

IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA

(Civil Jurisdiction)

2010/HP/955

IN THE MATTER OF: ARTICLE 28(1) OF THE CONSTITUTION
OF ZAMBIA OF THE LAWS OF ZAMBIA.

AND IN THE MATTER OF: RULE 2 OF THE PROTECTION OF
FUNDAMENTAL RIGHTS RULES, 1969.

AND IN THE MATTER OF: ARTICLES 11 (b) 19 (1) AND 23 (2) OF
THE CONSTITUTION OF ZAMBIA CAP 1
OF THE LAWS OF ZAMBIA.

BETWEEN:

KELVIN HANGANDU

PETITIONER

V

LAW ASSOCIATION OF ZAMBIA

RESPONDENT

Before the Hon. Mr. Justice Dr. P. Matibini, SC, this 12th day of May, 2011.

For the Petitioner: In person

For the Respondent: Mr. R. Simeza with Mr. K. Chenda of Messrs Simeza Sangwa and Associates.

RULING

Cases referred to:

1. *Jones v National Coal Board [1957] 2 ALL E.R. 155.*

2. *Zinka v Attorney General* (1990-1992) Z.R. 73.
3. *Zulu v Zambia Electricity Supply Corporation Limited (ZESCO)*, (2005) Z.R. 39.
4. *Mulane v Central Hanover Bank and Trust Company* 339 US 306, 314, 705, ct, 652, 657 (1950).

Legislation referred to:

1. *Constitution of Zambia, Cap 1, Articles 11 (a) and (b), 18 (2) (e), 19 (2) and 23 (2).*
2. *Protection of Fundamental Rights Rules Statutory Instrument Number 156 of 1969.*
3. *Law Association of Zambia Act, Cap 31, s.4 (1), and Rule 27.*
4. *High Court Act, Cap 27, Order V, Rule 24.*

Works referred to:

1. *Bryan A Gardner, Ed, Blacks Law Dictionary, 18th Edition, (St Paul Minnesota: West Publishing Company, 1999).*
2. *Muna Ndulo and John Hatchard, The Law of Evidence in Zambia: Cases and Materials (Lusaka: Multimedia Zambia, 1991).*

This matter was commenced on 7th September, 2010, by way of a petition pursuant to Rule 2 of the Protection of Fundamental Rights Rules Statutory Instrument number 156 of 1969. The petitioner averred as follows: the petitioner is an advocate of the High Court of Zambia, and a member of the Law Association of Zambia. The respondent is a Law Association constituted by an Act of Parliament to advance the professional interests of advocates in Zambia. Among the respondent's statutory objects are, in terms of section 4 (1) of the Law Association of Zambia Act, the advancement of the rule of law, and the rights and liberties of individuals.

Contrary to the preceding objects, the petitioner contends that the respondent has willfully set out and operated its affairs in a well crafted discriminatory manner that has excluded the petitioner from participating in the professional affairs of the Association, by the mere fact that the petitioner is a member of the Seventh Day

Adventist Church (S.D.A). Among the fundamental doctrinal beliefs of the S.D.A., is the immutable biblical command enshrined in the fourth commandment, in the Old Testament, of the Holy Bible in the Book of Exodus, chapter 20, verses 8 – 11, that the seventh day of the week is the Sabbath of the Lord God, and must be sacredly observed between Friday sunset and Saturday sunset, through public worship and the complete abstention from any form of menial work and secular activity, such as participation in the regular and periodic business meetings customarily conducted by the respondent on Saturdays, on the occasion of any of its formal meetings, including, but not limited to the association's Annual General Meeting(AGM).

The petitioner further contends that by long standing custom and usage, the respondent has routinely held its AGM on a Saturday to conduct its elections. The respondent's meetings have continued despite the petitioner's formal written complaints that his fundamental rights to religious liberty and freedom faith based segregation should be upheld by the Association's alteration of the days of convening the meetings, so that they are not held on the holy Sabbath. The petitioner therefore prays:

- (a) That it may be determined and declared that his fundamental rights to freedom of conscience and not to be discriminated against have been contravened, contrary to Articles 11 (a), 19 (1), and 23 (2) of the Constitution of Zambia;
- (b) That it may be determined and ordered that the association whether by itself, its agents, or servants or otherwise howsoever be restrained and an injunction be granted restraining it from holding or transacting any of its formal meetings during the Sabbath i.e. between Friday sunset and Saturday sunset;
- (c) That the Court may make such order, issue such writs, and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the fundamental rights provisions allegedly violated in relation to the petitioner, pursuant to Article 28 (1) of the Constitution of Zambia;
- (d) Costs; and
- (e) That the petitioner may have such further or other relief as may be just.

