IN THE SUBORDINATE COURT OF THE FIRST CLASS FOR THE LUSAKA DISTRICT HOLDEN AT LUSAKA
(*Criminal Jurisdiction*)

SSPB/017/2018

THE PEOPLE

V.

LAURA MITI, SEAN TEMBO, FUMBA CHAMA, BONWELL MWEWA, LEWIS MWAPE & MIKA MWAMBAZI

Before: Magistrate Mwaaka Chigali Mikalile - PRM

For the People: Mr D. Manda – National Prosecution Authority
For the Accused: Mr K. Mweemba and P. Muya – Messrs Keith Mweemba Advocates & Mr G. Phiri – Messrs PNP Advocates.

RULING

Legislation referred to:

1. The Penal Code, CAP 87 of the Laws of Zambia
2. The Criminal Procedure Code, CAP 88 of the Laws of Zambia
3. The Public Order Act, CAP 113 of the Laws of Zambia
4. The Republican Constitution

Cases referred to:

1. Republic v. Simon Wabungu Kimani & 20 others C.R Rev No 1 of 2015
2. Resident Doctors Association of Zambia & Others v Attorney General S.C.Z Judgment No. 12 of 2003
3. Penias Tembo v. The People (1980) ZR 218

Other works referred to:

Garner. Black's Law Dictionary (8th Edition): Thompson West, 2007, USA

R1

The accused persons stand jointly charged with one count of Disobedience of lawful orders contrary to section 127 of the Penal Code Chapter 87 of the Laws of Zambia.

Particulars of offence allege that on 29th September, 2017, the accused at Lusaka in the Lusaka District jointly and whilst acting with other persons unknown did disobey a lawful order to stop demonstrating at Zambia National Assembly, which order was issued or given by No. 4830 Chief Inspector Phiri, employed by the Zambia police Service whilst on duty.

The matter was allocated on 22nd January, 2018 but the accused only took plea on 17th May, 2018 due to the absence of A3 who had fled the country for the reason that his life was under threat.

The accused pleaded not guilty.

At this stage the court is called upon to determine whether or not on the evidence so far before it, a prima facie case has been made out against the accused persons.

The test to apply is this: if the accused elected to remain silent could a reasonable tribunal properly directing itself convict the accused on the evidence so far before court? If the answer is in the affirmative, then there is a case to answer. If the answer is in the negative, then there is no case to answer.

Reference is made to Lord Chief Justice Parker's famous practice note (quoted in 1962 1 ALL ER at P.448) where it was stated that a finding of no case to answer may be arrived at (i) when there has been no evidence to prove an essential element in the alleged offence; (ii) when the evidence adduced by the prosecution has been so discredited as a

result of cross examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.

In a criminal trial the prosecution bears the burden to prove the guilt of the accused beyond all reasonable doubt. All elements of the offence in question ought to be proved.

Section 127 states that:

> *Everyone who disobeys any order, warrant or command duly made, issued or given by any court, officer or person acting in any public capacity and duly authorised in that behalf, is guilty of a misdemeanour and is liable, unless any other penalty or mode of proceeding is expressly prescribed in respect of such disobedience, to imprisonment for two years.*

According to Black's Law Dictionary (1) at page 540, duly means *"in a proper manner; in accordance with legal requirements."* Thus, the order issued by an officer acting in public capacity ought to be in accordance with legal requirements.

In the defence's submissions on no case to answer, I was referred to a Kenyan authority in the case of **Republic v. Simon Wabungu Kimani & 20 others C.R Rev No 1 of 2015** where the High Court discussed the requirements of the charge against the accused contrary to section 131 of the Kenya Penal code which has almost the exact wording as section 127 of Cap 87.

The court in that matter stated that section 131 of the Penal code under which the convicts were charged requires that such order has to be lawful and issued by a public officer, for its disobedience to constitute a crime...Disobeying an order not backed by law is not an offence under that section.

