JUDICIAL DECISION-MAKING AND FREEDOM OF EXPRESSION IN ZAMBIA: THE CASE OF *PEOPLE V PAUL KASONKOMONA*[1]

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Introduction

There is no doubt that freedom of expression is absolutely necessary for the existence, preservation, and growth of a democratic society. It is with this in mind that I received, with great excitement, an invitation to present a paper relating to such an important topic to this judicial colloquium of men and women – who are looked upon by the public as having achieved distinguished careers as lawyers, or so excelled in matters of law as to merit their appointment to the bench.

To be clothed with judicial office requires that the decision-maker refuses to allow past experiences or prejudices, the opinions of litigant parties or the issues, or social, political, religious, or similar beliefs to influence judicial decision-making.[3]

Holmes J of the Supreme Court of the United States put it aptly in a tribute, upon the death of his brother Cardozo J:

> [I]nto our past have been woven all sorts of frustrated ambitions with their envies, and of hope of preferment with their corruptions, which long since forgotten, still determine our conclusions. A wise man is one exempt from the handicap of such a past; he is a runner stripped for the race; he can weigh the conflicting factors of his problem without always finding himself in one scale or the other. Cardozo was such a man ...[4]

This paper discusses freedom of expression in Zambia, with particular reference to the recent *Kasonkomona* case. The outcome of the case suggests that the judicial virtue described above is very relevant to a discussion of the development of freedom of expression jurisprudence in Zambia.

Freedom of expression

In Zambia, freedom of expression, with limitations, has been a constant feature in the Bill of Rights of the various constitutions. Thus, the current Constitution[5] states in article 20(1):

> Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas

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3 See ACK Nyirenda "The Role of the Judiciary in Protecting the Rights of Vulnerable Groups in Malawi" in this publication for a discussion on the influence of personal views and experiences on judicial decision-making.

4 M Glendon *A Nation under Lawyers* (1996) 127, citing Learned Hand "Mr Justice Cardozo" (1939) 52 *Harv L Rev* 361, 362-63.

5 Constitution of the Republic of Zambia, 1996.

> and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class of persons, and freedom from interference with his correspondence.

The limitations are set out in sub-articles 3(a) to (c):

> (3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this article to the extent that it is shown that the law in question makes provision –
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> (a) That is reasonably required in the interests of defence, public safety, public order, public morality or public health; or
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> (b) That is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating educational institutions in the interests of persons receiving instruction therein, or the registration of, or regulating the technical administration or the technical operation of, newspapers and other publications, telephony, telegraphy, posts, wireless broadcasting or television; or
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> (c) That imposes restrictions upon public officers; and except so far as that provision or the thing done under the authority thereof, as the case may be, is shown not to be reasonably justifiable in a democratic society.

I do not foresee the constitutional provisions pertaining to freedom of expression being materially different in the near future.

In terms of case law, the importance of protected freedom of expression to the workings of democracy was significantly established by the High Court in *Wina and Others v Attorney General*.[6] This was a petition that challenged a directive issued by the President of Zambia restricting access to government-owned newspapers by opposition parties. This clearly was a matter steeped in politics, as Zambia was transitioning from one-party to multi-party politics at the time. Musumali J held*, inter alia*, that:

> The directive ... hindered the petitioners in the enjoyment of their freedom of expression, as they were prevented from publishing their opinions through Government newspapers. The directive was accordingly quashed.[7]

Much has been written by others on freedom of expression, especially pre- and post- the one-party system of government in Zambia. The recent *Kasonkomona* case can significantly add to the existing discussion on freedom of expression.

6 (1990-1992) ZR 95 (HC).

7 *Id* 96.

The *Kasonkomona* case

On 25 February 2014, N'gambi J delivered a landmark judgment in the case of *People v Kasonkomona*,[8] heard in the Subordinate Court at Lusaka. The case was refreshing because it tested the ambit of freedom of expression in relation to gay rights, a contentious subject in Zambia.

What Happened?

