

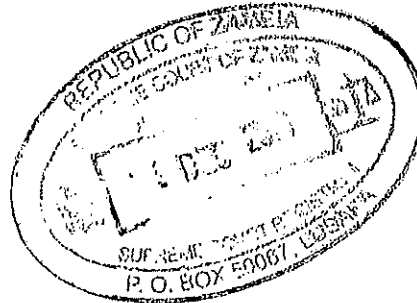
SELECTED JUDGMENT No. 33 of 2019

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IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA
(Civil Jurisdiction)

Appeal No. 153/2016

BETWEEN:



GEORGE PETER MWANZA

1ST APPELLANT

MELVIN BEENE

2ND APPELLANT

AND

ATTORNEY-GENERAL

RESPONDENT

Coram: Mambilima, CJ, Malila and Kajimanga, JJS
on 3rd December, 2019 and 9th December, 2019

For the Appellants: Mr. K. Mwale of Messrs K. Mwale & Co. (holding brief
for Legal Resources Chambers)

For the Respondent: Mr. C. Mulonda, Senior State Advocate, Attorney-
General's Chambers

J U D G M E N T

Malila, JS delivered the judgment of the court.

Case referred to:

1. *Resident Doctors Association v. Attorney General* (2003) ZR 88
2. *Carolie v. Union Territory of Delhi* (1981) AIR 746

3. *Shantiser Builders v. Narayan Khilimal Totame* (1990) AIR SC 630 p.9
4. *Sata and Another v. Post Newspapers Limited* (1995) HC1
5. *Munyonsi and Another v. Ngalabeka* (1999) ZMSC 24
6. *Ex Parte Attorney General in re: Corporal Punishment by Organs of State* (1991) NASC 2
7. *Pretty v. United Kingdom* (Application No. 2346/02)
8. *Regina v. Secretary of State for Home Affairs ex-parte Adam* (2005) UKHL 66
9. *Masangano v. Attorney General & Others* (2009) MWHC 31,
10. *Kachingwe & Others v. Minister of Home Affairs & Another* (2005) ZWSC 134
11. *Orchowski v. Poland* (No. 17885/04)
12. *Wilson Masauso Zulu v. Avondale Housing Project Limited* (1982) ZR 172
13. *Airedale NHS Trust v. Bland* (1993) ALL ER 821
14. *Indian case of Francis Mullin v. Administrator Union Territory of Delhi* (1981) AIR SC 746
15. *Olga Tellis v. Bombay Municipal Corporation* (1986) AIR SC 193
16. *Tito Rarasea v. State* (HC Fiji 12 May 2000)
17. *Sauhoyamaxa Indigenous Communities v. Paraguay* (29 March 200)
18. *Dr. Molhinddin Farooque v. Bangladesh and Others* (No.1) (of 1st July 1996) 22 BLD (HCD) 202 345
19. *Denmark, Norway, Sweden and the Netherlands v. Greece* (Applications 3321/67,3322/67 filed in September 1967 against Greece)
20. *Donald Peers v. Greece* (Application No. 28524/95) ECHR (2001)
21. *Kalashnikov v. Russia* (Case No. 47143/06) ECHR

Legislation referred to:

1. *Constitution of Zambia, Chapter 1 of the Laws of Zambia*
2. *Prisons Act, Chapter 97 of the Laws of Zambia*
3. *Prison Rules*
4. *International Covenant on Economic Social and Cultural Rights (ICESCR) adopted by the United Nations General Assembly on 19th December, 1966*
5. *International Covenant on Civil and Political Rights (ICCPR) adopted by the United Nations General Assembly on 16th December, 1966*
6. *United Nations Standard Minimum Rules for the Treatment of Prisoners*
7. *Directive Principles of State Policy and Duties of the Citizen (DPSPDC)*
8. *Bill of Rights*

- 9. *Universal Declaration of Human Rights of 1948 (UDHR)*
- 10. *European Commission of Human Rights*

1.0 Introduction

- 1.1 This appeal is about two Human Immunodeficiency Syndrome (HIV) positive prisoners on Anti-Retroviral Treatment (ART) and their appetite for a balanced diet as well as their craving for a salubrious environment while they serve time at a correctional facility in Lusaka. More grievously, it raises the question whether there is any role for the courts in Zambia to play in the full realization of economic, social and cultural rights in the broader context of the justiciability of fundamental rights, that is to say, the giving of a voice to rights – holders and offering them forms of reparations in case of a violation.
- 1.2 Like everyone else, the two appellant/prisoners are, of course, not unmindful that being admitted to penal or correctional servitude is anything but checking into a luxurious resort, complete with restaurant quality meals.

They have, however, been expectant that their health and dietary requirements would, at the very least, be accorded delicate attention by the State in accordance with what they consider are the applicable laws and human rights standards.

1.3 With their irksome incarceration in the correctional facility, it dawned on the two prisoners almost immediately following their admission to jail that the sheer fact of imprisonment presented a galaxy of challenges to their mental, and physical well-being. Probably owing to budgetary and logistical constraints on the part of the State, the two prisoners' dietary and health needs were not being fully met. Realizing that the State's failure to take care of their peculiar needs could well be against constitutional provisions, statutory prescription and international human rights standards, the appellants invoked the judicial process, determined to seek court orders to redress their plight.

2.0 Background facts

- 2.1 The two prisoner/appellants are Zambian nationals who have been jailed at Lusaka Central Prison where they are taking the consequences of their malefactions. The first appellant was at the time of the presentation of the claims in the High Court awaiting sentencing following his conviction for the offence of defilement. The second appellant was convicted for the offence of burglary and theft and was serving a nine-year jail term.
- 2.2 Being HIV positive, both prisoners were on ART which entailed a daily intake of a cocktail of drugs so as to contain the HIV infection in their bodies.
- 2.3 They claimed that until their incarceration at the said correctional establishment, they were each consuming a balanced diet in keeping with medical advice which they had received. While lodged in the correctional facility, however, it became evident to the two prisoners that no balanced diet was forthcoming, nor was any likely to be provided in the

short, medium or long-term. They received instead the stereotypically abysmal allocation of limited quantities of maize sump for breakfast; and a miserable lump of thick porridge (*nshima*) with either dried beans, which they claimed was often rotten, or dried anchovies (*kapenta*) containing foreign particles, for lunch and supper.