Taking into account the definition of duly and the above cited case, I am of the view that the essential elements of the offence to be proved are that:

1. an order was communicated to the accused
2. the order was given by a person acting in public capacity
3. the order was in accordance with the law
4. the order was disobeyed by the accused

In support of its case the state called seven witnesses. This is the gist of their evidence.

PW1 was No. 4830 Chief Inspector Anthony Phiri whose testimony was that on 29th September, 2017, there was budget presentation at Parliament and he was assigned to maintain peace and order and to ensure that people going into parliament were either members of parliament (M.Ps) or invited guests. Around 13h00, he observed a group of people along Great East road carrying placards. The group begun approaching Parliament building and he was prompted to enquire if the members had invitation cards. They informed him that they did not have but that they had written requests to march at Parliament. According to PW1, he informed the marchers that a mere request did not grant them authority to march to Parliament but they insisted on going ahead. He ordered them to go back about 3 times but they insisted on entering.

PW1 told court that their service instructions authorise any police officer to order anyone not to do anything if it is a security risk or likely to cause public nuisance.

He further testified that those people did not obey his orders hence he ordered his officers to apprehend them. PW1 said he personally apprehended the now A2 and this was along Parliament road leading to Parliament building.

Under cross examination, PW1 stated that the demonstration was peaceful. He also stated that another group did arrive at the scene that came to disrupt or oppose the peaceful demonstration. He admitted that that group had not notified the police of its intention to disrupt the accused's' demonstration. None of its members was apprehended.

PW2 was Chief Inspector Charles Hamooya who also told court that on 29th September, 2017, he was detailed at Parliament building with other officers. He testified that PW1 asked the group of people that arrived around 13h00 if at all they had invitation cards and when they did not produce any, PW1 ordered them to leave. They refused to leave saying they would go inside. PW1 then ordered the officers to apprehend the group for the offence of disobeying lawful orders. PW2 said he personally apprehended A3.

Under cross examination, PW2 was shown a photo of him as well as the accused persons seated on the road. He agreed that sitting was a sign of peace. PW2 erroneously stated that people wishing to hold a procession must get a permit from the police. He said the accused herein where arrested not because they had no permit but because they had no invitation cards. When shown a picture in which he was captured with other individuals wearing green barrets, PW2 denied the assertion that there were P.F cadres present at the scene and said he was not aware if the police had received notification from the P.F.

PW3 was Constable Patience Chitonge whose testimony was that PW1 approached the demonstrators as they tried to join the road to Parliament. The said demonstrators insisted on going inside despite not having invitation cards and PW1 later chased them. They refused to leave and some even sat down saying they wanted to go in. PW1 then directed the officers to apprehend the group. PW3 said she apprehended A1.

Under cross examination, PW3 stated that the demonstrators were initially peaceful but became stubborn when approached. She also erroneously stated that it is their democratic right to demonstrate as long as they have a permit. PW3 denied the assertion that sitting down by the demonstrators was a sign of peace. She said it was a sign of stubbornness as they did not want to go back as ordered.

PW64 was Stephen Kawimbe, a Principal Clerk, Public and International Relations at National Assembly who told court that for budget presentation, the Ministry of Finance issues the invitation cards and his office simply regulates the numbers because of limited sitting capacity. Those not invited cannot go beyond the security gate.

Under cross examination, PW4 stated that the invitations are for those entering the August house and have nothing to do with those that want to demonstrate outside parliament gates. He also stated that when one leaves Great East road and enters Parliament road, they cannot be said to be within Parliament. He further stated that the budget presentation of 2017 went undisturbed.

PW5 was Jonathan Sikwaya, a Parliamentary Security officer whose testimony was that on 29th September, 2017 he was on duty at the main entrance at parliament building from 06 to 17h00. He has no idea what happened around 13h00.