Paul Kasonkomona is a human rights activist, and is married with children. He has lived positively with the Human Immunodeficiency Virus (HIV) for fifteen years and has been using antiretroviral medication for eight years. On 7 April 2013, he appeared on Muvi Television – a private television station in Zambia – in a programme called 'The Assignment'. This is a popular programme that discusses important topical issues. The burning issue of the day was 'Gay or Human Rights.' Paul Kasonkomona's appearance in this programme was at the invitation of Muvi Television. The producers of the programme chose the topic, identified Paul as the guest, and prepared questions for him to answer. The topic was current because there was a new constitution-making process taking place at the time, and the topic was controversial in the Zambian context.[9]

Before the programme could even finish, the police arrived at Muvi Television Studios to apprehend Paul. However, Muvi Television staff did not allow the police inside the studios, where they wanted to see the Director of Programmes – so that, in the words of one of the police officers: "We can tell him (the Director of Programmes) that we are around and want to apprehend the person on the programme".[10] Paul was apprehended immediately after the programme finished and was detained by the police. His house was searched by the police for "suspected articles used in pornography or homosexual activities being concealed in his house." Among the articles found in the house and seized by the police were female condoms. Paul was charged with the offence of idle and disorderly conduct in terms of section 178(g) of the Penal Code[11] – a law whose roots can be traced to the Vagrancy Act, 1898 (UK), which amended the Vagrancy Act of 1824 (UK).

Section 178(g) of the Penal Code provides that:

> (g) Every person who in any public place solicits for immoral purposes ... are deemed idle and disorderly persons, and are liable to imprisonment for one month or to a fine ... or to both.

The particulars of the alleged offence read as follows:

> Paul Kasonkomona, on 7th April 2013 at Lusaka in the Lusaka District of the Republic of Zambia, being a person in a public place namely Muvi Television Studios on a programme called "The Assignment" did solicit for immoral purposes for Homosexual rights to be respected in Zambia.[12]

8 CR No. 9/04/13 (SubCt). All pertinent documents in this case are available at http://www.southernafricalitigationcentre.org/cases/ongoing-cases/zambia-activist-defends-right-to-freedom-of-expression/.

9 The prosecution subsequently made much of the fact that the Preamble of the Constitution of Zambia declares that Zambia is a Christian nation and that under Christianity homosexuality is considered immoral. *People v Kasonkomona* CR No. 9/04/13 (SubCt), Prosecution's Submission on a Preliminary Issue Raised by the Defence (Accused) for Constitutional Reference 5.

10 *People v Kasonkomona* CR No. 9/04/13 (SubCt), Accused's Submissions on No Case to Answer 41.

11 Cap 87 of the Laws of Zambia.

12 *People v Kasonkomona* CR No. 9/04/13 (SubCt), Ruling on Preliminary Issues for Constitutional Reference R1.

Despite the offence being a misdemeanour, Paul was denied a police bond and was only admitted to bail by the Subordinate Court after being in detention for four days.

Procedural History

During the course of the Subordinate Court proceedings, Paul Kasonkomona applied, within the terms of article 28(2)(a) of the Constitution of Zambia, to the Subordinate Court for a constitutional reference for determination by the High Court of, *inter alia*, the issue that section 178(g) of the Penal Code is unconstitutionally vague, unconstitutionally overbroad, and contravenes article 20 of the Constitution of Zambia.

A law is unconstitutionally vague if a reasonable person cannot tell what is allowed and what is not allowed. In the case of *Connally v General Construction*,[13] the United States Supreme Court stated that a law is unconstitutionally vague when people "of common intelligence must necessarily guess at its meaning".[14]

Thus, in the case of *Papachristou v City of Jacksonville,*[15] the United States Supreme Court held that a vagrancy law was void because of vagueness:

> [B]oth in the sense that it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute" ... and because it encourages arbitrary and erratic arrests and convictions.[16]

In the Namibian case of *Fantasy Enterprises CC T/A Hustler the Shop v Minister of Home Affairs and Another*,[17] the High Court held that:

> [T]he words employed in a penal provision which limits the exercise of a fundamental freedom must at least provide an intelligible standard from which to gain an understanding of the act enjoined or prohibited so that those to whom the law apply know whether they act lawfully or not.[18]

In relation to constitutional reference, article 28(2)(a) of the Constitution of Zambia provides that:

> If in any proceedings in any Subordinate Court any question arises as to the contravention of any of the provisions of articles 11 to 26 inclusive,[19] the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion the raising of the question is merely frivolous or vexatious.