2.4 The appellants asserted that the meals they were being provided with were not only inadequate in quantity and nutritional value, but were also clearly below the baseline standard for food meant to be served to prisoners in terms of the provisions of rule 17(2) of the Prison Rules and the First Schedule to the Prisons Act, Chapter 97 of the Laws of Zambia. They further claimed that if there was adherence by the State with the provisions of the Prison Rules as regards to the quantity, quality and variety of the food provided to them, the duo would, provisionally, at least, have a balanced diet.

- 2.5 The duo also asserted that the Prison Rules provide that inmates, like them, with special dietary needs on account of their health status, were entitled to alternative menus which, in their case, the prison authorities failed or neglected to provide to them.
- 2.6 They also believed that their being subjected to poorly prepared sub-standard food of an inferior nutritional content while in prison is a reality that could have devastating consequences on their lives as persons living with HIV and constitutes a serious threat to their right to life.
- 2.7 Away from issues of food, the two prisoners also claimed that, on occasion, they have been prevented from accessing anti-retroviral drugs and from making the necessary consultations with medical experts at a clinic away from the prison precincts where they ordinarily used to access those drugs and medical services. This is owing to the inability of the prison authorities to put in place logistical arrangements in the form of an escort guard to take the prisoners to and

from the medical facility. This threatens their lives, as evidenced by their suffering from some side effects and possible drug resistance due to intermittent intake of the drugs on an inappropriate and inadequate diet and under irregular consultation with their physicians.

- 2.8 The two prisoners also grumbled about overcrowding in prison cells and inadequate ventilation. They claim that their already compromised immune systems, makes them susceptible to contracting communicable diseases such as pulmonary tuberculosis (TB) and diarrhea, further compounding their health conditions. Besides they, further complained, they are kept in the most unsanitary of conditions as their cells are without any flushable lavatories.

3.0 The petition in the High Court

- 3.1 Given the foregoing state of affairs, the two prisoners petitioned the High Court under the protective provisions of the Bill of Rights of the Republican Constitution, alleging multiple violation of their rights by the State. They

specifically claimed, in part (a), that the decision of the prison authorities to feed them on *nshima* made from rotten corn taken with, as accompaniment, rotten beans or dried *kapenta*, laced with foreign substances, is inconsistent with the Constitution of Zambia, the International Covenant on Economic, Social and Cultural Rights and the Standard Minimum Rules for the Treatment of Prisoners in that:

- (i) **It violates the Petitioners' fundamental rights guaranteed under Article 11 of the Constitution of Zambia;**
- (ii) **It threatens violation of the Petitioners' fundamental right to life under Article 12 of the Constitution of Zambia;**
- (iii) **It violates the Petitioners' fundamental protection from inhuman and degrading treatment under Article 15 of the Constitution of Zambia;**
- (iv) **It violates the Petitioners' right to adequate food in Article 11 of the International Covenant on Economic, Social and Cultural Rights to which Zambia is a party.**
- (v) **It contravenes the right to food under Article 20(1) of the Standard Minimum Rules for the Treatment of Prisoners.**
- (vi) **It violates the Petitioners' right to medical and health facilities under Article 112(d) of the Constitution of Zambia.**

- (b) That it may be determined and declared that the Respondent's decision to prevent your Petitioners from accessing their antiretroviral therapy and drugs and/collection of antiretroviral drugs on their behalf without the Petitioners being examined:**

 - (i) threatens your petitioners' right to life guaranteed under the Constitution of Zambia.**
 - (ii) is a violation of their rights to adequate medical and health facilities as provided for in Article 112(d) of the Constitution of Zambia.**
- (c) That it may be determined and declared that the respondent's decision to overcrowd the holding cells at Lusaka Central Prison is a violation of Article 15 of the Constitution of Zambia as it constitutes an infringement on the Petitioners' protection from torture, inhuman and degrading treatment.**
- (d) That your Petitioners be awarded damages for mental and emotional stress.**

3.2 It is obvious from the prisoners' claim as framed in their petition that the substratum of their grievance is that there were violations in relation to themselves of some Bill of Rights provisions of the Republican Constitution, some provisions of international human rights instruments and other non-binding human rights standards.

3.3 It should be noted that the Constitution in force at the time was the 1991 Constitution as amended in 1996. The Constitution was amended further in 2016. The Bill of Rights, however, remained unaffected.

4.0 The respondent's answer

4.1 In response to the petitioners' claim, the respondent admitted that only the first petitioner was, to its knowledge, HIV positive and was on ART. It denied the allegation that the prisoners were not on a balanced diet and maintained that all prisoners on special diet are fed on rice.

4.2 The respondent also averred that the Churches Association of Zambia, a non-governmental faith-based entity, does provide supplementary food every Thursday for all prisoners living with HIV and others who are terminally ill.

4.3 As regards access to medical facilities and medication, the respondent maintained that a clinic is conducted at the prison premises to provide ART to all prisoners who are HIV positive.

4.4 The respondent denied, however, that the prisoners suffered any side effects of the drugs on account of taking them on an inadequate and unbalanced diet. It also denied that the prison cells are overcrowded and have poor ventilation or that they have unsanitary ablution facilities.

4.5 The respondent thus repulsed the prisoners' claims that their rights have been violated as alleged, and urged the court to dismiss the petition.

5.0 The judgment of the High Court

5.1 Kabuka J, as she then was, heard the petition. Two witnesses testified on behalf of the petitioners. A similar number of witnesses was called for the defence. Following the hearing the learned judge pertinently made findings of fact as follows:

5.1.1 Both prisoners were HIV positive and were both in custody at the Lusaka Central Prison at the material time.

5.1.2 There is congestion in the prison facility in that a holding cell, originally intended to accommodate 15 prisoners, is now accommodating 75 or more, while the whole prison which was designed to accommodate 160 inmates originally, now accommodates over 1,100 prisoners. Consequently, there is inadequate space for the prisoners to have any restful sleep, and are thus forced to spend nights either standing or sitting. The congestion makes access to the limited toilet facilities difficult. The already bad ventilation is made worse by the strong, sickly stench emanating from the blocked unflushable lavatories.

