

IN THE MATTER OF PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF
THE INDIVIDUAL AND IN THE MATTER OF ARTS 20(6) AND 29 OF THE
CONSTITUTION OF ZAMBIA MUNDIA SIKATANA v THE ATTORNEY-GENERAL
(1982) Z.R. 109 (H.C.)

HIGH
KAKAD, J.
26TH
(1982/HP/213)

FEBRUARY,

COURT
1982.

Flynote

Civil procedure - Jurisdiction - Whether a High Court judge has the power to review as a civil matter a case determined by another High Court judge of equal jurisdiction, as a criminal matter.

Headnote

The petitioner with others was charged with treason. At the trial and before pleading to the charge he raised a plea of pardon. The plea was heard and dismissed by the trial court. He then filed a notice of appeal to the Supreme Court, which court held that it had no jurisdiction to determine the matter. Consequently the petitioner filed a petition claiming that his rights under Art. 20 (6) of the Constitution had been contravened by the High Courts dismissal of his plea.

Held:

- (i) A judge of the High Court has no jurisdiction to reopen and reconsider and interfere with and comment upon a matter already determined by another judge of equal jurisdiction.
- (ii) The fact that the case was first determined as a criminal matter and is then subsequently raised as a civil matter is irrelevant as long as it arises from the same facts and evidence.
- (iii) Principle of res judicata applies.

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Cases cited:

- (1) In re Charles Matakala Sikuka (1978) Z.R. 138.
- (2) Valentine Musakanya and Edward Shamwana v A-G. 1981/HP/527.

Legislation referred to:

Constitution of Zambia Cap.1 Arts. 29(1), 20 (6), 29 (2).

High Court Act, Cap.50 s.4.

Protection of Fundamental Rights Rules, SI No.156 of 1969.

For the petitioner: In person

For the respondent: G.M. Sheikh, Senior State Advocate.

Judgment

KAKAD, J.:

The petitioner in his petition claims that his rights under Art. 20 (6) of the Constitution of Zambia, Cap. 1, have been contravened by the ruling of the High Court in the High Court criminal case HP/166/1981 in which the High Court had dismissed the petitioner's plea of pardon raised by the petitioner.

It is common cause that the petitioner with others is charged with treason in the High Court at Lusaka in criminal cause HP/166/1981. On 11th January, 1981, the petitioner at the trial of the above-mentioned criminal case and before pleading to the charge had raised a plea of pardon. The plea of pardon was heard and determined by my learned brother Chirwa, J., the trial judge. The

plea of pardon was rejected and dismissed by the court. The petitioner, thereafter, filed a notice of appeal to the Supreme Court of Zambia. Ultimately the decision on the plea of pardon was referred by the High Court to the Supreme Court. The Supreme Court held that the High Court had no power to refer the matter to the Supreme Court and therefore had no jurisdiction to consider the matter. The petitioner thereafter attempted to revive the appeal, but failed. Consequently the petitioner filed the petition in question. The above facts are apparent from the petition and answer. The petitioner in paras. 11 and 12 of the petition claims:

- "11. The petitioner's rights under Art. 20 (6) have been contravened by the determination of Mr Justice Chirwa. According to the Supreme Court, the petitioner's appeal under Art. 29 (4) of the Constitution can only be determined after a petition to the High Court.
12. The petitioner seeks an order that his rights Art. 20 (6) of the Constitution have been contravened by the Ruling of Mr Justice Chirwa."

Article 20(6) of the Constitution of Zambia, Cap.1 provides:

"(6) No person shall be tried for a criminal offence if he shows that he has been pardoned for the offence.

Article 29 (1) and (2) of the Constitution of Zambia, Cap.1, states:

"29 (1) Subject to the provisions of clause (d), if any person alleges that any of the provision of Art. 13 to 27 (inclusive)

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has been, is being or is likely to be contravened in relation to him, item, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction:

- (a) to hear and determine any application made by any person in pursuance of Clause (1);
- (b) to determine any question arising in the case of any person which is referred to it in pursuance of Clause (3);

and may, subject to the Provisions of Clause (a), make such orders issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of Art. 23 to 27 (inclusive)."

The protection of Fundamental Rights Rules 1969, under Statutory Instrument No.156 of 1969 provides for the procedure concerning petition under Art. 29 of the Constitution of Zambia Cap. 1.