PW5 was Geoffrey Kunda, the Deputy Commissioner of Police who ran court through some salient features of the Public Order Act. He testified that on 20th September, 2017, he received a notification from the Executive Director for Alliance for Community Action, A1, to conduct a demonstration at parliament building during the budget presentation. The letter was identified and marked ID1. According to PW5, he assessed the situation and called A1 to tell her that the date was not favourable for two reasons, firstly, there was a security

concern and secondly the officers were overstretched. He then advised A1 to find an alternative date and revert to him. A1 asked him to reduce that response in writing and on 26th September, 2017 he communicated in writing and the letter was delivered. The response was identified and marked ID2. According to PW5, he was surprised to learn that A1 and her members had proceeded to assemble at parliament. He said when A1 did not get back to him, he assumed she had understood his explanation

When cross examined, PW5 stated that A1 did notify the police even this year for the 2018 budget and she was turned down. He said the same reasons as last year were given He is aware that the Minister overruled the police and allowed the demonstration to go ahead. The 2018 demonstration was incident free.

Still under cross examination, PW5 stated that he has no proof that his response was delivered on 26th September, 2017. He admitted that he should have written back to A1 5 days before the event and that he should have offered an alternative date.

PW6 was Sgt Robert Undi Phiri, a rider under Lusaka Central Police traffic department. His evidence basically was that he delivered a letter from PW5 to Alliance for Community Action on 26th September, 2017. He said he asked the lady to whom he handed the mail if there was anywhere he could sign and she said their offices were still closed. He identified the letter he delivered and it was marked ID3. Since ID3 is the original of ID2, it was remarked ID2.

Under cross examination, he denied having gone to A1's office on 29th September, the day of the budget presentation.

PW7 was Dt Chief Inspector Mubita Moya of Emmasdale Police Station whose testimony was that on 29th September, 2017, PW1 handed over

to him 6 suspects whom he had apprehended at Parliament for disobeying his orders. He interviewed the suspects, the now accused persons, who informed him that they were peacefully demonstrating and that they had notified the police in advance. The accused showed him the letter written to the Commissioner of Police and also the reply. They told him that the police had no authority to stop them from matching peacefully to parliament building. After conducting his investigations, he charged and arrested the accused for the subject offence. He produced IDs 1 and 2 admitted marked P1 and P2 respectively.

Under cross examination, PW7 conceded that the accused cannot be blamed for having gone ahead to demonstrate in light of the fact that the police did not comply with the law in their rejection. He further stated that PW1 did not inform him of any security concerns that were attendant at the time of the procession.

Having considered the evidence and the written submissions from the defence, I ask myself if a reasonable tribunal could convict the accused if they chose to remain silent. This question can only be answered if it is found that the essential elements of the offence as outlined above have been established.

It has been satisfactorily shown that on 29th September, 2017, an order was communicated to the accused persons by PW1, a police officer of Chief Inspector by rank for them to go back or to stop demonstrating. Clearly, PW1 was acting in a public capacity. But I ask myself if it has been established that the order issued by PW1 was backed by law.

In considering this issue, I have had recourse to the Public Order Act Cap 113 of the Laws of Zambia and particularly section 5 which provides for regulation of assemblies, public meetings and

processions. The law essentially provides that every person wishing to carry out any such activity must give notice to the police at least 7 days before the event. If the police deem it impossible to adequately police the event, they shall inform the conveners in writing at least 5 days before the event and shall propose an alternative date. The event shall then not be held. Where the conveners are not satisfied with the reasons advanced, they may appeal to the Minister and if not satisfied with the Minister's response, may appeal to the High Court.

It has been shown that the accused through A1 and A2 did notify the police and in the case of A1, she got a response from PW5. PW5 confirmed that he wrote back to A1 on 26th September, 2017 which was only 2 clear days from the intended procession earmarked for 29th September. This was of course in contravention of Chapter 113 which demands that the police inform the conveners at least 5 days before the event.

According to the defence, the letter from PW5 was only delivered on 29th September, 2017, the day of the intended procession. No concrete evidence was led by the prosecution to prove that the said letter was actually delivered on 26th September as alleged. All there is are verbal representations of the prosecution witnesses to that effect.

Furthermore, PW5 did not propose an alternative date as per law required.

