

EDITH ZEWELANI NAWAKWI (Female) v THE ATTORNEY GENERAL (1991) S.J. (H.C.)

HIGH COURT  
MR. JUSTICE C, M. MUSUMALI  
24TH DAY OF JUNE, 1991  
1990/HP/1724

Flynote

Freedom of movement - whether passport office requires both parents' consents to include children on passports - single parent family - recognition under Zambian Law.

Headnote

The applicant was an unmarried mother of two boys. She was a Zambian citizen and had held two Zambian passports. The first one, which was expired at the time she brought this action, was No. ZA 088728 (IDI). Her two children were endorsed in that passport, although one of them, the younger one was later deleted from it because he was issued with a travel document in London to enable him travel alone from London to Lusaka. That travel document had since expired, she said. Following the expiry of the first passport she applied for its renewal and the inclusion of her children in it. She got a new passport she said, but her children were refused to be included in it. She made several applications to the court.

**Held:**

- (i) the petitioner has been unfairly discriminated against on the ground of sex
- (ii) the petitioner's children's particulars be endorsed in her present passport without a requirement for her to furnish fresh affidavit or other fresh documents in respect of them,
- (iii) a single parent family headed by a male or female is a recognised family unit in the Zambian society
- (iv) a passport is part of the freedom of movement and as such it is a right for every Zambian to have one or be endorsed in one unless there is a valid legal excuse barring such possession or endorsement; and
- (v) A mother of a child does not need to get the consent of the father to have her child/ren included in her passport or for him/or them to be eligible for obtaining passports or travel documents.

For the Applicant: Mrs L. Mushota and Associates  
For the Respondent Mr. E. Sewanyana - State Advocate

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Judgment

**MR. JUSTICE C, M MUSUMALI.:** delivered the judgment of the court.

This is a petition filed by the Applicant in which she is asking the court to make a number of declarations. Those declarations are, as summarised in paragraph 12 of her said petition that:

- (1) She has been and continues to be unfairly discriminated against on the ground of sex.
- (2) Since she had previously furnished the Department of Passport and Citizenship with satisfactory documentary evidence as to the personal particulars and social status of the two children (i.e David Kayivwambile Siwakwi, born 31/7/83 at Lusaka and Mbwiga Mlozi Siwakwi born on 10/6/88 in London) the officers of the (said) Department are estopped by record and past conduct from refusing the application to endorse on the Petitioner's new passport the personal particulars of the said children of her single parent family.
- (3) A single parent family headed by a female be recognised as a family unit in the Zambia society.
- (4) Upon the birth of a child to a single mother, the name of the father shall only be included on the child's birth certificate if the father is physically present at the Registrar General's office on the day of the Registration of the child's birth, otherwise, the single mother should be declared the sole guardian and custodian of the child without undue administrative impediments.

AND such other Orders or Directions or Reliefs as shall to the court seem appropriate for the purpose of enforcing or securing the enforcement of Articles 13 and 25 of the (Republican) Constitution in relation to the petitioner.

- (5) A passport is a right which is incidental to and consequent upon the petitioner's citizenship. Thus the inclusion of the petitioner's Zambian children's particulars on her passport is a matter which is a natural incidence and consequence of both the petitioner's and the children's Zambia Citizenship; and
- (6) Consequently upon (5) the petitioner's said children have been, are being and are likely in the future to be hindered in their enjoyment of freedom of movement out of and back into Zambia, otherwise guaranteed them under Article 24 of the Constitution.

She also prays for the costs of this action to be granted to her. The petition was based on the provisions of Articles 13, 25 and 29 of the Republican Constitution:

ARTICLE 13 Provides as follows:

It is recognised and declared that every person in Zambia has been and shall continue to be entitled to the fundamental rights and freedoms of the individual, that is to say, the right whatever his race, place of origin, political opinions, colour, creed or sex, but subject to the limitations contained in Article 4 (which has since been amended) and in this Part, to each and all of the following, namely:

- (a) Life, liberty, security of the person and the protection of the law;
- (b) Freedom of conscience, expression, assembly and association; and
- (c) Protection for the privacy of his home and other property without compensation;

And the provisions of this Part shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in Article 4 and in those provision, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others on the public interests.

