respondent as a party to proceedings?

It was submitted that the Respondent was legally married to the deceased until his death. That she had an interest in the subject

matter of the Court order of certiorari dated 26th December 2013, in which her order of appointment as Administrator of the deceased's estate was quashed without being heard.

The case of **ATTORNEY GENERAL V TALL AND ANOTHER [3]** was relied upon that:

“it is trite law that in the interest of finality and to avoid unnecessary contradictions and conflicts in the judgments of the Court and in order that all matter in dispute are determined at once to avoid multiplicity of action, all parties who are likely to be affected by any judgment or order a Court is likely to make must be joined as parties to the action.”

Further, that under **Order 14 Rule 5 of the High Court Rules:**

“A Court can order a joinder if it appears to the Court or Judge that all persons who may be entitled to, or claim some share or interest in the subject matter of suit by the result require to be joined.”

It was the Respondent's prayer that the preliminary issues be entertained, heard and determined based on the merits of the

Intention to Raise Preliminary Issues on a Point of Law pursuant to **Order 14A of the Rules of the Supreme Court.**

The Applicant filed an affidavit in support of response to the respondent's application. The deponent was one Chimba Phiri, a Managing Clerk in the employment of Forrest Price & Company, since 1984. He deposed that on the instructions of his principals, he took the following action in the matter:

On the 15th of August 2013, a letter was written to the Provincial Local Courts Officer at Kitwe. A copy is hereto annexed and marked as exhibit "CP1". In my presence she telephoned the Registrar at Chingola Local Court.

On the 16th August 2013, I travelled to Chingola and saw the Local Court Registrar and delivered a copy of the said letter. The Registrar refused the application.

Proceedings for Judicial Review were commenced and I served the application on the Provincial Local Courts Officer at Kitwe. She accepted the documents but did nothing. A copy of the Acknowledgment of Service is also attached.

Acknowledgment of Service of Originating Notice of Motion on the Provincial Local Courts Officer on the 9th October 2013 marked as exhibit "CP2".

Acknowledgment of Service on the Registrar Local Court Chingola of the Order of Certiorari marked as exhibit "CP3".

I sent a copy of the Order of Certiorari to the Clerk of the Court Chingola Subordinate Court who served it on the Respondent. The Acknowledgment of Service is hereto annexed and marked as exhibit "CP4".

The Respondent was also served with the Notice of Application, Originating Notice and Statement of Particulars on the 7th January 2014 marked "CP5".

The Applicant also filed a response to the Respondent's Skeleton Arguments thus:

The background submitted by the Respondent is very deficient in the "facts" alleged. The real facts are as follows:

On or about the 26th July 2013, an application was made to the Honourable Deputy Registrar to remove the proceedings from the Local Court to the High Court. The Deputy Registrar refused. A copy of the proposed Order endorsed by him is hereto annexed as Annexure "A".

On the 20th August 2013, an application was taken to the Local Court at Chingola to revoke the appointment of Peggy Meleka as Administrator. A copy of the Affidavit is annexed hereto and

marked as Annexure “B”. In the Order of Appointment annexed thereto the name of the Administrator is “*PEGGY PELEKA*”.

Annexed to the present Affidavit by the Respondent is a copy of the Appointment of Administrator also dated 4th December 2012 but the name of the Respondent has been changed to “Meleka”. The date stamp on the top left hand corner of the copy filed by the Applicant is 4th December 2012 whereas that used by the Respondent says 27th November 2013. That the copy used by the Respondent is an apparent forgery.

2. As a result of the refusal by the Local Court to deal with the matter and the Deputy Registrar to transfer the matter to the High Court, we were compelled to proceed for “Judicial Review”.
3. The section 45 says that an Appeal lies under that section in respect of an “Order or Decree” but no Order or Decree was made by any Court and in any event the final Arbiter is the High Court to which we duly made application. There was nothing against which to Appeal from the Local Court. The order of transfer by Judicial Review complies with Section 44(1) (c) of the Local Courts Act. There was no need for an Appeal.

Paragraph 4 (a) to (d) contain facts relating to the cause of death of the deceased.

At the hearing on 31st January 2014, Mr. Mulenga relied on the Affidavit in Support and Skeleton Arguments. He argued that the Respondent was not cited and was not given an opportunity to respond until an order was granted and served on her dated 5th December 2013.

It was further submitted that the procedure was also wrong. That the only recourse available to the Applicant was to appeal. That once the Court upholds the preliminary issues raised, then all the orders made in favour of the applicant should be set aside.

Mr. Forrest equally relied on the affidavit and arguments in response to the Respondent's Notice to Raise Preliminary Issues.

He submitted that there was evidence of fraud given the two orders of appointment dated 4th November 2012 and 27th November 2013.

He further argued that the deceased was a South African European and thus not subject to African customary law.

And that the rules of the Local Court on appointment of Administrator, made it clear that no one can be appointed as such for such a person. That the marriage between the deceased and the Respondent was earlier under the Local Court Act but later it became marriage under the law. Thus, the appointment of the administrator was a nullity and Judicial Review was the only way out.

He contended that the Local Court was misled and there was no record to produce to show how the Respondent managed to get an order.

Mr. Forrest contended that all his efforts were frustrated while the Respondent was busying distributing the estate without applying to Court as required by section 19 of the Intestate Succession Act.

That section 45 of the said Act was inapplicable because no order was made by the Local Court. The order of appointment was a nullity and there was nothing to appeal against. Accordingly, the preliminary issues raised were irrelevant.

In response, Mr. Mulenga submitted that the Applicant was making a lot of allegations such as fraud, which were not reasons for Judicial Review. And that the Local Court was not a court of record and that however, the law still provided for appeal under section 45.

Before I can dwell into the preliminary issues, I wish to highlight that, as acknowledged, the Applicant's application for leave for Judicial Review was *ex parte*. According to the *ex parte* Originating Notice of Motion, the Applicant applied for an order that she be at liberty to apply for Judicial Review in respect of an order by the Local Court, Chingola in case No. 1597/2012 and dated 4th day of December 2012 for the appointment of Peggy Meleka as administrator of the estate of the deceased, notwithstanding, the fact that the deceased was a citizen of the Republic of South Africa and therefore not subject to the Local Courts (Administration of Estates) Rule No. 2 and that the costs of the application be in the cause.

The Notice of Motion was supported by an affidavit sworn by one William Myles Forrest (the Applicant's advocate herein), he deposed that:

I am the duly appointed Attorney of the Applicant herein by virtue of a Power of Attorney dated the 22nd day of August 2013 which was duly authenticated in the Republic of South Africa as endorsed thereon. The original is hereto annexed and marked as exhibit 'WMF1'.

The Applicant is the daughter of the said deceased and her particulars are contained in the said Power of Attorney.

The Applicant also made an application on the 26th July 2013 in the Case No. 2013/HK/Pb.33 for removal of the said matter from the Local Court at Chingola to the High Court but the application was refused by the Deputy Registrar.

The purpose of the present application for leave to apply for Judicial Review is to quash the Order of Appointment of the said Peggy Meleka as Administrator and to proceed with the application for Letters of Administration to be made in favour of the Applicant in the High Court.

An application was also submitted to the Local Court at Chingola for it to dismiss the appointment of the said Peggy Meleka. They refused to allow the application to be filed.

The said Peggy Meleka was charged, before the Subordinate Court at Ndola, with the murder of the said deceased but the Director of Public Prosecutions entered a nolle prosequi and she was discharged.