On 28th October, 2011, the respondent filed its answer to the petition. In the answer, the respondent admitted that it is constituted by an Act of Parliament to promote the interests of Legal Practitioners in Zambia. And to advance the rule of law, rights and liberties of individuals. The respondent however denies that it has conducted its affairs in a discriminatory manner that has resulted in excluding the petitioner from participating in the affairs of the respondent on the ground that he is a member of the S.D.A.

The respondent contends that the practice of holding its AGM and other meetings on Saturdays has been in place from time immemorial, and even before the petitioner's professed conversion to S.D.A. Thus the respondent denies that the petitioner's fundamental right to religious liberty and freedom from faith based segregation, if such a freedom exists, have been infringed upon considering that the holding of the meetings on Saturday had nothing to do with any member's religious beliefs, but due to the convenience of the day to the majority of members who attend such meetings. In any event, the respondent contends that the petitioner can nonetheless participate in the voting activities of the respondent by sending a proxy under rule 17 of the respondent's Electoral Rules.

Consequently, the respondent denies that it has contravened Article 11 (a) of the Constitution of Zambia because the petitioner has continued to enjoy his freedom of life, liberty, to security of the person, and protection of the law. Further, the respondent contends that the petitioner has not been coerced into or suspended from participating in his preferred religious activities held on Saturdays. Furthermore, the respondent denies that it has contravened Article 19(1) of the Constitution because the petitioner has since his conversion continued to enjoy his freedom of conscience and religion by attending his church services on the day in question, despite the secular nature of the respondent's AGM. Thus the respondent contends that the holding of any of its meetings on Saturdays has no link to the exercise of any religious activity.

The respondent also denies that it has contravened the provisions of Article 23 (2) of the Constitution on the basis of faith based discrimination because the holding of the meetings is based on the consent of the majority of members of the respondent. The respondent has therefore urged me to dismiss the petition and condemn the petitioner in costs.

The hearing of the petition commenced on 8th April, 2011. The petitioner appeared in person. At the start of the hearing, however, Mr. Chenda sought my guidance on the procedural propriety of the petitioner acting in a dual capacity. Namely, as a litigant in person when it came to the general conduct of the case. And as his own counsel when it came to examining witnesses. I ruled that since the point raised by Mr. Chenda was in my opinion novel, I was constrained to decide or resolve the issue *extempore*. Instead, I invited the parties to file written submissions on the point. Mr. Simeza and Mr. Chenda in their submissions dated 13th April, 2011, submitted as follows: that Rule 5 (6) of the protection of Fundamental Rights Rules, 1969, stipulates as follows: “*The High Court may in its discretion receive evidence by affidavit in addition to or in substitution of oral evidence.*”

On the basis of the preceding rule, it was argued by Mr. Simeza, and Mr. Chenda, that I had the discretion to decide the manner in which evidence would be presented by the parties to this petition. However, it was contended that where the conduct of a matter includes the receipt of *viva voce* evidence, there is an established practice that the leading of witnesses is undertaken by counsel, as distinct from a litigant in person. It was submitted that this practice has since received judicial recognition. In aid of this submission, my attention was drawn to the dictum by Lord Denning in the case of *Jones v National Coal Board* [1957] 2 ALL E.R. 155 at page 158 as follows:

“So also it is for the advocates each in turn to examine the witness, and not for the judge to take it on himself lest by so doing he appeared to favour one side or the other... And it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the sequence of his argument be lost...”

Lord Denning went on to state that:

“The judge’s part in all this is to hearken to the evidence, asking questions only when it is necessary to clear up any point. To see to it that the advocate behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points made by the advocates and assess their worth and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well.”

The preceding dictum was followed in the case of *Zulu v Zambia Electricity Corporation Limited* (2005) Z.R. 39. I must state at once that the cases of *Jones*, and *Zulu* do not aid the respondent’s case. The *ratio decidendi*, in these two cases is that although a trial judge has the judicial discretion to ask questions during the trial, he should not use his discretion to insert himself into the substantive questioning during the trial. A trial judge should ask questions only to clear a point. In a word, a trial judge should not in the course of the trial drop the mantle of the judge, and assume the robe of an advocate.