5.1.3 Food availed to the prisoners is not only insufficient in quantity but also totally lacking in nutritional value and does not constitute a balanced diet – nor does it address the specific needs of the two prisoners and other ailing inmates.

5.2 Having made the findings of fact as set out above, the learned judge then set out what she considered were the questions to be resolved, namely:

5.2.1 whether the lives of the two prisoners have been safeguarded by ensuring that they have access to ART at all times while in incarceration;

5.2.2 whether access to adequate nutrition, both in quantity and quality, has been provided;

5.2.3 whether the conditions in which the two prisoners are detained, constitute inhuman and degrading treatment; and, more importantly

5.2.4 whether, if such grievances were established, they are justiciable or not.

5.3 Having set out for herself the questions for determination, and having considered the evidence deployed before her, the learned judge made the following conclusions:

5.3.1 ART drugs for HIV positive prisoners at Lusaka Central Prison were initially sourced from outside the prison premises. Owing to logistical challenges as regards manpower to escort prisoners to collect their supply of medication, to be reviewed by medical personnel and to have their CD4 counts taken, there was occasional failure to take prisoners to meet these requirements. These challenges were, however, resolved when in 2013, the Lusaka Central Prison Clinic became operational and designated as an ART center.

5.3.2 The Prisons Act, Chapter 97 of the Laws of Zambia, together with the rules made thereunder, do provide for access to medical care by prisoners. With admirable clarity, the learned judge explained the various provisions of the Prisons Act and Rules touching upon prisoners' medical welfare and concluded that:

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considering the evidence, I find no basis for declaring that the petitioners' right to life as guaranteed under the Constitution was threatened by the respondent's violation of their rights to adequate medical and health facilities as provided for in Article 112(d) of the Constitution of Zambia.

5.3.3 Turning to the issue of access to adequate nutrition both in quality and quantity, the learned judge, upon examining rule 17 of the Prison Rules which sets out the ordinary diet to be given to prisoners, concluded that the prescribed diet conforms with what constitutes a balanced diet. The evidence adduced did not establish that the food the prisoners were being fed on was 'rotten.' However,

on the evidence, I have no difficulty in finding [that] although the daily, dietary schedule of rations provides for a balanced diet; it is the prison authorities failure to comply with this schedule that has resulted in the petitioners not being provided with such diet. The real grievance as I understand it, however, is that the petitioners' nutritional needs require a special diet to address their particular condition which the State is failing to provide. Consequently, that this poses a threat to

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their lives, thus violating their right to life which is guaranteed in Article 12(1) of the Constitution.

5.3.4 On whether the conditions in prison cells constituted inhuman and degrading treatment, the learned judge did find that indeed for one to be subjected to the conditions obtaining in the prison cell in which the two prisoners were lodged, constitutes inhuman and degrading treatment within the meaning of Article 15 of the Constitution of Zambia.

5.3.5 The learned judge finally dealt with the issue of justiciability of the prisoners' rights which she found had been infringed by the respondent. In doing so the learned judge seemingly regressed to considering only the health-related rights within the confined context of the Directive Principles of State Policy and concluded in what turned out to be the soul of her judgment thus:

As already pointed out, the Constitution of Zambia has no provision guaranteeing the citizens adequate medical treatment, but only Directive Principle of

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State Policy contained under Article 112(d). This Article merely directs what government policy should address on such issues as social, cultural and economic rights of citizens but does not oblige the State to provide the same. Nor entice an aggrieved person to seek legal redress for any violation of such rights....

In the event, I must come to the inevitable conclusion that although the claims relating to lack of balanced diet; degrading and inhuman treatment have been proved, they are however, not justiciable under the provisions of the Constitution Article 112(d) on which they were grounded.

5.4 The learned judge consequently granted neither relief to the two prisoners nor did she make any pronouncement in regard to the violations which were proved.

6.0 The appeal to this court and the grounds of appeal

6.1 Beleaguered by the judgment of the High Court, the two prisoners have now appealed to us and have framed three grounds of appeal as follows:

- (1) **The learned trial judge misdirected herself in law and in fact when she found that although the claims relating to lack of balanced diet were proved, the same were not justiciable under Article 112(d) of the Constitution.**

- (2) **The learned trial judge misdirected herself in law and in fact when she found that although the appellants had proved their claim of degrading and inhuman treatment, the same were not justiciable under Article 112(d) of the Constitution.**
- (3) **The learned trial judge misdirected herself in law and in fact when she found that although the State had a duty to provide adequate medical care and food to prisoners in general, it has no obligation to provide a special diet to particular patients such as HIV + prisoners to assist them in their recovery.**

6.2 What is clear to us is that the issue of justiciability – or put more precisely, non-justiciability, of the rights allegedly violated, was the dominant factor in the lower court's decision.

6.3 Both parties filed detailed heads of argument in support of their respective positions upon which they relied at the appeal. Each of the learned counsel orally supplemented those heads of argument and engaged the court in fairly useful exchanges.

7.0 Justiciability of rights generally

7.1 Before delving into the substance of the arguments which were so ably debated by counsel for the parties before us, we consider it appropriate that we should take a short detour and address the issue of justiciability as it is the fulcrum upon which the learned lower court judge dismissed the prisoners' claims despite finding that some of them had been proved.

7.2 By justiciability is meant the ability to claim a remedy before an independent and impartial body when a violation of a right has occurred or is likely to occur. It implies access to a mechanism that redresses violation for recognized rights. Accordingly, justiciable rights grant rights holders a legal recourse to enforce them whenever the duty bearer fails to live by its duty to honour those rights.

7.3 The distinction between the different types of rights as it implicates justiciability must be noted. Civil and political rights include the right to life; to dignity; to free speech; to

movement; to privacy; to a fair trial; freedom against torture; against cruel, inhuman and degrading punishment or treatment, and against discrimination. These are rights replicated in the Bill of Rights of the Republican Constitution and are *ipso facto* justiciable. Economic, social and cultural rights, on the other hand, include the right to work; the right to an adequate standard of living, including food, clothing and housing; the right to physical and mental health; the right to social security; the right to a healthy environment and the right to education.