The deceased left a substantial estate and unless she is restrained in these proceedings she will dispose of the Applicant's interest in the estate.

The application was accompanied by a Certificate of Urgency.

The Court set the 26th of September 2013 as the date of hearing the application for leave for Judicial Review. At the hearing, Mr. Forrest informed the Court that he was making the application by virtue of the Power of Attorney and since the deceased was intestate, he also relied on section 17 of the Intestate Succession Act (the Act). That section 17 gave authority for an Applicant out of jurisdiction to appoint an Attorney to make an application on their behalf.

Further, that the White Book directed that the application be made *ex parte* to a Judge per Order 53 Rule 1-14/30. Mr. Forrest also submitted that the deceased was a South African citizen of European descent and that in accordance with Rule 2 of the Local Courts (Administration of Estates) Rules, the Local Court dealt with African customary law and thus not applicable to the deceased.

Mr. Forrest further submitted that the value of the estate was substantial about Five Hundred Million Kwacha. That the deceased was a businessman with four properties, i.e land and buildings, three companies and a manufacturer of bicycles plus several bank accounts.

After hearing from the Applicant, the Court granted leave to apply for Judicial Review.

The Applicant then filed on 2nd October 2013, an Originating Notice of Motion for Judicial Review pursuant to Order 53/5(2) of the Rules of the Supreme Court. The application was supported by the Affidavit in Support of Ex-parte Originating Notice of Motion for leave to apply for Judicial Review, Statement of Particulars required on exparte application, Notice of Application for Leave to Apply for Judicial Review and the Certificate of Urgency.

An affidavit of service was also filed. The deponent Chimba Phiri deposed that he had personally served the Local Courts Officer, Gladys Mumba with true copies of the Originating Notice of Motion for Judicial Review per exhibit 'CP1' a copy of the acknowledgement of service sworn by the said Gladys Mumba.

The hearing was set for 4th December 2013. Only Mr. Forrest was in attendance. He informed the Court that his application was for an order to quash the Order of the Local Court and to move proceedings into the High Court.

After hearing the Applicant, the Court granted the application as prayed. Hence the application to raise preliminary issues on a point of law on behalf of the Respondent.

I wish to state from the outset that I am inclined to dismiss the preliminary issues raised on behalf of the Respondent.

I note, as contended by Mr. Forrest, that the application was *ex parte*. Therefore, the failure to cite the Respondent was not fatal and as contended by Mr. Forrest, this was in accordance with Order 53, Rule 3 of the White Book.

Further, I was compelled to grant leave to apply for Judicial Review and subsequently the order of certiorari after reading the affidavits in support including the exhibits.

I also read Rule 2 of the Local Courts (Administration of Estates) Rules, regarding the jurisdiction of the Local Court over the

deceased who was not a subject of African Customary Law which is administered by the Local Court.

I also considered learned counsel's submission that the estate was substantial and in excess of Five Hundred Million Kwacha. The deceased was a businessman and ran three companies.

I have considered the arguments by both counsel as summarised herein. It is noteworthy that Section 43(2) of the Intestate Succession Act limits the jurisdiction of the Local Court to estates whose value does not exceed Fifty Thousand Kwacha.

I note that even with the rebased kwacha, the deceased's estate exceeds Fifty Thousand Kwacha, considering the properties and companies he owned as submitted by Mr. Forrest.

In the case of **CHARITY OPARAOCHA V DOROTHY MURAMBIWA [4]**, the Supreme Court among other issues dealt with Section 43(2) of the Act. The Supreme Court held that, *“we agree with the respondent's counsel that the value of the deceased's estate went beyond the jurisdiction of the Local Court. We agree that probate in this case should have been obtained from the High Court. We cannot therefore, fault the trial Judge for*

having found that the appointment of the appellant by the local court, as administrator of the deceased was null and void. The consequence of such a finding was cancellation of the order of appointment post facto.”

The Supreme Court further observed that, *“the court had power under section 29(2) of the Act, to remove an administrator where it is satisfied that the proper distribution of the estate and the interest of beneficiaries entitled, so require.”*

Therefore, I concur that Judicial Review was the proper recourse for the Applicant. The Local Court had no jurisdiction to deal with the estate of the deceased. First, the value was beyond its jurisdiction and second the deceased was not subject to African customary law. The order of appointment was actually null and void ab initio. Section 45 of the Act does not apply on the facts in hand as argued by Mr. Forrest. Consequently, the authorities cited by Mr. Mulenga, though good law, do not apply in this case.

Accordingly, the preliminary issues raised by the Respondent have no merit and are accordingly dismissed with costs to the Applicant. The Respondent’s appointment as administrator of the deceased’s estate stands quashed and all the orders made on 26th December, 2013 remain in force. Leave to appeal is granted.

Dated this **21st** day of **March**, 2014

.....
J.Z. Mulongoti
HIGH COURT JUDGE

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
HOLDEN AT KITWE
(CIVIL JURISDICTION)

2012/HK/SCA/33

B E T W E E N:

CHARITY MWALE
HUMPHREY KALUNGA

1ST APPELLANT

2ND APPELLANT

AND

MWANSA MWABA

1ST RESPONDENT

JOSEPHINE CHOMBA

2ND RESPONDENT

ZCCM INVESTMENT HOLDINGS

3RD RESPONDENT

Before the Honourable Justice Mrs. J.Z. Mulongoti

In Open Court on the 7th day of April, 2014

For the Appellants : Mr. I. Mulenga & Mr. M.C. Hamachila of Messrs Iven Mulenga & Company

For the 1st & 2nd Respondents: In Person

For the 3rd Respondent : Ms. J. Ndovi of Messrs John Kaite Legal Practitioners

J U D G M E N T

A. CASES REFERRED TO:

1. *LUMANYENDA AND ANOTHER V. CHAMUKA AND OTHERS [1988-89] ZR 194 (SC)*
2. *DAVIES HOWES AND OTHERS V. BETTY BUTTS CARBIN (Sued in her capacity as Trustee of the Estate of the late DAISY BUTTS) APPEAL NO. 64/2008(SC)*
3. *ABDALLAH V. MOHAMEDI AND OTHERS (1969) E.A 144 (CA)*
4. *NAMUNG'ANDU V. LUSAKA CITY COUNCIL [1978] ZR 358 (HC)*
5. *HUMANE V. D.P. CHINKULI 1971/HP/407 (Unreported) H.C.*

B. LEGISLATION REFERRED TO:

*1. LANDS AND DEEDS REGISTRY ACT, CHAPTER 185 OF THE LAWS OF
ZAMBIA*

Introduction

The matter came before me on appeal from the Subordinate Court.

The first respondent, Mr. **Mwansa Mwaba**, had sued the first appellant Ms. **Charity Mwale**, in the Wusakile Local Court over ownership of House No. 6 Ntana in Mindolo.

The second respondent, **Josephine Chomba**, had also sued the second appellant, **Humphrey Kalunga**, also over ownership of House No. 5 Ntana in Mindolo.

The Court found in favour of the plaintiffs (first and second respondents) and ordered the defendants (first and second appellants) to vacate the respective houses within 90 days.

The defendants appealed to the Subordinate Court but somehow never prosecuted the appeal which was eventually struck off. Hence the appeal in the High Court.

Before I could hear the appeal, the parties agreed to start de novo and to join ZCCM Investment Holdings (ZCCM-IH) to the proceedings as third respondent.

I shall continue to refer to the parties as appellants and respondents.