On 5 June 2013, the Subordinate Court referred for determination by the High Court the question of "whether the appearance by [Paul] and the views expressed by [him were] protected under the

13 (1926) 269 US 385 (SC).

14 *Id* 391.

15 (1972) 405 US 156 (SC). This case is also discussed in C Banda & A Meerkotter "Examining the Constitutionality of Rogue and Vagabond Offences in Malawi" in this publication.

16 *Id* 162.

17 Case No. A159/96 (HC).

18 *Id.*

19 Part III of the Zambian Constitution contains provisions pertaining to Protection of the Fundamental Rights and Freedoms of the Individual.

ambit of article 20 or whether section 178(g) is constitutional."[20]

On 15 August 2013, the High Court of Zambia, sitting at Lusaka, delivered a ruling touching on the constitutional issue, and concluded by holding that:

> A review of the two relevant pieces of legislation shows that section 178(g) of the Penal Code refers to a person being "idle and disorderly by soliciting for immoral purposes" whereas article 20 of the Constitution refers to the fundamental freedoms of expression. I am of the considered view that the subject contained under section 178(g) of the Penal Code is not the same as that contained in article 20 of the Constitution. The two issues are different. I therefore find that there was no constitutional issue concerning the contravention of fundamental rights of the accused and there was no ground for the court below to make this reference to the High Court.
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> I therefore send this file back to the Senior Resident Magistrate in the Subordinate Court to deal with the matter before him.[21]

Thereafter, trial proceeded and the prosecution closed its case after calling six witnesses. Among the witnesses was a reverend of the Evangelical Fellowship of Zambia – one of the church mother bodies. There was also evidence that, prior to transmission of the programme, the Deputy Minister of Home Affairs (the Ministry in charge of the police and internal security) had issued a statement that people like Paul Kasonkomona risked being arrested.

The arresting officer from the Zambia Police Service summarised the case for the prosecution against Paul in the following piece of evidence:

> On 7th April 2013, on a Sunday, [I] reported on duty at Woodlands Police Station [Lusaka] and whilst on duty at the office, at around 18:30 hours, there was news on Muvi Television that they would conduct a programme called the Assignment, where one person was going to talk about gay rights. It was going to be aired at 19:00 hours on Sunday. I got interested and decided to wait for the programme to start. When it started on the screen of Muvi, then appeared Costa Mwansa [the presenter] and a man I came to know as Paul Kasonkomona. An introduction was made by Costa Mwansa that the programme was not of the view of Muvi Television, but the view of the interviewee. The public would hear Paul's views on gay rights. The programme started and Paul introduced himself as a Project Co-ordinator on behalf of gay rights and homosexuals. As the programme continued, I realised as a police officer that the said Paul was soliciting for immoral purposes, which is against the laws of Zambia.[22]

It was submitted, *inter alia*, on behalf of Paul Kasonkomona, that the manner in which the state was seeking to interpret and apply section 178(g) was wrong, and so broad that it violated Paul's fundamental right to freedom of expression; and that the police's use of section 178(g) to target Paul Kasonkomona as an activist was a perfect example of arbitrary use of section 178(g).

The defence referred the Court to the case of *Kabwe and Chungu v Sakala, Chitengi, and the Attorney General*,[23] in which the Supreme Court of Zambia pronounced on the interpretation of

20 *People v Kasonkomona* CR No. 9/04/13 (SubCt), Ruling on Preliminary Issues for Constitutional Reference R6.

21 *People v Kasonkomona* HPR/05/2013 (HC) 5-6.