7.4 Although that important World Conference on Human Rights held in Vienna in June, 1993 reiterated that 'all human rights are universal, indivisible, interdependent and interrelated and that they should be available to all persons at all times without distinction, the reality on the ground has been different. The conventional approach is that economic, social and cultural rights have largely been thought to be non-justiciable. This is partly due to the hierarchical

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privileging of civil and political rights over economic, social and cultural rights. The ingrained language of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR) has not helped matters either. While States parties to the ICCPR are obliged to immediately implement the rights contained in the ICCPR, under the ICESCR States can only work towards their 'progressive realization' of rights set out in that Covenant.

7.5 In Zambia, economic, social and cultural rights are not part of the Bill of Rights but instead appeared, at the time of the presentation of the petition, under the Directive Principles of State Policy in Article 112(d) of the Constitution prior to the 2016 amendment. That Article provided as follows:

The State shall endeavor to provide clean and safe water, adequate medical and health facilities and decent shelter for all person, and take measures to constantly improve such facilities and amenities.

7.6 A differently formulated Part II of the amended Constitution (2016) titled 'National Values, Principles and Economic

Policies' in Articles 8 to 10 of the Amended Constitution replaced the Directive Principles of State Policy in the pre-amended Constitution. The bottom line is that listing economic social and cultural rights in the directive principles of state policy or national values, principles and economic principles, makes them rights which the government will strive to achieve based on resource availability. These rights have thus traditionally not been legally enforceable like their civil and political counterparts.

7.7 Arising from the foregoing, an argument that has had a common-sense attraction is that all rights of a social economic and cultural kind, are not justiciable. This is probably what prompted the learned lower court judge to reach the conclusion she did as regards the prisoners' claims and the justiciability of the rights attaching to those claims. As we shall demonstrate later in this judgment this approach is conceptually wrong and empirically unfounded.

8.0 The appellants' submissions

8.1 As intimated at paragraph 6.3 the learned counsel for the appellants filed heads of argument in support of the grounds of appeal. At the hearing, these heads of argument were supplemented orally.

8.2 Counsel for the appellants invited us to adopt a generous and purposive interpretation of the Constitution as we considered the lower court's factual findings against Article 12(1) of the Constitution. Our attention was drawn to our statement in the case of **Resident Doctors Association v. Attorney General**⁽¹⁾ where we stated that a court should take:

a generous and purposive construction...so as to confer on a person the full measure in the enjoyment of that right.

8.3 The learned counsel for the appellant correctly observed that although thus far, the Supreme Court of Zambia has not had occasion to define the extent and scope of the right to life, there is much interpretational guidance to be learnt from countries with similar Constitution as Zambia, which have

had the opportunity to do so. In this regard, we were referred to the Indian case of **Carolie v. Union Territory of Delhi**⁽²⁾ where the Indian Supreme Court remarked that:

the right to life includes the right to life with dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition...

a position affirmed by the same court in **Shantiser Builders v. Narayan Khilimal Totame**⁽³⁾ where the court stated that:

The right to life is guaranteed in any civilized society. That we would take the right within its sweep the right to food, clothing, the right to decent environment and reasonable accommodation to life in.

8.4 Counsel urged us to take the two Indian Supreme Court cases he cited for what they are, namely of persuasive effect only. He cited the High Court judgment of **Sata and Another v. Post Newspapers Limited**⁽⁴⁾ where the then Chief Justice, sitting as a judge of the High Court, spoke to the value of resorting to international instruments and judgments of foreign superior courts in assisting Zambian courts to knowledgeably and fairly execute their interpretive function.

- 8.5 It was also submitted that the right to life encompasses the right to adequate food which is high in nutritional value to maintain a decent human existence. Counsel posited that from the findings of the court below, it was clear that the respondent had violated the two prisoners' right to life as enshrined under Article 12(1) of the Constitution when it failed to provide an adequate, balanced diet to maintain a dignified human existence.
- 8.6 The learned counsel also drew our attention to the testimony of PW2, Dr. Canisus Banda, that ART must be taken with a balanced diet, absent which compromises the efficacy of the medication. The improper administration of ART may be toxic to a patient as it may fail to suppress the patient's HIV viral levels resulting in opportunistic infectious and a high likelihood of death.
- 8.7 Turning to ground two, counsel for the appellants submitted that it was a misdirection by the learned lower court judge to have found that although the two prisoners had proved their

claim that they had been subjected to inhuman and degrading treatment, the same was not justiciable under Article 112(d) of the Constitution. Counsel pointed out that the claim was taken out under Article 15 of the Constitution; and not Article 112(d) as held by the court.

8.8 To buttress the point that the fact of detention in unwholesome conditions indeed amounted to inhuman and degrading treatment, counsel referred to the case of **Munyonsi and Another v. Ngalabeka**⁽⁵⁾ where we held that cruel and inhuman treatment had occurred where a person was detained and held in an unsanitary cell without space to sleep and without food for three days. He also referred to the definition of 'inhuman and degrading' treatment as adopted in the Namibian case of **Ex Parte Attorney General in re: Corporal Punishment by Organs of State**⁽⁶⁾.

8.9 By way of illustration on what has been held to be inhuman and degrading treatment in other jurisdictions and international forums, the learned counsel for the appellants

cited the decision of the European Court of Human Rights in **Pretty v. United Kingdom**⁽⁷⁾, and to the English case of **Regina v. Secretary of State for Home Affairs**⁽⁸⁾, where it was stated that 'treatment is inhuman and degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being.'

8.10 The learned counsel also referred to a plethora of other decision by quasi-judicial bodies such as the African Commission on Human and Peoples' Rights and the Inter-American Court of Human Rights. He also referred to examples from the Malawian High Court in **Masangano v. Attorney General & Others**⁽⁹⁾, the Zimbabwean case of **Kachingwe & Others v. Minister of Home Affairs & Another**⁽¹⁰⁾ and the European Court of Human Rights in **Orchowski v. Poland**⁽¹¹⁾.