General Background

The action which commenced in the Local Court was over ownership of houses in a settlement commonly known as AMCO. The respondents alleged that they were dispossessed of their houses which were rented out by the appellants, without compensation. And that the new houses which were built in a new area commonly known as Ntana after their old houses in AMCO were demolished belonged to the respondents and not the appellants.

The Court below agreed with the respondents and ordered the appellants to surrender the houses and to vacate within 90 days.

Historical Background

According to the World Bank guidelines, reproduced in the third respondent's Bundle of Documents, AMCO settlement was

located adjacent to a residential area, Mindolo, on the northwestern periphery of the city of Kitwe, some 500m north of the Mindolo dam stream. It was approximately 5km from the centre of Kitwe. The settlement was within the Mindolo ward and under the administrative control of the Kitwe City Council.

The AMCO houses were originally built for contract labour by a company called AMCO in the 1960s. AMCO was a contractor of ZCCM Limited, the houses were on land now owned by Mopani Copper Mines (MCM). Mpelembe Drilling then used these buildings to house their workforce in the 1980s. Many of the houses were occupied by the original labourers, their families and descendants, who have assumed "*ownership*" status. Others had been sold or given to new residents by the original labourers. The sale and purchase of these houses, whilst done in exchange for money, was never concluded with an exchange of title or registration with the council. Tenants, as opposed to owners, were mostly residents in the homes.

The guidelines further highlighted that due to significant cracking of a few houses in AMCO, the project to resettle the residents was developed. The settlement of the AMCO community was to take place as part of the Copperbelt Environmental Project (CEP)

which aimed to address the environmental and social legacy of mining in the Copperbelt conducted during the years of state-owned enterprise under Zambia Consolidated Copper Mines (ZCCM) Limited, in light of current privatization efforts. The houses occupied by the AMCO community were demolished and new ones built which were given to the AMCO tenants as opposed to the landlords leading to the matter in hand.

Viva Voce Evidence

The first appellant Mrs. **Charity Mwale**, 46, (hereafter PW1) testified that in 2002 she was a resident of AMCO compound within Mindolo. That same year the residents were approached by census enumerators who asked for details like whether the occupant of the house was a tenant or landlord including the names. PW1 informed them that she was a tenant and the landlord was a Mr. Mwaba, now deceased. These details were entered in the Census Register.

PW1 testified that she did not know the first respondent, Mr. Mwansa Mwaba.

The Court heard that later Engineers from ZCCM-IH (third respondent herein) came and told the residents that the area had

copper deposits. The residents were told that ZCCM-IH would find alternative accommodation for them. PW1 was rented a house and ZCCM –IH paid their rentals for five years. After that she was later given a new house in Ntana.

It was her testimony that even the landlord the late Mr Mwaba was built a new two bedroomed house. She said she stayed peacefully in the new house until a year or so after Mr. Mwaba's death when the first respondent started troubling her over ownership of the new house. He sued her in the Local Court. She went to inquire with the third respondent and was advised that the house was hers. ZCCM-IH even vowed to testify in Court to that effect. To this end, she wrote to a Mr. Makumba and Mr. Musonda of ZCCM-IH.

It was her testimony that the residents who were not given houses were compensated by ZCCM-IH. When referred to page 3 of the first respondent's Bundle of Documents, PW1 testified that she occupied the house at No. 4 in AMCO compound. Her late husband Jonathan Mwale was the registered occupant and the Committee resolved to give him the house. When referred to page 4 of the Respondent's Bundle of Documents, PW1 testified that at entry No. 13 it showed that Augustine Mwaba was her landlord and he was compensated K24,344,640.00 (unrebased).

In relation to page 8 of the Appellant's Bundle of Documents, it was her testimony that her house was at No. 17 as indicated by her late husband's name. At entry No. 50 at page 12, it revealed that Augustine Mwaba, their landlord was given a two bedroomed house. PW1 testified that hers was a one bedroomed house.

The Court heard that in addition to the two bedroomed house, Augustine Mwaba was also compensated with money as alluded to, because he also owned a tavern within AMCO. Further, that the house they rented from Mr. Mwaba was not listed as per first Respondent's Bundle of Documents on the entry on Augustine Mwaba. She admitted that she was unable to recall the house number.

She further testified that she was surprised when the first respondent went over to her new house to forcibly evict her, claiming it was his house. In the process her goods were damaged and that the first respondent should compensate her.

It was her prayer that she be declared the legal owner of the house.

Under cross examination by the first respondent, PW1 testified that when she rented the AMCO house from the first respondent's father, she never encountered the first respondent. And that the new house which was given to the late Augustine Mwaba was connected to the one that she and her late husband rented in AMCO.

When asked to show proof that ZCCM-IH had advised that she was the owner of the new house, PW1 testified that the proof was the letter of offer though the same was not before court.

Under cross examination by the learned counsel for the third respondent, PW1 testified that she and her family had stayed in AMCO for 11 years i.e from 1998 to 2009.

She also testified that the people who were conducting the census wanted to know the number of people, who were the landlords and tenants etc. The census was conducted by CBU and ZCCM-IH. That before the census, ZCCM-IH called for a meeting sometime in 2002, the people were informed that the AMCO settlement was becoming dangerous because there was a big ditch which was about to collapse and that the houses were not safe. To this end, ZCCM promised to build new houses

elsewhere for the tenants and landlords. The people were also informed that copper had been found in AMCO.

Under further cross examination, PW1 testified that she used to live in a one bedroomed house in AMCO and a one bedroomed house was built for her family in Ntana.

That was the evidence on behalf of the first appellant.

The second appellant, **Humphrey Kalunga**, 37, hereafter PW2, testified that he owned House No. 5 Ntana in Mindolo. The house was given to him by ZCCM. Before that he was staying in AMCO where he rented a house from Bunda's mother. Later, after ZCCM gave him the house, he was sued in the Local Court by Bunda's mother's daughter, the second respondent herein. The second respondent was claiming the house.

When referred to page 9 of the Appellant's Bundle of Documents Entry No. 10, PW2 testified that his name was indicated under the column "*Name as contained in RAP*"- then his wife's name was entered as she was the one present while he (PW2) was in prison for an offence unrelated to the house.

He testified that the second respondent's name was under the column for "*absentee/present owner*".

PW2 further testified that the AMCO house was a one bedroomed house. And the new house was also one bedroomed and it was in the name of his wife Priscilla Banda.

Under cross examination by the second respondent, PW2 testified that at the time the exercise of building new houses began, he was living in AMCO, in the second respondent's house.

When cross examined by the third respondent's counsel, PW2 testified that it was correct to say that his wife, Priscilla Banda, owned the house. He said he went to prison in 2003 and came out in 2009.

PW2 also testified that the second respondent lives in Wusakile and never stayed in AMCO.

That was the evidence on behalf of the 2nd appellant. At the close of his testimony, the appellants closed their case.

The first respondent, **Mwansa Mwaba Kennedy**, 45, hereafter DW1, testified that his late father, Mr. Augustine Mwaba bought house No. C4 AMCO Compound on 3rd January 1995. This was from a Mr. John Mulenga.

The house was rented to Jonathan Mwale. During the time of the census, his late father was counted as the landlord for House No. A10 and he (DW1) as landlord for C4, both houses were in AMCO. After DW1 went back to school in Senanga, his father updated him on what was happening.