22 *People v Kasonkomona* CR No. 9/04/13 (SubCt), Accused's Submissions on No Case to Answer 40.

23 Judgment No. 25 of 2012 (Appeal No. 152 of 2001) (SC).

fundamental rights, as follows:

> The provisions conferring the rights and freedoms should not be narrowly construed but stretched in favour of the individual so as to ensure that the rights and freedoms so conferred are not diluted. The individual must enjoy the full measure and benefits of the rights so conferred and in this respect, any derogation of the rights will usually be narrowly or strictly construed.[24]

The defence also referred to the provisions of international instruments that Zambia has ratified to assist the Court in interpreting the constitutionally protected right to free expression. The Court was referred to the International Covenant on Civil and Political Rights, the African Charter on Human and Peoples' Rights, and the Declaration of Principles on Freedom of Expression in Africa (promulgated by the African Commission on Human and Peoples' Rights).

In the Zambian case of *Longwe v Intercontinental Hotels*,[25] Musumali J noted the relevance of international law, stating:

> [R]atification of such [instruments] by a nation State without reservations is a clear testimony of the willingness by the State to be bound by the provisions of such [instruments]. Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international [instrument], I would take judicial notice of that Treaty or Convention in my resolution of the dispute.[26]

On 25 February 2014, after over ten months of trial, the Subordinate Court found that Paul Kasonkomona had no case to answer and he was accordingly acquitted[27]. In acquitting him, the Subordinate Court made fundamental observations in relation to freedom of expression – starting with a quote from *Whitney v California*[28] in the United States Supreme Court:

> Justice Brandeis of the United States Supreme Court eloquently stated the importance of freedom of expression, when he observed in *Whitney v California* that:
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> > "Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that, in its government, the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that, without free speech and assembly, discussion would be futile; that, with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty, and that this should be a fundamental principle of the American government."[29]

24 *Id* 30.

25 (1993) 4 LRC 221 (HC). This case is discussed in more detail in L Mushota "International Law, Women's Rights, and the Courts: A Zambian Perspective" in this publication.

26 *Id.*

27 The state has appealed the acquittal and, at the time of publication, the appeal has not yet been decided.

28 (1927) 274 US 357 (SC).

29 *Id* 375.

The Subordinate Court then went on to state, *inter alia*, that:

> [F]rom the evidence on the record the accused was not engaging anyone to practice homosexuality. What I heard was that he was advocating for the rights of those already practicing it to be protected. By way of analogy, if someone was to go on TV and advocate that the law on defilement should be amended will they be soliciting for immoral purposes? Or if someone was to engage the public discussing that the death sentence should be abolished, will they also be soliciting for immoral purposes? The answer is not. It is through debate that people share information and ideas whether good or bad.[30]

In these few passages the Subordinate Court exhibited judicial qualities of detachment and disinterestedness in its decision-making – in a case which had clearly been surrounded by religious, social, and political connotations[31].

Conclusion

The development of freedom of expression jurisprudence in Zambia has not been a constant feature of Zambian case law. In terms of the judiciary, freedom of expression has been developed and will continue to be developed by men and women who are "exempt from the handicap" of their past experiences or prejudices, the opinion of the litigant parties or the issues, and social, political, religious, or similar beliefs; men and women who are "runners stripped for the race". These men and women also ultimately mirror the independence of the judiciary.

30 *People v Kasonkomona* CR No. 9/04/13 (SubCt) R10.

31 A similar finding was made by the High Court of Botswana in the case of *Rammoge and Others v Attorney General*, Case No. MAHGB-175-13, where the Court ordered that the refusal to register an organisation which lobbies for the rights of gays and lesbians violated their rights to equal protection of the law, and freedom of expression, association and assembly. The High Court held that: "In a democratic society asking for a particular law to be changed is not a crime, neither is it incompatible with peace, welfare and good order (para. 23) ... Lobbying for legislative reforms is not per se a crime. It is also not a crime to be a homosexual (para. 58)."