In Archbold's 40th Edn. on *Plea of Pardon* in para. 389 at p. 390, it is stated:

"389. Plea of pardon. A pardon may be pleaded in bar to the indictment; or, after verdict, in arrest of judgment; or after judgment, in bar of execution: 2 HAWK. C. 37. A pardon under statute need not be pleaded: 3 Co. Inst. 234; 2 HAWK. C. 37, s.59; unless there be exception out of it; *ibid* Fast. 43 2 Hale 252; 3 Co. Inst. 344; nor can the defendant lose the benefit of it by his own laches or negligence. The Royal Pardon should be pleaded at the first opportunity which the defendant may have of doing; for instance, he has obtained a pardon before arraignment, and, instead of pleading it in bar, he pleads the general issue, he is deemed to have worked the benefit of it, and cannot afterwards avail himself of it in arrest of judgment: 2 HAWK. C. 37, s.59."

The respondent in reply to the petition has raised the issues of jurisdiction and *res judicata*.

Paragraphs 3, 4, and 5 of the answer to petition states:

"3. With regard to paragraphs 11 and 12 of the petition, it is submitted that the matter having been properly and regularly adjudicated in a legal process which the petitioner had selected and subjected to, he cannot now maintain that his rights have been contravened by the determination in course of such legal process.

4. That the Respondents will maintain that the Honourable Court has no jurisdiction to hear this petition as the issue raised by the petitioner before this court, has already been heard, determined and decided upon by the learned judge of a competent and concurrent jurisdiction to this Honourable Court.

5. That the Respondent will further maintain that there is now 'Res Judicata' as the issue whether the contents of the letter dated

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21st June, 1981, exhibited by the petitioner at his trial on a charge of treason, disclosed a pardon alleged to be granted to him by the President has already been determined in finality by the Honourable Judge in answer to a plea of pardon put forward by the petitioner in that trial."

At the hearing of the petition it was my considered view that the issue of jurisdiction raised by the respondent went to the root of the matter. The petitioner and the respondent agreed with my views. I therefore decided first to hear the parties on the question of jurisdiction.

Mr Sheikh, the Senior State Advocate, for the respondent submitted that a plea of pardon raised by the petitioner at his trial of treason the High Court criminal case HP/166/1981, was duly considered and decided finally by the High Court presided over by my learned brother Chirwa. J. He contended that the matters raised by the petitioner in the petition before this court under Arts. 20 (6), 29 (1) and 29 (2) of the Constitution of Zambia Cap.1, are identical and the same to those raised before the High Court at the trial of criminal case HP/166/1981, presided over by brother Chirwa. J. According to the learned State Advocate this court is now invited by way of petition, to re-open and to reconsider whether the alleged letter of pardon was or was not a pardon. Referring to s.4 of the High Court Act, Cap. 50, he submitted that this court is a court of equal jurisdiction to the court that was presided over by my learned brother Chirwa, J., and has the same and equal power, authority and jurisdiction. He therefore, contended that this court has no jurisdiction to reconsider the issue of pardon which was finally decided by the court having equal jurisdiction to this court. According to him there cannot be multiplicity of declarations by courts having equal jurisdiction, power and authority. In his view it would have been a different matter where the court would have been asked to give its opinion in a case having varied facts. He referred to pages 843 to 845 in The English and Empire Digest, Vol. 30 at p.277. He submitted that on the basis of his submission this court should not consider the issue of pardon all over again.

Mr Sikatana in reply stated that in the normal circumstances he would not have argued against the submissions made by the learned Senior State Advocate. According to him, he would not have asked the second court to determine an issue which had been finally determined by a court having equal jurisdiction. He agreed that that would amount to ridicule of justice. He submitted that the jurisdiction conferred on this court was by the Constitution of Zambia. He conceded that the jurisdiction conferred by the Constitution did not infer that this court was expected to determine an issue for the second time. The learned petitioner referred to the events which led the Supreme Court of Zambia to rejecting the petitioner's right of appeal against the decision of my learned brother Chirwa, J. dismissing the plea of pardon. According to him, those events have made him to come to this court by way of petition. He conceded that the plea of pardon he had raised before the trial court, presided over by my brother Chirwa, J., in criminal case HP/166/1981, was based on the provisions of Art. 20 (6) of the Constitution of Zambia Act, Cap.1.