DW1 further testified that at the time of relocating the families, PW1 was not with her late husband Jonathan Mwale although she remained as the tenant of C4. The new houses were built at a site now called Ntana. PW1 was given house No. 6 Ntana but DW1 as the landlord was not given a house. He made a follow up with ZCCM, YMCA etc all to no avail.

According to DW1, other landlords were compensated but himself got nothing.

Under cross examination by first appellant's counsel, DW1 testified that his father had no title deed to the house at C4 but

there was a sale transaction as evidenced at page 1 of his Bundle of Documents.

Further, that they were informed that the AMCO settlement was curving in and that it was unsafe for people to stay there. He conceded that house No. C4 was bought for him by his father. He denied the assertion that his father did not register house No. C4. He insisted that his late father had four houses in AMCO namely numbers C4, G1, G2 and A10. He was built one house at 26 Ntana as compensation for three houses.

When further cross examined, DW1 testified that when his father realised that house No.C4 was not registered as his by ZCCM, he lodged a complaint but because of corruption, the house was hidden.

He denied the assertion that all documents showed that his late father was the landlord for all his houses.

He testified that this was not the case with house No. C4.

When cross examined by the third respondent's counsel, DW1 conceded that he was aware of the Steering Committee formed in

AMCO and that his late father was part of it. He said his father prepared the document at page 6 of his Bundle of Documents though the committee never recognized it.

He said the document at page 6 was proof that the house at C4 AMCO belonged to him.

He said his claim was for house No. 6 Ntana not C4 AMCO. When referred to page 7, DW1 testified that his name was not mentioned in the letter but the house No. C4 was appearing.

When told that the document showed that house No. C4 belonged to his late father, DW1 insisted that it was his.

When asked if he was aware that his father was compensated two fold, DW1 said the K24 Million plus compensation was for loss of the tavern which was part of G1 and G2 AMCO as revealed at page 4 of his Bundle of Documents.

He conceded that in addition to the K24 million plus his late father was built a two bedroomed house.

He further conceded that the AMCO land was ZCCM land sold to Mopani. He insisted though that the houses did not belong to Mopani.

DW1 when told that the World Bank had decided to compensate the occupants because landlords were not residents, DW1 said it was wrong for the World Bank to decide like that.

That was the evidence on behalf of the first respondent.

The second respondent, **Josephine Chama**, 39, hereafter DW2, testified that she bought house No. C10 AMCO from one Mwansa Pepesa in 1992. In 1995, she moved from AMCO to Wusakile and left her mother in charge of the house at No. C10. The house was put on rent and PW2 rented it. When the census was conducted, PW2 was registered as the tenant and herself as the landlord. DW2 attended the first meeting which was chaired by Mr. Kalowa from ZCCM.

The landlords were advised to let the tenants stay without paying rent during the demolition and construction exercise. In 2005, DW2 came to learn that ZCCM-IH was compensating some residents of AMCO. When she made follow up at the third

respondent's offices, she was referred to a Ms. Patricia Mwape who gave her K2,251.00 (rebased) as compensation. DW2 refused to get the money and demanded for a house. However, when the new houses were distributed, her tenant's wife was given the house at No. 5 Ntana. Her efforts to get a house yielded no results. She then decided to sue and won in the Local Court and Subordinate Court.

When cross examined by the second appellant's advocate, DW2 testified that at the meeting, the landlords were advised to let the tenants stay without paying rent because the tenants would continue being tenants once the new houses were built.

DW2 conceded that she was compensated and not given a house because she was married at the time and was not part of the census. She insisted that be that as it may, ZCCM would have located her after making proper inquiries.

When cross examined by third respondent's counsel, DW2 testified that she had no title deed to the AMCO house and that none of the other landlords had as well.

She admitted that the houses were built on Mopani land. She also admitted that she did not know that funders of the project required one to be in occupancy to be given a new house.

DW3, **Lucy Bunda**, 64, testified that PW2 was a tenant of DW2 at house No. C10 AMCO which is now No. 5 Ntana.

DW3 testified that she was the chairlady of AMCO residents and she had let DW2 rent her daughter (DW2)'s house. Later she heard that DW2 had been imprisoned for theft of copper and ZCCM gave the new house to his wife Priscilla Banda.

In response to cross examination by Mrs. Ndovi, DW3 testified that at the time of the census, she was living in AMCO.

That was the evidence on behalf of the second respondent.

The third respondent called two witnesses, the first one was **Michael Mwila Lwaile**, a Principal Agricultural Research Officer, (hereafter DW4). He testified that between 2004 and 2006, he was employed by GKW Consult, which was subcontracted by the third respondent to implement a project called Resettlement Action Plan which involved shifting people from AMCO compound

to other places. And he was physically involved in the implementation of the plan.

The Court heard that the action plan entailed moving people from AMCO because the houses were curving in and some were collapsing which was not safe for people to stay there. That the decision for resettlement was made jointly by the Government Republic of Zambia (GRZ) and the World Bank. The policy guidelines were developed by the World Bank which also provided the finances for construction of new houses. Even the guidelines as to compensation were worked by the World Bank.

The Court heard that people targeted for resettlement were those at risk who were the residents of AMCO.

DW4 further testified that according to clause 15(a) to (c) of the guidelines, a person with a title deed was entitled to compensation. That the absentee landlords of AMCO were compensated financially, for the houses they owned. And the prime concern was for the residents.

It was DW4's testimony that there were lots of disputes as the absentee landlords also wanted houses. Several conflict

resolution meetings were held as indicated by the Minutes on pages 233 and 249 of the third respondent's Bundle of Documents. At one meeting the second respondent who was an absentee landlord appeared and complained saying she wanted a house. The committee rejected her request as reflected on pages 246 and 247.

DW4 also testified that the first respondent's name was not appearing which entailed that he did not complain at the time the committee made its Report.

Under cross examination by the appellants' counsel, DW4 testified that the primary concern of the project was to safeguard lives of residents by taking them to safer places. That according to page 3 of the appellants' Bundle of Documents, last column at No. 10, the second respondent did not qualify for a house.

Under cross examination by the second respondent, DW4 testified that there was a criteria used to determine who got a house and who did not.

In response to a question from the Court, DW4 testified that the monetary compensation was the value of the house like the K2,000 plus which the second respondent was given.

He further clarified that actually the compensation amount was the loss of income. He said he was unable to explain if the K2,000 plus the second respondent was given was for yearly, monthly or quarterly rentals.

When cross examined by the first respondent, DW4 testified that the census was conducted once. He said that GKW did not have power to alter the report.

When referred to page 80 of the third respondent's Bundle of Documents, entry No. 12, DW4 read the entry as *"Musonda Mwansa Mwaba, house No. K14, Chamboli"*.

When referred to page 11 of the Bundle of Documents entry No. 28, DW4 testified that Mr. Chanda was given a two bedroomed house, although he was not staying in AMCO because he lived there when the area was declared a disaster but had moved out before the resettlement. The Committee took it that he qualified. DW4 explained that a resident was someone who was present in

AMCO at the time as stated in clause 2.3.1 at page 25 of the third respondent's Bundle of Documents.

When asked if a person who was counted in the census was considered a resident, DW4 admitted.

When re-examined, DW4 testified that it would be difficult to say that Musonda Mwansa Mwaba and Mwansa Mwaba were the same.

The third respondent's second witness was one **Joseph Makumba**, 57, the Chief Executive Officer (CEO) of Busenge Environmental Services, a subsidiary of ZCCM-IH.