8.11 According to the learned counsel, the court below having found that the conditions in which the two prisoners were kept were inhuman and degrading was obliged to find a

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violation of their right under Article 15 of the Constitution and to make an unequivocal pronouncement to that effect.

- 8.12 Ground three assigned error to the lower court judge in holding that although the State had a duty to provide adequate medical care and food to prisoners in general, it had no obligation to provide a special diet to particular patients such as HIV positive prisoners to assist their recovery.
- 8.13 Counsel submitted that under the common law, the State has a duty of care towards the lives and well-being of prisoners to include the provision of adequate nutritious food. The Prisons Act and Rules equally impose a duty on the State to provide for the nutritional needs of prisoners who can thus assert the right to food under these laws.
- 8.14 Counsel referred to the HIV & AIDS/STI/TB workplace policy of the Zambia Prison Service which recognizes the importance of nutrition and food for prisoners on ART and the evidence of PW2 on good nutrition for HIV patients, before submitting that the State had an obligation to provide a

special diet to particular patients such as the two prisoners who were HIV positive and on ART. Counsel prayed that we uphold the appeal.

- 8.15 At the hearing, Mr. Mwale in response to a question from the court conceded that neither the ICESCR nor the Minimum Standard Rules for the Treatment of Prisoners, were directly enforceable by a domestic court. He, however, pointed out that although the State was obliged to ensure the progressive realization of the rights in the ICESCR, prison conditions in the correctional facility in question have been in a state of neglect for many years. He reiterated the point that the rights the two prisoners claim were violated are justiciable as they are in Article 12 and 15 of the Bill of Rights and were enforceable independently of Article 112(d). He disclosed that although the appellants had sought damages, they no longer were insistent on that remedy.

9.0 The respondent's retort

- 9.1 In its heads of argument opposing the appeal, the respondent countered grounds one and three together while ground two was argued separately.
- 9.2 Counsel pointed out that in the reliefs sought by the appellants there is specific reference to the ICESCR, the Standard Minimum Rules for the Treatment of Prisoners and Article 112(d) of the Constitution as having had their provisions violated in respect of the two prisoners.
- 9.3 Counsel contended that through their arguments in the lower court, the appellants had sought to persuade the court to examine and apply Article 112(d) of the Constitution in determining the content of the right to life as provided for in Article 12(1) of the Constitution. In other words, they had sought the court to assess the influence of the Directive Principles of State Policy of the Constitution in the application of those principles to the right to life.

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- 9.4 Counsel submitted that the HIV & AIDS/STI/TB Workplace Policy of the Zambia Prison Service, which was cited by the appellants, is not legally binding; that the respondent is not under any legal duty to provide food supplements to any HIV positive inmates.
- 9.5 The learned counsel further contended that the finding by the lower court that claims relating to lack of a balanced diet were grounded in Article 112(d) of the Constitution, were a finding of fact which was not perverse. Reliance was placed on the case of **Wilson Masauso Zulu v. Avondale Housing Project Limited⁽¹²⁾**.
- 9.6 Counsel for the respondent also gave the rationale for the non-justiciability of Directive Principles of State Policy by quoting Article 110(2) of the Constitution as it stood then as follows:
- (2) **The application of the Directive Principles of State Policy may be observed only in so far as State resources are able to sustain their application, or if the general welfare of the public so unavoidably demands, as may be determined.**

- 9.7 We were also referred to the English case of **Airedale NHS Trust v. Bland**⁽¹³⁾ where the Court of Appeal stated that the duty to provide medical care is restricted to what one can reasonably provide and that the resources of the National Health Service are not limitless and choices have to be made.
- 9.8 Counsel also submitted that having correctly found as a fact that the appellants' claims relating to lack of a balanced diet were grounded in Article 112(d) of the Constitution, the learned High Court judge correctly reached the inescapable position that the said claim was not justiciable. He referred us to Article 111 of the Constitution.
- 9.9 Turning to ground two of the appeal counsel for the respondent shortly submitted that the trial judge was right to hold that despite the appellants proving that their claim of being subjected to degrading and inhuman treatment had been violated, the same are not justiciable. Pointing to the appellants' claim in the petition, counsel submitted that the claim was made pursuant to Article 15 as read with Article

112(d) and 112(f) of the Constitution. This means that the right claimed to have been violated is not justiciable under Article 112(d) of the Constitution.

9.10 Counsel implored us to dismiss the appeal.

10.0 The issues for determination in this appeal

10.1 As we intimated at the opening paragraph of this judgment the principal issue in this appeal is whether economic social and cultural rights are justiciable in their own right or whether they may be called in aid of civil and political rights. Put shortly, and in less elevated language, is there any role for the court in a dualist State which Zambia is, in vindicating prisoners' right to food and the right to health granted the formulation of these rights in the Republican Constitution as mere public policy goals and principles.

10.2 It likewise must be determined whether the prisoners' civil and political rights to life and to protection against inhuman

and degrading treatment, were indeed violated, and if so, in what respects.

11.0 Analysis and decision of the court

11.1 It is important to recap the prisoners' claims as were set out in their petition before the High Court. The rights allegedly violated are specifically mentioned as those contained in Article 11 of the Zambian Constitution (general protective provision); Article 12 of the Zambian Constitution (the right to life); Article 15 of the Zambian Constitution (protection from inhuman and degrading treatment); Article 11 of the ICESCR (the right to adequate food); Article 20(1) of the United Nations Standard Minimum Rules for the Treatment of Prisoners (right to food) and finally Article 112(d) of the Zambian Constitution (pre 2016 Amended Constitution) (the right to medical and health facilities).

11.2 What is clear to us is that the rights alleged to have been violated are not of the same genre; they belong to the two broad categories unhappily categorized as first-generation

rights, i.e. civil and political rights, and second-generation rights – economic social and cultural rights.

- 11.3 It is also incontroverted that some of these rights fall within Articles 11 and 26 of the Constitution of Zambia and are enforceable under Article 28 of the Constitution which provides that:

If any person alleges that any of the provisions of Articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him then...that person may apply to the High Court...