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According to him, for him to have a right of appeal to the Supreme Court against that decision. he had to raise the plea of pardon under Art. 20 (6) of Cap.1 by procedure laid down in Art. 29 (1) of

the Constitution of Zambia Act, Cap. 1. The contended that as he had not raised the plea of pardon under the right procedure, i.e. by petition, he had a further right to raise the same plea of pardon before this court by petition as provided under Art. 29 (1) of cap. 1. According to him when he raised the plea of pardon before the trial judge in the High Court criminal case HP/166/1981, he had thought that he had made an application under Art. 29 (1) of Cap.1. He stated that by this petition before this court he is not inviting this court to find contrary to what the trial court in criminal case HP/166/ 1981, had decided on a plea of pardon. He contended that the trial judge, my brother Judge Chirwa, had contravened his constitutional rights. According to him the issues of jurisdiction and res judicata were inter related. He contended that had this petition been before my brother Chirwa, J., then it would have meant that it was before an equal jurisdiction. He submitted that now the petition is before a different court and a different judge, the question of similar jurisdiction and equality did not arise. According to the learned petitioner he was not asking this court to reconsider the plea of pardon decided finally by the trial judge in criminal case HP/166/1981. He argued that the learned Senior State Advocate's views on the question of jurisdiction were correct. He, however, prayed this court to find that this court had no jurisdiction, to reconsider the plea of pardon.

Having considered the petition and the answer and having heard the parties, it is my considered view that the petitioner in essence is praying to this court to re-open and reconsider the plea of pardon which was raised before the trial court in High Court case HP/166/1981 and which was finally decided by the trial judge, my brother Chirwa, J.

There can be no doubt that the High Court presided over by learned brother Chirwa, J., in criminal case HP/166/1981, at which the plea of pardon was finally decided, was and is equal jurisdiction power and authority to this court presided over by me. Equally there can be no doubt that the jurisdiction, power and authority vested by the Constitution of Zambia, in my learned brother Chirwa, J., is equal to the jurisdiction, power and authority vested in me by the Constitution of Zambia. Therefore there is no question of me and this court having any different or dissimilar jurisdiction, power and authority to that vested in my brother Chirwa, J., and the court presided over by him (*see* s.4 of the High Court Act, Cap.50). The fact that the plea of pardon raised before the court presided over by my brother Chirwa, J., was in a criminal matter and the fact that the petition before this court concerning the same plea of pardon based on the same facts, evidence and the constitutional provisions is in a civil matter, in my considered opinion, makes no difference at all to the question of our equal jurisdiction, power and authority. The fact remains that the plea of pardon, the subject matter of this petition, emanates

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from treason, the offence the petitioner is charged with and the one which is before the trial court presided over by my brother Chirwa, J., and who had finally decided that plea. Therefore, the petition before this court, I find, is a successive application to re-open and reconsider the plea of pardon that was decided by my learned brother Chirwa, J., in the High Court criminal case HP/166/1981.

In *The English and Empire Digest*, Vol. 30, in para. 845, at p.277, it is stated:

"A Judge of the KB Div. should follow the decision of another Judge of the Division on a point of law without saying what his own view would have been on the matter, leaving it to the court of appeal to say whether or not that decision was wrong. PAPWORTH *v* BATTERSEA P.C. (1915) 84 L.J.K.."

On the question of Jurisdiction and successive applications before judges having the same jurisdiction, I have taken into account the decisions in *The Matter of Charles Matakala Sikuka* (1), *Valentine Musakanya, Edward Shamwana and Attorney-General* (2), and other authorities referred to by the learned State Advocates. I fully concur with those decisions which I find are applicable to the situation in a petition before this court.

The plea of pardon raised by the petitioner in the High Court criminal case HP/166/1981, presided over by my learned brother Chirwa, J., was finally decided by that court. Therefore, do I, having equal jurisdiction, have jurisdiction, power and authority to re-open and reconsider the same plea of pardon based on the same facts and same constitutional provisions. Legally, logically or otherwise, for the reasons stated, I cannot see what jurisdiction, power or authority I have to

interfere and comment on a final decision made by my learned brother Chirwa, J., on the plea of pardon in the High Court criminal case HP/166/1981. In my opinion it would be a mockery of justice if a judge of equal jurisdiction interfered with or commented upon final decision made by a judge of equal jurisdiction on a matter based on the same facts and evidence. In my judgment I have neither the jurisdiction nor the power nor the authority to re-open or reconsider the plea of pardon decided by my learned brother Chirwa, J., in the High Court criminal case HP/166/1981, or for that matter on any decision taken or made on the same plea of pardon. In the result I find that I have no jurisdiction this matter. I consider that with the above finding the plea of res judicata, though not argued, would succeed.

With regards to costs, I consider that this petition has raised important issues, and therefore order that each party bears his own costs.

Petition dismissed

MUVUMA KAMBANJA SITUNA v