DW5 informed the Court that he was employed by ZCCM in 1981 and continued with ZCCM-IH after the transition, he worked as an Environmental Manager.

DW5 testified that the AMCO project started in 2001. The Court heard that AMCO was a camp built by AMCO which was contracted to sink Mindolo Mining Shaft. It was within a caving area and thus, ordinarily, not a residential area. However, being a temporary camp, it was allowed to be residential. And thus AMCO

built hostels for its workers. This was in the early 1960s or late 50s. The camp was located between the ventilation shafts with tunnels beneath the settlement.

DW5 further testified that after completion of the assignment, the camp should have been destroyed but this was not done. People took advantage and moved into the hostels. After Mopani took over ZCCM, it discovered that there was copper at AMCO and there were cracks as the ground opened up due to the caving.

Mopani approached ZCCM-IH to move the people. Then the government and the World Bank were also approached. A World Bank loan of US Dollars 40 Million was obtained for the project and others also on the Copperbelt. A Resettlement framework was developed by the negotiating team of which DW5 was a member.

It was his testimony that two types of compensations were formulated, one for residents (tenants) and the other for absentee landlords. DW5 disclosed that this was so because no one owned the hostels, nor did any have legal rights. DW5 testified that the guidelines also provided that those without title deeds could only be resettled. The residents were to be resettled and built houses

because they were in actual danger. The Committee took it that if one lived in a one roomed house, then a one roomed house would be built for them, if the old house was two roomed, then a new two roomed was built respectively.

DW5's testimony was that absentee landlords were compensated with a year's rentals. After complaints, a Conflict Resolution Committee was formed, this was before the houses were built or compensation paid out.

He said the list of people who complained was at pages 246 to 249 of third respondent's Bundle of Documents. And that the first respondent's name or that of his father were not on that list which entailed that they had not lodged a complaint.

Under cross examination by the appellant's counsel, DW5 testified that according to page 6, clause 15(a), the legal owner of the land was ZCCM. The houses were given as gifts to the residents of AMCO which was the sole criteria.

Under cross examination by the first appellant's counsel, DW5 testified in relation to one Kenneth Mutale when referred to page 240, case No. 7 of the respondent's Bundle of

Documents and page 12 of the appellants' Bundle of Documents, entry No. 48 that, he was a son to the landlord who was a tenant of AMCO. And that although his parents died in 1991 and 1995 and the project began in 2001, the Conflict Resolution Committee decided that way in accordance with information available from both sides.

When further cross examined in relation to PW1's late husband, Jonathan Mwale, DW5 testified that the deceased was a tenant and was present at the time and the recommendation was that he be built a new house.

DW5 conceded that the Residents Development Committee had suggested that the landlord be given the new houses which the tenants could rent but this was neither agreed upon nor adopted.

It was his testimony that this was because AMCO was a unique situation as the landlord did not own the properties and some had no documents. The Committee also felt that the residents who had nowhere to go would be affected.

When cross examined by the second respondent, DW5 testified that the tenants were given houses after a census.

In response to a question from the Court, DW5 testified that the landlords were compensated at one year rentals in accordance with the policy.

Under further cross examination by the second respondent, DW5 testified that no one died when the houses cracked but insisted that the curving area was not a residential area.

That was the evidence on behalf of the third respondent.

Analysis of the Evidence And Findings of Fact:

The evidence of the appellants that they were tenants of the respondents in AMCO stands uncontroverted. The issue that falls for determination, in my view, is whether the respondents were the legal owners of the demolished houses. If so, whether it follows therefore that the new houses at Ntana belong to them.

It was not disputed that the AMCO land belonged to ZCCM and after privatization, Mopani took over ownership. According to clause 3.5 of the Resettlement Action Plan for AMCO at page 171 of the 3rd respondent's Bundle of Documents, ZCCM held land under statutory leaseholds of 99 years on all its mine licence areas.

According to clause 3.5.1. though the AMCO land belonged to Mopani, ZCCM-IH was responsible for planning and implementation of the resettlement program.

It is a fact that the respondents had no title to the land. In fact it was their testimony that they bought the said houses from previous owners. In the case of **LUMANYENDA AND ANOTHER V. CHAMUKA AND OTHERS [1]**, the appellants claimed title by prescription as occupiers of land to which the third respondent said it had a certificate of title. At the trial, the respondent produced a certificate of title under a lease and upon that evidence, the Court found in their favour on the basis that title by prescription does not apply to leasehold land.

On appeal, the appellants argued that they had adversely possessed the land. The third respondent argued that in terms of **Section 35 of the Lands and Deeds Registry Act**, adverse possession cannot be acquired against land to which there is a certificate of title. The Supreme Court agreed with the respondent. This position was restated by the Supreme Court in the recent case of **DAVIES HOWES AND OTHERS V. BETTY BUTTS**

CARBIN (Sued in her capacity as Trustee of the Estate of the late DAISY BUTTS) [2].

It is noted that the respondents and others before them had been in possession of the AMCO houses for quite some time. It is equally noted that despite them not having title to the land, the owners of the land were aware of their presence hence the resettlement project.

In the East African case of **ABDALLAH V. MOHAMEDI AND OTHERS [3]**, the Court of appeal observed that the tribal unit which had been in occupation of government land without title for more than 50 years and could not be said to be trespassers as they could not have gone unnoticed for such a long period.

The Court held that they occupied the land on an implied license until the license was terminated by the owner of the land.

The same could apply to the case in casu. Further, I am of the considered view that both the landlords and the tenants herein were squatters or licensees. In the case of **NAMUNG'ANDU V. LUSAKA CITY COUNCIL [4]**, though a High Court decision, it was held that:

“squatters build at their own risk and if the owners of the land withdraw their permission or licence

or if they decide to demolish a structure built in the absence of any permission or other lawful relationship, the squatters losses' though very much regrettable are, not recoverable in a court of law".

Further, in **HUMANE V. D.P. CHINKULI [5]**, where both the plaintiff and the defendant were squatters, it was elucidated that a squatter is a person in mere adverse possession. And that the position in law was that his want of title dis-entitles him to any remedy in a court of law.

On the facts of this case, it is clear both the landlords (respondents) and the tenants (appellants) were squatters. The third respondent was under no legal obligation to compensate them or even resettle them by building the new houses. These houses were actually gifts to the AMCO residents in actual occupation.

As noted, the landlords were squatters or licensees of the AMCO properties. They were in adverse possession and as already determined, and in accordance with section 35 of the Lands and Deeds Registry Act, adverse possession does not apply to

leasehold land such as the ZCCM/Mopani land in AMCO settlement.

It is trite law also that a licensee or even a squatter has no proprietary rights and cannot pass on any such rights. Thus the previous occupiers who sold to the respondents did not pass on any title or proprietary rights to the respondents' over the houses in question. The new houses therefore, belong to the appellants who were gifted by the third respondent. The landlords did not have any proprietary rights to the demolished houses in AMCO and therefore, cannot claim the new houses.

If anything, the compensation of one year's rentals by the third respondent was a benevolent gesture as well. The compensation and building of new houses was gratuitous and the third respondent had no legal obligation to do so.

Conclusion

In sum, I find that the appellants are the lawful owners of the houses in Ntana, which were given to them as gifts by the third respondent. The respondents were squatters or licensees in adverse possession. Neither they nor the previous occupiers who sold them the houses had title or proprietary rights as the land

belonged to ZCCM/Mopani who had title to the land under a 99 year lease. It is trite law as provided in section 35 of the Lands and Deeds Registry Act that adverse possession does not apply to leasehold land such as the ZCCM/Mopani land where the AMCO settlement was.