- 11.4 The learned judge in the court below based her rejection of the prisoners' claim before her on the premise that although they were proved, they were not justiciable as they fall under Article 112(d) of the Constitution of Zambia which dealt with the Directive Principles of State Policy. In the peroration to her judgment, the learned judge held that:

In the event, I come to the inevitable conclusion that although the claims relating to lack of balanced diet; degrading and inhuman treatment have been proved, they are however, not justiciable under the provisions of the Constitution Article 112(d) on which they were grounded.

11.5 Although the conclusion of the learned judge appears to have a *prima facie* appeal, it was in truth not anchored in the correct factual position. The correct factual position, and as was submitted at the hearing by Mr. Mwale, learned counsel for the appellants, and as is also clear from paragraph 3.1 of this judgment, is that the claims of the prisoners were not all grounded on Article 112(d) nor were they all in fact claims to economic social and cultural rights. We shall revert to this point later in this judgment.

11.6 Taken and analysed individually, the rights which the prisoners claim were violated can in fact be located within redressible rights under the justiciable part of the Republican Constitution, namely the Bill of Rights, Articles 11 to 26. We now set out to demonstrate this position.

12.0 Was Article 11 of the Constitution violated in respect of the two prisoners?

12.1 Article 11 of the Zambian Constitution provides that:

It is recognized and declared that every person in Zambia has been and shall continue to be entitled to the fundamental rights

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and freedoms of the individual, that is to say, the right, whatever his race, place or origin, political opinions, colour, creed, sex or marital status, but subject to limitations contained in this Part, to each and all of the following, namely:

(a) Love, liberty, security of the person and the protection of the law;

(b) Freedom of conscience, expression, assembly, movement and association;

(c) Protection of young person from exploitation;

(d) Protection for the privacy of his home and other property and from deprivation of property without compensation; ...

12.2 It is clear that Article 11 offers general protection in regard to all civil and political rights. A violation of any of the distinct rights under the Bill of Rights would also invariably entail a violation of Article 11. Until it is established that any of the prisoners' fundamental rights had been violated, it would be premature to allege a violation of Article 11.

13.0 Was the prisoners' right to life violated?

13.1 Article 12 of the Republican Constitution guarantees protection of the right to life except in some instances specified in the Article. As regards this right, the two

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prisoners allege that it was violated or threatened through their being fed on inadequate portions of *nshima* made from rotten maize taken with rotten beans or dried *kapenta* containing foreign materials contrary to the provisions of Prison Rules and the First Schedule under the Prisons Act.

- 13.2 Besides violating Article 12 of the Republican Constitution, the two prisoners also claimed that their being fed on poorly prepared and inadequate portions of substandard food also violated the provisions of Article 11 of the ICESCR and Article 20(1) of the UN Standard Minimum Rules for the Treatment of Prisoners to both of which instruments Zambia is a party.
- 13.3 The two prisoners' claim that their right to life - a clearly justiciable right of the first-generation type - was violated through the non-observance of another right, i.e. the right to food (adequate food) - which as a second-generation right is generally taken to be of doubtful justiciability. The point is conceded that the right to food in Zambia is not in the justiciable category of rights in the domestic Bill of Rights.

13.4 The right to food is, however, a distinct, valid and fundamental human right which has been recognized as such for many years. It has been formally recognized in both binding and non-binding international instruments since the Universal Declaration of Human Rights of 1948 – whose Article 25 refers to the right to food in unambiguous terms as follows:

Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

13.5 The ICESCR formalized the right to food as a basic human right. Article 11 of the ICESCR affirms that:

The State parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food... The States parties, to the present Covenant recognizing the fundamental right of everyone to be free from hunger shall take individually and through international co-operation, the measures including specific programmes, which are needed...

- 13.6 The ICESCR was adopted on 16 December, 1966 by the United Nation General Assembly Resolution 2200A (XXI) 21. It entered into force on 3 January, 1976. Zambia acceded to it on 10 April, 1984. Under Article 2 of the ICESCR States parties undertake a legally binding obligation to take steps, to the maximum of their available resources, to achieve progressively, the full realization of economic and social rights in that Covenant.
- 13.7 The ICESCR proposes an analysis of different levels of duties imposed by any right – uses a triptych of obligations to respect, protect and fulfill.
- 13.8 As there is no express justiciable constitutional basis for the right to food in Zambia, arguing on the basis of the text of the ICESCR and soft laws documents like the Standard Minimum Rules for the Treatment of Prisoners or indeed policy documents cannot be the main means of full realization of these rights.

13.9 Although there is thus far no interpretive tradition for economic social and cultural right in domestic courts in this country, we take note that the experience of directly applying international human rights instruments and standards is a growing practice in domestic courts in different parts of the world.

13.10 In its General Comment No. 9, the Committee on Economic Social and Cultural Rights, did summarise some of the ideas in favour of justiciability of economic, social and cultural rights as follows:

In relation to civil and political rights, it is generally taken for granted that judicial remedies for violations are essential. Regrettably, the contrary assumption is too often made in relation to economic social and cultural rights. This discrepancy is not warranted either by the nature of the rights or by the relevant Covenant provisions...while the general approach of each legal system needs to be taken into account, there is no Covenant right which could not, in the great majority of systems, be considered to possess at least some significant justiciable dimensions.

13.11 Economic, social and cultural rights are now increasingly being widely recognized as enforceable in the courts either

directly or indirectly through civil and political rights. In the **Indian case of Francis Mullin v. Administrator Union Territory of Delhi**⁽¹⁴⁾ the Supreme Court supported the wider interpretation of the right to life in the following terms:

But the question which arises is whether the right to life is limited only to the protection of limb or faculty or does it go further and embrace something more? We think that the right to life includes right to live with human dignity and all that goes along with it, viz, the bare necessities of such life such as adequate nutrition, clothing, shelter and facilities for reading and expression of oneself in diverse forms freely moving about and mixing and co-mingling with fellow human beings.

13.12 Similarly expanded approach was adopted in **Olga Tellis v. Bombay Municipal Corporation**⁽¹⁵⁾. There street Bombay and Petty Hawking brought a petition arguing that the removal from the street would ultimately compromise their right to a livelihood, and by extension their right to life as guaranteed by Article 21 of the Constitution.