It was argued further on behalf of the respondent that the subject of examining witnesses, is addressed in Article 18 (2) (e) of the Constitution. The relevant portions of Article 18 (2) (e), it was submitted, state as follows.

“18 (1) ...

(2) Every person who is charged with a criminal offence____

(a)

(b)

(c)

(d) *Shall unless legal aid is granted to him in accordance with the law enacted by Parliament for such purpose be permitted to defend himself before the Court in person, or at his own expense by a legal representative of his own choice.*

(e) *Shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the Court and to obtain the*

attendance and carry out the examination of the witnesses to testify on his behalf before the Court on the same conditions as those applying to witnesses called by the prosecution.

It was argued on behalf of the respondent that the petitioner has glossed over the fact that the wording of Article 18 (2) (e) is confined to criminal proceedings. It is contended that the rest of the sub-articles of Article 18 and Article 28 do not extend to civil proceedings. Thus it was argued strenuously that the petitioner's witnesses should testify in chief without the aid of the petitioner. And thereafter should be subjected to cross examination by respondents counsel, before testifying in "re-examination," again, unaided. It was urged that the petitioner's testimony should also follow the pattern suggested above. It was further pressed that the petitioner should not be permitted to vacillate within the same proceedings from the bar to the witness box and *vice versa*. Lastly, it was argued that since the petitioner elected not to instruct counsel, he should not be allowed to abuse the Constitution by having his case heard in a manner that is not provided for by law.

The petitioner also filed his written submissions on 13th April, 2011. The petitioner submitted as follows: that at the commencement of the hearing on 8th April, 2011, counsel for the respondent raised an oral objection of the effect that an unrepresented litigant has not right to examine in chief his own witnesses. According to the respondent's counsel, such a procedure is the strict prerogative of a litigant defended by counsel. The petitioner submitted that no rule of law or practice was cited in support of the objection. The petitioner contends that an unrepresented litigant has the legal right to examine in chief his own witness(es). Further, the petitioner contends, that an unrepresented litigant enjoys the same rights and privileges as a litigant who is represented in relation to the examination of witnesses in civil proceedings. Thus it was urged that I can only rule otherwise if there is an express prohibition stipulated by either written law, or the common law of England. It was also argued that it is an elementary maxim of the rule of law that whatever is not prohibited by law must be lawful.

The petitioner also submitted that according to Order 5, Rule 24, of the High Court Rules there is no provision barring an unrepresented litigant from examining in chief his own witness during a civil trial. On the contrary, it was canvassed that Order 5, Rule 24, stipulates that: “*the witnesses at the trial or any suit shall be examined viva voce.*” The “*examination,*” it was argued, encapsulates: examination in chief; cross-examination; and re-examination.

The petitioner further submitted that while the Constitution is silent on civil proceedings, Article 18 (2) (e) unequivocally enshrines a sacrosanct Constitutional principle that an undefended accused person enjoys the same freedom as the prosecution to examine witnesses that are called to testify on behalf of the accused. Thus it was argued by the petitioner that Article 18 (2) (e) of the Constitution lays down for criminal trials, what is self-evident in civil trials. Namely, that an unrepresented litigant also enjoys the right to examine in chief his own witness. It was further submitted by the petitioner that the right in issue is enveloped by the rubric; “*fair hearing*” in Article 18 (a) of the Constitution. The case of *Zinka v Attorney General* (1990_1992) Z.R. 71, was cited in support of this proposition. In short, it was submitted that the *Zinka case* embraces the rules of natural justice.

The petitioner also drew my attention to the American case of *Mullane v Central Hanover Bank and Trust Company* 339 US 306, 314, 705. Ct 652,657 1950, and submitted that an undefended litigant has the indisputable legal right to examine his own witnesses. This right is apparently rooted in the common law standard of fair adjudication: the right not to be condemned unheard. The petitioner argued that it is plainly unjust to hear a party’s case when he is incapable of adequately presenting his case; and this may be so when a litigant’s right to examine-in-chief his own witness is subjected to the onerous condition that he ought to exercise that right only through counsel. The petitioner urged that the right to fair hearing extends not only to the right to have notice of the other party’s case, but the right also to bring evidence and the right to argue. Ultimately, the petitioner submitted that the objection taken at the

bar by counsel for the respondent against the petitioner examining in chief his own witness should be dismissed with costs.