Further, according to sections 33 and 34 of the same Act, a certificate of title is conclusive evidence of ownership of the land and can only be cancelled where there is fraud or impropriety in its acquisition.

There was no evidence to suggest that there was cancellation of the ZCCM/Mopani title for fraud or otherwise. Further, the houses were built by AMCO not the respondents or the previous occupiers who sold to them. I find no merit in the respondents' claims. I find that the new houses belong to the appellants.

Considering the circumstances of this case, I order each party to bear own costs.

Leave to appeal is granted.

Dated this 7th day of **April**, 2014

.....
J.Z. Mulongoti
HIGH COURT JUDGE

IN THE HIGH COURT FOR ZAMBIA

HKSA/01/2014

AT THE SOLWEZI DISTRICT REGISTRY

HLODEN AT SOLWEZI

(CRIMINAL JURISDICTION)

B E T W E E N:

CHARLES NGOMI

VS

THE PEOPLE

Before the Honourable Justice Mrs. J.Z. Mulongoti

In Open Court on the 18th day of February, 2014

For the Accused : Mr. E. Mazyopa, Legal Aid Counsel

**For the People : Mr. K.I. Wazuzimba, Senior State
Advocate**

J U D G M E N T

1. CASES REFERRED TO:

1. *LUPUPA VS. THE PEOPLE [1977] ZR 38*
2. *TEPER VS. R [1952] ALL ER 452*
3. *MUTAMBO AND FIVE OTHERS VS. THE PEOPLE [1965] ZR 15*
4. *SHAWKI FAWAZ AND ANOTHER VS. THE PEOPLE [1995-97] ZR 3*
5. *CHOMBA VS. THE PEOPLE [1975] ZR 245*

2. LEGISLATION REFERRED TO:

1. *Penal Code, Section 358, Chapter 87 of the Laws of Zambia*
2. *Criminal Procedure Code, Sections 191 and 192, Chapter 88 of the Laws of Zambia*
3. *Forfeiture of Proceeds of Crime Act, Sections 71(1) and 71(1) Subsection (2), Act No. 19 of 2010.*

3. OTHER WORK REFERRED TO

1. *Archbold Criminal Pleadings: Evidence and Practice, 2007 Edition*

The appellant was convicted by the Magistrate of the First Class at Solwezi of one count of Unlawful Possession of Forged Bank Notes and one count of unlawful possession of Forged Blank Bank Notes **contrary to section 358 of the Penal Code**. And one count of Unlawful Possession of Property believed to be proceeds of crime contrary to **section 71(1)(a) of the Forfeiture of Proceeds of Crime Act No. 19 of 2010**.

I shall refer to the appellant as the accused as he was in the court below.

The particulars of offence in the first count, alleged that the accused on the 26th day of November 2012, at Solwezi in North Western Province of Zambia, knowingly and without lawful authority did possess 65 x 100 United States Dollars forged bank notes.

In the second count, it was alleged that on the 26th day of November 2012, at Solwezi in North Western Province of Zambia, the accused knowingly and without lawful authority did possess 8,500 blank papers cut to the size of bank notes.

In the third count, it was alleged that the accused on dates unknown but between the 9th day of September 2012 and the 26th

day of November 2012 at Solwezi in North Western Province of Zambia, did possess a motor vehicle namely a Toyota Prado Land Cruiser, registration number ACM 8510, property reasonably suspected to have been acquired through proceeds of crime.

The accused pleaded not guilty before the trial Magistrate.

The prosecution led evidence from four witnesses.

PW1 and PW2 both Investigations Officers with the Drug Enforcement Commission (DEC) testified that they were tipped by a member of the public to the effect that the accused was dealing in suspected counterfeit currency and suspected illegal substances.

This led to a search at the accused's residence in Kazomba compound of Solwezi. They recovered two suspected elephant tusks, a tail found under the bed, a red and white cooler box containing suspected 100 USD counterfeit notes found in the sitting room and also blank pieces of paper cut to the size of bank notes found in the television display unit.

The court heard that the search was conducted in the presence of the accused and his wife.

According to PW2 the seizure of the items was done after the accused admitted to owning the bank notes.

In cross examination, PW1 testified that when asked where he got the USD 100 notes, the accused said he had bought them from an Angolan and after cleaning the said notes used them to better his life.

PW3, the **Detective Seargent** of Anti Robbery Squad at Solwezi Central Police had accompanied the DEC officers when they conducted the search at the accused's residence, his testimony was similar to that of PW1 and PW2.

PW4 a **Senior Investigations Officer** in the Anti Money Laundering Section at DEC testified that he was handed the 65 x 100 USD notes and the 8,500 blank pieces of paper cut to the size of bank notes.

PW4 referred them to a Mr. Charles Hamalala, an Investigations Officer of Bank of Zambia (BOZ) who examined the notes and

prepared a Report in which he found that the notes were counterfeits and were not issued by BOZ.

PW4 further testified that after interviewing the accused, he revealed that he owned a Toyota Prado. And that he had bought it from money raised from selling precious stones imported from Angola.

PW4 also testified that the accused failed to establish that he had acquired the vehicle legally and it was seized.

In cross examination, PW4 testified that he did not personally analyse the bank notes but this was done by the BOZ Specialist. Under further cross examination, PW4 testified that the accused had failed to produce documentation to support his line of business.

When called upon to defend himself, the accused testified on oath and called his wife as a witness. His testimony was that on 26th November 2012, around 01:00 am, his home was raided by seven people including two who were armed.

They woke up everyone in the house and made them sit in one room. The other men started going through the house and came

out of the bedroom with two cell phones. After that, they picked him and at the Police Station told him that he had stolen a motor vehicle from Chingola.

He said they never showed him a search warrant when they searched his premises. He corporated with them for fear of being killed.

In cross examination, he said he heard the prosecution witnesses testify that they had found two tusks and an elephant tail in his bedroom.

Further, that he did not challenge them in cross examination because he knew he would be given an opportunity to speak.

He said the officer entered his bedroom but denied that they came out with a red cooler box.

He also testified that he was a small scale miner dealing in copper. He also produced a licence in the name of CALTAGE stating the company was owned by a group of people.

In re-examination, the accused told the court that when he signed the warn and caution statement, he was not feeling well.

The accused's wife testified as a witness and her testimony was similar to that of the accused.

After analyzing the facts, the trial Magistrate found as a fact the 65 x 100 USD were found in the accused's home. And that the same were forged notes as stated in the Report. She also found as a fact that the 8,500 blank pieces of paper were found in the red cooler box at the accused's home. She also found as a fact that the Toyota Prado belonged to the accused.

The trial Magistrate considered the definition of Forgery under **sections 342 and 346 of the Penal Code.**

She further found that the ingredients of the offence of being in unlawful possession of forged bank notes or currency notes as provided in section 358, were:

- (i) That the notes were currency pursuant to section 346
- (ii) That the currency notes were forged as outlined in the definition in section 342
- (iii) That they were found in possession of the accused

- (iv) That the accused had no lawful authority or excuse to have the currency notes in his possession

The court accepted the testimonies of the prosecution witnesses and the Report, authored by a Mr. Charles Hamalala of BOZ. She found that the report revealed that the currency notes were not genuine and thus were confirmed as forged or counterfeits.

She noted that the accused had said in cross examination that he had never seen the officers who bombarded his home and had never differed with any of them before.