13.13 We accept the learned counsel for the appellants' call that the right to life must be interpreted liberally. It inevitably

dovetails and is interlinked with other rights such as the right to food and the right to health.

13.14 Comparative legal experiences from which Zambia stands to benefit highlights the growing trend of indirect judicial protection of the right to food through the interconnection of that right with other rights and by framing, as we believe the two prisoners did here, the right to food with other rights. In Fiji, for example, the High Court of that country in the case of **Tito Rarasea v. State**⁽¹⁶⁾ struck down a punishment imposed by prison authorities on an inmate, consisting of reducing his food rations by half. The court held that the reduction of food rations as a means of control was inconsistent with Article 11(1) of the ICESCR. Further, that the reduction of food was incompatible with human dignity and amounted to degrading treatment.

13.15 The Inter-American Court of Human Rights decided in the case of **Sauhoyamaxa Indigenous Communities v. Paraguay**⁽¹⁷⁾ that the Paraguayan State had violated the right to life for

failing to ensure access to food, water and health services to nineteen members of an extremely poor indigenous community eighteen of whom were children. The court held that the State's positive obligation concerning the right to life, including providing access to food, are triggered when the State authorities:

Knew or should know about the existence of a real and immediate risk for the life of a determinate person or group of persons, and did not take the necessary measures, within the realm of its powers which could be reasonably deemed adequate to prevent or avoid the risk.

13.16 In *Dr. Molhinddin Farooque v. Bangladesh and Others*⁽¹⁸⁾, the Supreme Court of Bangladesh offered negative protection against inadequate food products that constituted threats to life. In construing the constitutional clause enshrining the right to life, the court decided that the government should remove threats posed by consignments of powdered milk which exhibited level of radiation which were above the accepted limits. In its holding the court stated that the right to life includes the protection of health and normal longevity

of an ordinary human being and that these can be threatened by the consumption of food and drink injurious to health.

13.17 In agreeing with counsel for the prisoners, we must state that the right to life ought to be given a broader interpretation as a right to a dignified life, that is to say a life according to human dignity, encompassing a wider range of aspects of the right to food nutritious to sustain a dignified human life. For those with special requirements owing to their health conditions, the right to life should be construed even more broadly to mean food which will take care of their peculiar health needs. Any consideration of the right to life which is short of these stipulations, is in our view, is meaningful - it is merely rhetorical or metaphorical.

13.18 The learned judge found [at J32] that there was no evidence led by the prisoners that the food on which they were fed was rotten. However, she held that:

On the evidence, I have no difficulty in finding [that] although the daily dietary schedule of rations provides for a balanced diet; it is the prison authorities' failure to comply with this

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schedule that has resulted in the petitioners not being provided with such diet.

Having made that finding, the lower court, as already pointed out at paragraph 11.4, proceeded to hold that such rights were anchored in Article 112(d) of the Constitution and were not justiciable. This holding, in our considered view, defies logic. It was a wrong conclusion for the court to reach as in doing so the court unduly conflated a justiciable right under Article 12 of the Bill of Rights with an unjustifiable right under Article 112(d) of the Constitution or indeed under the ICESCR. The learned judge thus misdirected herself in this regard. Grounds one and three are thus bound to succeed.

14.0 Was the right against being treated in an inhuman and degrading manner established?

14.1 We have already pointed out the infliction of inhuman and degrading treatment or punishment is proscribed by Article 15 of the Zambian Constitution. Additionally, there is a whole body of regional and international instruments developed by the international community designed to

- 14.2 protect the rights of prisoners. Some of these constitute binding obligations on States while others provide non-binding standards. These include the Basic Principles for the Treatment of Prisoners (UN General Assembly Resolution 45/111 of 14 December 1990) (the Basic Principles on Prisoners) the Standard Minimum Rules for the Treatment of Prisoners (UN ECOSOC resolution 663 C (XXIV) 31 July 1957 and resolution 2076 (LXII) 13 May 1977, and the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (UN General Assembly resolution 43/173, 9 December, 1988). All these are important reference tools regarding the rights of prisoners.
- 14.3 We are, of course, not unmindful that international human rights standards have differing legal status. Some are treaties which are legally binding on States that enter into them. Others (non-treaty standards) represent the consensus of the international community on standard to which States should aspire. Together they constitute an

international framework of fundamental safeguards against denials of prisoners' rights.

- 14.4 Article 10 of the International Covenant on Civil and Political Rights provides in paragraph 1 that:

All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

The right to humane treatment imposes a positive obligation on States intended to ensure the observance of minimum standards with regard to persons deprived of their liberty.

- 14.5 In **Denmark, Norway, Sweden and the Netherlands v. Greece**⁽¹⁹⁾, the European Commission of Human Rights observed that:

The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable...

- 14.6 Treatment or punishment of an individual is said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience. Inhumane treatment is that which causes, if not actual bodily injury, at

least intense physical and mental suffering to persons subject to it. Degrading treatment is that which arouses in a victim the feeling of fear, anguish and inferiority capable of humiliating or debasing.

- 14.6 The European Court on Human Rights have in numerous cases held that detention of prisoners in unhygienic cell conditions made such detention inhuman and degrading.
- 14.7 In **Donald Peers v. Greece ECHR**⁽²⁰⁾ the applicant, a heroin addict was remanded in a Greece prison. He complained that he had shared a small cell with one another prisoner, with an open toilet which often failed to work, in hot cramped conditions with little natural light and no ventilation. The European Court held that there had been a violation of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention of Human Rights. Likewise, the court found a violation of the same Article of the Convention in **Kalashnikov v. Russia**⁽²¹⁾ Council of Europe 15 July 2002. There the applicant was held in a cell which was overcrowded

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– on 17 square meters 24 inmates were held – and he was surrounded by heavy smokers and was thus forced to be a passive smoker. He also complained that it was impossible to sleep properly as the TV and cell lights were never turned off and the cell was overran with cockroaches and ants. The court accepted his complaint even though there had been no indication of a positive intention to humiliate the applicant.