I am indebted to counsel for the spirited and interesting submission rendered at a very short notice. As I see it, the issue that falls to be determined in this ruling is not just whether the petitioner has a right to examine in chief his witness. But rather whether or not an unrepresented litigant has the right to examine witnesses generally. I must state at the outset that initially the petitioner filed this petition on 7th September, 2010, in his capacity as counsel practicing law under the name and style of Messrs Kelvin Hangundu and Company. Later, on 13th September, 2010, the petition was amended to reflect the fact that the petition was filed in person. The petitioner is therefore an unrepresented litigant.

A convenient starting point in considering the issue under discussion is the Constitution itself. Article 18 of the Constitution relates to provisions that secure protection of the law in criminal proceedings. To recapitulate, Article 18 (2) (e) enacts as follows:

“18 (1).....

(2) Every person who is charged with a criminal offence.....

(a)

(b)

(c)

(d)

(e) Shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the Court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the Court on the same conditions as those applying to witnesses called by the prosecution. (The underlining is for emphasis sake.)

Clearly, Article 18 (2) (e) of the Constitution expressly permits any person charged with a criminal offence to examine in person witnesses called by the prosecution. The Article further permits an accused person to examine his own witnesses. The

constitution does not however provide for counterpart provisions to govern civil proceedings. Thus the Constitution is conspicuously silent on civil proceedings. I therefore agree with Mr. Simeza and Mr. Chenda's submission that Article 18 (2) (e) does not extend to civil proceedings.

Mr. Hangandu drew my attention to Order 5 of the High Court Rules. Order 5 provides for various evidential matters under the rubric "Evidence." In the instant case, Mr. Hangandu drew my attention to Rule 24 of Order 5. Rule 24 is expressed in the following terms:

"24 In the absence of any agreement between the parties, and subject to these Rules, the witnesses at the trial or any suit shall be examined viva voce and in open Court; but the Court may at any time for sufficient reason order that any particular fact, or facts may be proved by affidavit or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the Court may think reasonable; or that any witness whose attendance in Court ought, for some sufficient cause, to be dispensed with be examined by interrogatories or otherwise before an officer of the Court or other person.

Provided that, where it appears to the Court that the other party bona fide desires the production of a witness for cross-examination, and that such witnesses can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit."

On the basis of Rule 24, Mr. Hangandu argued that there is no provision barring an unrepresented litigant from examining in chief his own witness during a trial. On the contrary, Mr. Hangandu contends that Rule 24 provides in part that; *"the witnesses at the trial or any suit shall be examined viva voce."* Mr. Hangandu submitted that the *"examination"* envisaged by Rule 24, includes examination in chief; cross-examination, and re-examination. Mr. Hangandu argued strenuously that if it was intended that the examination should be understood in another sense, then the rule would have expressly stated so. I endorse Mr. Hangandu's contention that under Rule 24 the

parties are at liberty to examine witnesses *viva voce*. The right to examine witness under Rule 24 is not qualified. In my opinion, the examination can be done either in person or through counsel. I further opine that the term “examination” in the context of Rule 24 includes examination in chief; cross examination and re-examination.

As earlier on noted, Mr. Hangandu drew my attention to the *Mullane case*. In the *Mullane case* it was held *inter alia* that:

“An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties on the pendency of the action and afford them an opportunity to present their objections... the notice must be of such nature as reasonably to convey the required information”

The *Mullane case* in my opinion lays down, in essence, that it is a requirement of due process that a party in any proceedings should be accorded notice of the pending, action and should also be given an opportunity to present their case and or objections. Be that as it may, it is in my opinion a fundamental principle of due process that an unrepresented litigant should, as is the case in criminal proceedings, be accorded the opportunity to examine the witnesses called by the adversary, as well as his own. The examination should include examination in chief; cross-examination and re-examination. Surely, what is good for the gander must be good for the goose.

The objection raised by the respondent seems in my opinion to be chiefly founded in the apprehension of Mr. Hangandu seemingly vacillating from the bar to the witness box and vice versa. I have already held that in these proceedings. Mr. Hangandu is an unrepresented litigant. At any rate, there is no rule of law that prohibits a Legal Practitioner from appearing in person. In view of the foregoing, I have come to the firm conclusion that it is in the interest of justice and fair adjudication to permit Mr. Hangandu to examine the respondent’s and his own witnesses. The examination shall include examination in chief; cross-examination and re-examination.

There is no doubt that this application has raised important constitutional and professional issues. And the practice of the Courts is to depart from the general rule that costs follow the event. I therefore order that each party bears its own costs.

Leave to appeal is hereby granted.

Dr. P. Matibini, SC.

HIGH COURT JUDGE