According to her, she found it amazing that the officers from DEC and Zambia Police would just wake up one day and decide to pick a house in Kazomba compound out of all the houses in Solwezi, prepare a search warrant and pounce on the accused and bring into court a cooler box containing counterfeit 100 USD and cut up blank pieces of paper to the size of bank notes and allege that the same was found in the home of the accused.

The court went on to state that this seemed too far fetched even for DEC officers to fabricate and thus she firmly believed that the

cooler box was found in the home of the accused. She accordingly found him guilty on counts one and two.

Regarding the third count, the trial Magistrate noted that the court was not given an opportunity to view the same motor vehicle as it was submitted that it was not in a condition to be driven to the court premises and had to be towed from the accused's home to the police.

The Magistrate noted the accused and DW1's testimony that he purchased the vehicle after selling maize to Food Reserve Agency (FRA) and that their son O'Brien who works at Lumwana gave the accused K25,000 towards the purchase of the vehicle.

The Magistrate reasoned that she would have expected the accused to provide documentation because she believed FRA made payment through the Bank and also to have called O'Brien as a witness given that Lumwana was only 90 kilometres from Solwezi.

Further that the copy of the mining licence in the name of CALTAGE, was not an original document and did not bear the names of the accused. The court then refused to accept that the company belonged to him.

She accepted the prosecution witnesses' testimonies and believed that the Toyota Prado was indeed obtained using proceeds of crime. The accused was accordingly found guilty and convicted count three as well.

He was sentenced to two years imprisonment with hard labour in the first count, one year imprisonment with hard labour in the second count and two years imprisonment with hard labour suspended for one year in the third count. And ordered that the Toyota Prado, registration number ACM 8510 be forfeited to the State.

The appellant raised four grounds of appeal against conviction that:

The learned trial court erred both in law and fact when:

- (i) It held that the notes in issue were counterfeit bank notes in the absence of proof beyond reasonable doubt to that effect.
- (ii) It failed to address its mind to the defence raised by the appellant and ordered forfeiture of the motor vehicle Toyota Prado Registration ACM 8510 thereby shifting the burden of proof to the appellant.
- (iii) It convicted the appellant in the absence of proof

- (iv) It concluded that the red cooler box found in the house of the appellant belonged to him in the absence of proof to that effect.

At the hearing of the appeal, the appellant's learned counsel argued in relation to ground one that the trial Magistrate failed to note and appreciate that the prosecution had failed to discharge the burden of proof beyond reasonable doubt by failing to call the expert witness.

Mr. Mazyopa argued that the expert Mr. Charles Hamalala, whose evidence goes to the root of the charge should have been called to demonstrate how he arrived at his conclusion. Archbold Criminal Pleadings Evidence and Practice, was cited as authority that:

An expert witness should state the facts on which his opinion is based, such facts should be proved by admissible evidence. Once the primary facts on which his opinion is based are proved, he is entitled to draw on the work of others in his field of experience as part of the process of arriving at a conclusion. When an expert does draw on the work of others, he should refer to such material so that the cogency and probative value

of his conclusion can be tested and evaluated by reference to it”.

Mr. Mazyopa further contended that the expert was not called to explain the procedure he took to make his findings. The case of **LUPUPA VS. THE PEOPLE [1]**, was cited where it was held that:

“Section 191 of the Criminal Procedure Code was intended to obviate the necessity to call experts to prove merely formal matters. But should not be used as a substitute for verbal evidence when the actual content of the report goes to the very root of the charge. In any case, where the evidence is more than purely formal, the expert should be called”.

He argued that PW4 should not have produced the Report but the expert because the trial Magistrate based her finding that the notes were counterfeits or forged on the expert Report. The court was urged to allow ground one.

In ground two, the learned counsel for the appellant argued that the expert Report upon which the trial court based its finding was hearsay.

He cited Archbold again that:

“the basic common law rule is that hearsay evidence is, whether oral or written, inadmissible in criminal proceedings. The mere fact that the statement was made on oath does not render the statement admissible as evidence of the truth of its contents”.

The case of **TEPER VS. R. [2]** was also cited that:

“the rule against hearsay is fundamental. It is not the best evidence and is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross examination and the light which his demeanor would throw on his testimony is lost”.

The case of **MUTAMBO AND FIVE OTHERS VS. THE PEOPLE [3]** was also cited.

Mr. Mazyopa argued that the trial Magistrate premised her judgment upon that Report and therefore the prosecution did not prove its case beyond reasonable doubt.

In ground three, it was argued that by ordering forfeiture of the motor vehicle, the Magistrate shifted the burden of proof to the accused.

That the vehicle was a shell which could not have been purchased out of proceeds of crime. That the Magistrate acknowledged that the vehicle could not move but did not know how it appeared.

In ground four, it was argued that the finding that the red cooler box belonged to the appellant was a misdirection.

The learned defence counsel argued that the cooler box was found in the sitting room and not in the appellant's bedroom. It could belong to any one of the appellant's family, a fact the prosecution did nothing to exclude. That the appellant was convicted because he owned the house where the cooler box was found.

The Court was urged to consider that people living in the same house keep things sometimes without the knowledge or authority of the owner of the house. The court was urged to quash the conviction and acquit the appellant.

The Court was also urged to interfere with the sentences and consider substituting lighter sentences.

The learned Senior State Advocate argued in relation to grounds one and two that the Report from Hamalala and its contents cannot amount to hearsay. And was duly tendered by the Arresting Officer.

That according to Part 5 of the Criminal Procedure Code, the court of its own volition could call the expert and the Defence itself could do so. That section 191(a) referred to by the appellant's counsel related to medical evidence.

Further, that section 192 was more appropriate in the instant case. And that evidence of an Analyst such as Hamalala maybe admitted into evidence without the Analyst being called.

Mr. Waluzimba amplified that the expert evidence is a mere guide and not as a substitute for the court to draw its own conclusion on the evidence before it. The case of **SHAWKI FAWAZ AND ANOTHER VS. THE PEOPLE [4]** was cited in support.

Regarding ground three, it was argued that the lower court did not shift the burden of proof.

That the trial court merely took into account that the motor vehicle was purchased using lawful funds from the maize sale as well as mining business. And that the Magistrate took judicial notice of the notorious fact that FRA made payments through the Bank.

Furthermore, the mining licence presented before court did not show any relationship to the appellant.

Therefore, the court merely placed the evidential burden on the appellant and not the burden of proof.

According to the learned Senior State Advocate, the **Forfeiture of Proceeds of Crime Act No. 19 of 2010** was a unique piece of legislation intended to ensure that no person or body corporate derived benefits from criminal conduct. That the key element in section 71 (1) was '**reasonably being suspected**'.

Accordingly there was evidence from DEC officers that they received information to the effect that a businessman in Kazomba compound was suspected of dealing in counterfeits and other

illegal substances. And it was upon that information that the appellant was nabbed, tried and convicted. And all the prosecution needed to show was reasonable suspicion which they did.

The learned State Advocate further submitted that under section 71 (1) subsection (2), the Act provided for a defence. It was for the appellant to have satisfied the court that the motor vehicle was not bought using proceeds of crime.

The appellant should have shown how he acquired the motor vehicle in issue. He could have produced a document from FRA to show that he received payment from there. And his son who allegedly contributed to the purchase of the vehicle could have been called. And the burden of proof never shifted. And failure by the court to view the vehicle was not fatal and that the issue was not whether the vehicle existed but whether it was a proceed of crime. Accordingly that ground three be dismissed.