14.8 It has been contended by the learned counsel for the respondent that the State is short of resources to improve the conditions of incarceration in the country's correctional facilities and hence the poor state of Lusaka Central Correctional facility. However, according to the Human Rights Committee in its General Committee No. 9/16 of 27 July 1982, a State cannot invoke a lack of adequate material or financial resources or financial difficulties as justification for inhuman treatment and is obliged to provide detainees and prisoners with services that will satisfy their essential needs.

14.9 We have already stated that in her conclusion the learned judge held that although the prisoners had, by reason of the overcrowding, poor sanitation and the general state of the prevailing conditions at the correctional facility, been subjected to degrading and inhuman treatment, that too could not be redressed because it fell under Article 112(d) of the Constitution. This was a clear misapprehension on the part of the lower court. In fact, it sharply contradicts her own finding [at J33] that:

I find [that] for one to be subjected to such conditions certainly constitutes inhuman and degrading treatment within the meaning of Article 15 of the Constitution of Zambia which guarantees the protection of any person from being subject to such treatment.

14.10 We have no hesitation in holding that while the lower court judge made what appears, in all probability, to be the correct findings of fact, she totally misdirected herself when she applied the law to the fact. As we have elsewhere stated, the violation alleged was of Article 15 of the Constitution which

is part of the mainstream Bill of Rights – justiciable in its own right.

14.11 As regards ground two of the appeal, the gravamen is that the learned lower court judge was wrong to hold that although the conditions in the correctional facility in which the two prisoners together with other inmates were lodged constituted inhuman and degrading treatment, that violation was not redressible because it came under Article 112(d) of the Constitution.

14.12 Like Article 12 (the right to life) Article 15 (protection against inhuman and degrading treatment or punishment) falls within the justiciable part of the Constitution. The learned judge was thus wrong to conclude that the right against inhuman and degrading treatment was not justiciable under Article 112(d) of the Constitution.

15.0 Was the respondent obliged to provide a special diet to the prisoners?

15.1 The learned lower court judge held that AS the State has no obligation to provide adequate care and food to prisoners in general, it has no obligation to provide a special diet to particular patients such as HIV positive prisoners to assist them in their recovery.

15.2 Yet it is well known that eating a balanced diet is of vital importance for maintaining good health and well-being which in turn guarantees the right to life.

15.3 The conclusion of the lower court judge was to us rather puzzling. We say so in light of the clear articulation by the judge in her judgment of the position of the law. At J28 the learned judge remarked as follows:

The Prison Rules attendant to the Prison Act, contain provisions which enhance the medical care and the provision of food for prisoners. The medical officer can direct modification in diet (Rule 40(1)(e)) and report to the officer-in-charge of any such prisoner with such recommendations as he may think proper on the supply of additional or alternative food. Rule 24(1) places a duty on the medical officer-in-charge of prison to

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maintain a prison hospital clinic or such bay and Rule 44 further provides for a normal hospital diet for prisoners admitted in hospital.

15.4 We accept the submissions of the learned counsel for the appellants that both the common law and the Prisons Act and Rules made thereunder impose on the State the obligation to provide for the nutritional needs of the prisoners who are under specific medical needs. The State has failed to discharge that duty.

15.5 We hold, therefore, that by failing to provide the two prisoners with a balanced diet as prescribed in the Prisons Rules, the State not only failed to observe legislation which it had enacted for itself, it has also violated the prisoner's right to life as set out in Article 12 of the Constitution.

16.0 Conclusion: declarations and orders

16.1 We must make the point that adjudication through the courts is not, and cannot be the main means to fulfill the realization of prisoners' rights, particularly those alleging

neglect and violation of rights of an economic and social nature. The development and implantation of services and policies necessary to make these rights a reality, are the kinds of tasks that repose in the political branch of the government – not the judiciary. We as courts are not even the best actors to perform the task of monitoring the general result of policies oriented to ensure the full realization of the whole range of prisoners' rights – a task which the political and especially independent constitutional technical bodies such as the Human Rights Commission are better equipped to do.

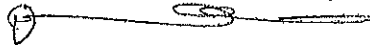
16.2 Taken in the round, we hold that the appeal succeeds on all claims. The State is in continuing violation of the two prisoner's rights to life as guaranteed by Article 12 of the constitution, the right against inhuman and degrading treatment under Article 15 and to special dietary needs as persons living with HIV. The State has also consequently violated Article 11 in relation to the two prisoners.

- 16.3 The right to life entails that the two prisoners should have the right to decent food – adequate nutritious food. Prison food or conditions of detention should not be used as an additional punitive measure. In other words, they should not be leveraged as further punishment of criminals by the State. Being incarcerated is punishment enough; being served bad inadequate or unsafe food or being kept in inhumane conditions is unfairly punitive.
- 16.4 Prisons such as the Lusaka Central Correctional facility which, as the lower court found are overcrowded and unsanitary, can be breeding grounds for infection. Overcrowding, lengthy confinement with poor ventilation and sanitation, are all conditions which frequently contribute to the spread of diseases and ill health. These factors, when combined with poor hygiene, inadequate nutrition and limited access to adequate health care are a serious threat to the right to life.


- 16.5 We hold that the conditions under which the two prisoners were held at Lusaka Central Correctional facility constitute inhuman and degrading treatment or punishment.
- 16.6 Prisoners with special dietary needs because of conditions like HIV, diabetes, high blood pressure, cholesterol problems, allergies, etc. religious dietary requirement, general nutritional concerns and vegetarian preferences, all require preferential consideration in furtherance of their right to life.
- 16.7 We direct and order the State to immediately take measures to decongest the Lusaka Central Correctional facility and to render a report to the session judge at all subsequent opening day of the Lusaka Session of the High Court on the measures taken to decongest the facility so as to make it humane.
- 16.8 We order the State to increase the allocation of resources to Lusaka Central Prison for purposes of improving the dietary needs of prisoners, special attention being paid to HIV positive prisoners on ART, and ensure that the dietary needs

of the inmates comply with the prescriptions in the Prison Rules. A report as in paragraph 16.7 above shall be submitted to the session judge at the opening day of every session at Lusaka.

16.9 We make no order as to costs.



.....
I. C. Mambilima
CHIEF JUSTICE


.....
M. Malila

SUPREME COURT JUDGE



.....
C. Kajimanga
SUPREME COURT JUDGE