Ultimately, A1 was deprived the opportunity to appeal to the Minister in time.

As regards the notification tendered by A2 for a demonstration on 29th September, 2017, it appears it was not attended to. There is no proof on record that the police did inform the convener whether or not it had the capacity to police the event.

From the foregoing, I am of the view that the conveners were well within their right to proceed with the planned demonstration along parliament road. They did what is required of them but the police failed to do what was required of them by law.

In the case of **Resident Doctors Association of Zambia & Others v Attorney General** (2) the Supreme Court stated as follows:

> *The petitioners complied with the law and duly notified the Police within the time allowed by law. The regulating officer had a duty to inform the petitioners in writing at least five days before the event, if they were unable to police the march and propose alternative days. The petitioners' right to assemble and march therefore accrued at this stage. The regulating officer's endorsement of a purported rejection of the march, a day before the event for reasons that the demonstration would cause a breach of the peace, was not a valid exercise of power under the Act. Section 5(7), which prohibits the holding of the event after the Police have indicated in writing their inability to police the event can only be invoked when there has been a valid notification to that effect.*

Similarly, in this case, the accused's rights to assemble and march had accrued at the time PW5 purportedly responded on 26th September, 2017, which is 2 to 3 days before the demonstration and further by virtue of the fact that the regulating officer did not respond to A2's letter. In both instances, section 5(7) was not invoked.

It was submitted by the defence and I agree that any subsequent order that followed after the police failed to obey the law is and was illegal, unlawful and unconstitutional.

Through cross examination, it was established that the demonstrators, the now accused, were peaceful on 29th September, 2017. This court was told that no property was damaged, traffic on the nearby roads continued flowing undisturbed and the proceedings in Parliament were not disturbed.

I note the evidence of some prosecution witnesses that the accused wanted to enter Parliament building. However, this has not been proved because the accused were stopped just when they turned into Parliament road. Their notices are specific that they wanted to demonstrate along that road and not to enter Parliament building. In any case, it has been established that they could not have entered through the gates as they did not have invitation cards.

In light of this, it becomes abundantly clear that there was no basis upon which the police could stop the demonstration on 29th September, 2017. They had been properly notified and the demonstration was not a security risk.

There was, therefore, no need for PW1 to fall back on the service instructions, which according to him, authorise him to order anyone not to do anything if it is a security risk or likely to cause a public nuisance. In any event, the Constitution of Zambia gives the accused the right to assemble or demonstrate peacefully and the Constitution is superior to the said service instructions or rules of engagement.

If anything, the service instructions should have applied to the group in green barrets that came for the purpose of disturbing the peaceful demonstrators because it had clearly not notified the police of its intention to assemble.

As was rightly submitted by the defence, the police did not act professionally and lawfully and they are indeed the major obstacle in the proper administration of the Public Order Act.

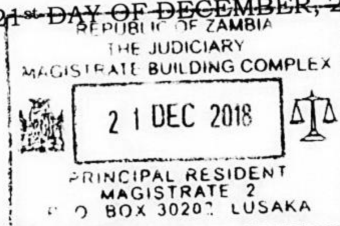
The inescapable conclusion, therefore, is that the order issued by PW1 to the accused persons was not duly made or was not backed by law. As such, I find that an essential element of the offence under

consideration has not been proved. Consequently, no reasonable tribunal could safely convict the accused.

In the case of **Penias Tembo v. The People** (3), it was held that "*it is mandatory for a court to acquit an accused at the close of the prosecution case if the facts do not support the case against him, and no evidence that is led thereafter can remedy the deficiency in the prosecution evidence.*"

In the circumstances, I do hereby dismiss the charge. I accordingly ACQUIT all the accused persons in compliance with section 206 of the Criminal Procedure Code CAP 88 of the Laws of Zambia and set them at liberty forthwith.

DELIVERED IN OPEN COURT THIS 21st DAY OF DECEMBER, 2018.



PRINCIPAL RESIDENT MAGISTRATE