In ground four, it was submitted that the issue of the cooler box hinged on credibility. Who between the prosecution witnesses and the accused and his witness was more credible.

Hence, the court's amazement and her decision to resolve the issue on who was more credible. She found that the prosecution witnesses were and she cannot be faulted.

Further, that the submission by the appellant's counsel that others could have owned the cooler box was inappropriate because he denied its existence. Accordingly, ground four be dismissed as well.

In response, Mr. Mazyopa argued that the evidential burden was discharged by producing the mining licence and to require more was shifting the burden.

Further, that the appellant told the Arresting Officer of his son and it was for the police to investigate that. And that failure to do so was a dereliction of duty.

Regarding the BOZ Report, learned counsel argued that it would have even been done by an affidavit sworn by Mr. Hamalala. And that there was a similarity with medical evidence without which the charge fail.

The court was urged to allow the appeal.

The issue in relation to grounds one, two and four is whether or not on the evidence available the accused was found in unlawful possession of counterfeits or forged notes whether filled up or in blank without authority.

In relation to ground three the issue was whether or not the accused possessed property reasonably suspected to have been acquired through proceeds of crime.

With respect to grounds one, two and four, the question is whether the learned Magistrate erred in law and fact when she found the accused guilty of being in unlawful possession of 65 x 100 USD counterfeit notes and 8,500 blank papers cut to the size of currency notes.

The learned trial Magistrate accepted the prosecution testimonies that the said notes were recovered at the house of the accused in the TV display unit and a cooler box respectively.

The Magistrate also considered the expert evidence via a report from BOZ, who analysed the said notes and confirmed them to be counterfeits.

I have considered the arguments by the appellant's counsel. I am unable to agree with him that failure to call the expert resulted in the prosecution's failure to prove its case beyond reasonable doubt.

As argued by Mr. Waluzimba, section 191(a) of the Criminal Procedure Code relates to medical evidence.

I also concur that section 192 is more appropriate in the matter at hand. The provision is clear that such a document when adduced in evidence, the court, in its discretion may summon the author or may let him answer to some written questions. This is at the court's discretion. In casu, the court decided to use her discretion and not call the expert from BOZ.

Further, the provision is also clear that the accused can summon such a witness to give oral evidence as argued also by Mr. Waluzimba.

I am thus unable to accept Mr. Mazyopa's argument that the lower court's reliance on the report was tantamount to relying on hearsay evidence.

It is trite law further that the Court is not bound by the Report of any expert. The Court considers the expert's Report or testimony as an opinion which can be accepted or not based on the evidence before it.

As canvassed by Mr. Waluzimba, the expert Report was a mere guide and not as a substitute for the Court to draw its own conclusion on the evidence before it. Clearly, the lower court considered all the evidence available before her including the Report to convict the accused.

It was clear that the 65 x 100 USD notes and the 8,500 blank paper cut into sizes of currency notes were found in the house of the accused. The court found the prosecution witnesses to be more credible and accepted their testimonies.

It is further noted that at the trial, the accused denied any knowledge of the cooler box with the counterfeits. It is strange that he is now saying it could belong to any member of his household.

It is equally strange that learned counsel argued that the prosecution did nothing to exclude the possibility of other members of the appellant's family owning the cooler box.

It is trite law that the job of the prosecutor is that of prosecuting and not to defend the accused. If anything, it was up to the accused to show otherwise.

The prosecution evidence was that they were tipped about the accused's unlawful possession of the counterfeits or forged currency notes. They raided his home and confirmed the report. The accused was given an opportunity to defend himself and he should have shown that possibility, which he never did as aforementioned he denied that the said items were recovered from his home.

Accordingly, grounds one, two and four are unsuccessful.

Regarding ground three, the issue is whether the learned Magistrate misdirected herself in law and fact when she ordered forfeiture of the Toyota Prado to the State for the reason that it was acquired through proceeds of crime.

I perused section 71 (1) (a) of the Forfeiture of Proceeds of Crime Act No. 19 of 2010, it is couched thus:

“As person who after the commencement of this Act, receives, possesses, conceals, disposes of or brings into Zambia any money, or other property, that may reasonably be suspected of being proceeds of crime commits an offence and is liable upon conviction to-

**(a) if the offender is a natural person,
imprisonment for a period not exceeding
five years”.**

The question is, was it reasonable for the prosecution to suspect that the Toyota Prado belonging to the accused was acquired through proceeds of crime?

After analyzing the evidence before her, the learned trial Magistrate agreed. She found that the accused failed to negative this suspicion.

And as submitted by Mr. Waluzimba, the Act is a unique piece of legislation because the prosecution was simply required to show reasonable suspicion. It was therefore, for the accused to show that the suspicion was unreasonable by providing evidence as

canvassed by Mr. Waluzimba. In fact, the accused attempted to do so by saying firstly, that he was a small scale miner. He produced a mining licence in the name of CALTAGE.

He also testified that he had sold some maize to FRA for which he was paid and that his son O'Brien had contributed K25,000 towards the purchase of the said Toyota Prado.

The trial Magistrate analysed this evidence and rejected it. She reasoned that the accused's name did not appear on the mining licence and no evidence was adduced to show his connection to the said company.

The Magistrate reasoned also that it was not sufficient to simply state that he was paid by FRA without showing any proof of the payment because she took it FRA as an institute made payments through the bank. Lastly, she reasoned that the accused should have called O'Brien as a witness to confirm that he indeed gave his father K25,000 towards the purchase of the Toyota Prado.

The Magistrate after rejecting the accused's evidence accepted that the suspicion by the prosecution was reasonable and ordered

forfeiture of the Toyota Prado to the State as provided by section 71(1) of the Act.

I am of the considered view and as buttressed by Mr. Waluzimba that the Magistrate was on firm ground. The prosecution adduced evidence to show that the accused was involved in illegal activities and they showed reasonable suspicion that the Toyota Prado was acquired through proceeds of crime.

There was evidence from PW1 in cross examination that when asked, the accused said he bought the 65 x 100 USD notes from an Angolan and after cleaning them he used them to better his life. PW4 testified in cross examination that the accused told him that he bought the Toyota Prado after selling precious stones imported from Angola. This evidence was unchallenged.

Further, as contended there is a defence in section 71(1) subsection (2) and it cannot be said that the burden of proof shifted but as Mr. Waluzimba ably submitted, the appellant needed to provide evidence, which he attempted to do, but was unsuccessful as noted above. Ground three is therefore, equally unsuccessful.

Regarding the sentence, it is trite law that the courts would interfere if the sentence comes to it with a sense of shock. The accused was sentenced to two years imprisonment with hard labour in count one, one year imprisonment with hard labour in count two and two years imprisonment with hard labour suspended for one year in the third count. These sentences do not come to me with a sense of shock.

The only thing I noted is that the Magistrate did not state if the sentences were to run concurrently or consecutively.

I, therefore, will substitute the sentences only to state that the sentences are to run concurrently since they were committed almost at the same period and are interrelated. I am guided by the case of **CHOMBA VS. THE PEOPLE [5]**

In sum, the appeal against conviction is unsuccessful and is accordingly dismissed. The appeal against sentence succeeds to the extent herein stated with effect from today since he has been on bail

Leave to appeal is granted.

Dated this **18th** day of **February**, 2014

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J.Z. Mulongoti
HIGH COURT JUDGE