ARTICLE 25 provides as follows leaving out provisions which are irrelevant to this case:

- (1) Subject to the provisions of clauses (4) (5) and (7) no law shall make nay provision that is discriminatory either of itself or in its effect.
- (2) Subject to the provisions of clauses (6) (7) and (8), no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.
- (3) In this Article , the expression "discriminatory" means affording different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions colour or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.
- (4) Clause (1) shall not apply to any law so far as that law makes provisions -
  - (a) -----
  - (b) -----
  - (c) With respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law;
  - (d) -----; or
  - (e) Whereby persons of any such description as is mentioned in clause (3) may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society
- (5) -----
- (6) Clause (2) shall not apply to anything which is expressly or by necessary implication authorised to be done by any such provision of law as is referred to in clause (4) or (5)
- (7) Nothing contained in or done under the authority of any law shall be held to be

inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision whereby persons of any such description as is mentioned in clause (3) may be subjected to any restriction on the rights and freedoms guaranteed by Articles ----, -----,-----,-----, and 24, being such a restriction as is authorised by Article ---(----), ----(----), ----(----), ----(----) and 24 (3) as the case may be

(8)

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And Article 29 provides as follows, leaving out what is not relevant in this case:

- (1) Subject to the provisions of clause (6), if any person alleges that any of the provisions of Article 13 to 27 (inclusive) has been, is being or is likely to be contravened in relation to him, then 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) -----  
and may, subject to the provisions of clause (8), 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 Article 13 to 27 (inclusive)
- (3) -----  
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- (4) -----  
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- (5) -----  
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- (6) -----  
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- (7) -----  
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- (8) -----  
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In this case I heard the evidence of the petitioner only. She told the court that she is not married; that she is a mother of two boys. Kayivwambile Siwakwi aged seven and Mbwiza Mlozi Siwakwi aged two and a half years; that Kayivwambile was born in the University Teaching Hospital Lusaka, and the other child in the West Minister Hospital London. She went on and said that she is a Zambian citizen. She has held Zambian Passports: The first one, which is now expired was No. ZA 088728 (IDI) Her two children were endorsed in that passport, she said; although one of them, the younger one was later deleted from it because he was issued with at travel document in London to enable him travel alone from London to Lusaka. That travel document has since expired, she said.

Following the expiry of the first passport she applied for its renewal and the inclusion of her children in it. She got a new passport she said, but her children were refused to be included in it.

She then explained that when she had the first child, in order to get his birth certificate she was made to swear an affidavit showing that (1) she was the mother of that child and (2) he was born out of wedlock. After that she applied to the passport office for his inclusion in her passport.

Again she was asked to swear an affidavit similar to the one she had sworn to get the child's birth certificates. She swore that affidavit and had the child included in the passport i.e the first passport.

She went on and said that she did not have any problems to include the second child in her passport. This was because his father filled in all the relevant documents in London and they were handed in and processed by the Zambian High Commission. She attacked that practice because it recognises a foreign male, as was the case in this case

as the father of her second child is a Tanzanian, but refuses to recognise a Zambian Female, who is a parent of a child.

The petitioner then explained that when she was issued the second passport, she was again asked to swear fresh affidavit of the sort she had sworn and filed to get Kayivwambile's birth certificate and to have him included in the expired passport. She then drew the attention of the passport officer who was handling her application to the presence of the details he wanted to know about her and her children in those affidavits and in Mbwiga's expired travel documents, which were in the possession of that (passport) office. The officer told her that much as he appreciated that the regulations and procedures he was enforcing were unfair to women, there was nothing he could do about them, but follow them. Explaining the implication of the application of those regulations and procedures to her second child it was that she had to get the consent of the Tanzanian father to the inclusion of that child in her Zambian passport. It meant also that she had to swear those affidavits every time she was renewing her passport and/or whenever she had a new child as a single parent. These procedures were lengthy, costly, discriminatory and demeaning to her, she said. She therefore decided to petition against these procedures.

Talking about the specific forms which are used by the Passport Office she said that Form D which is the 'Application of children or child under the age of Sixteen Years to be added to Passport of a Relative, is discriminatory because only the father is recognised as the legal custodian of a child. Yet the mother of a child is the only one who will really know who the father of the child is/was.

Maternity is the only thing that no one will question, she said. She then said that the word "father" "on Form D should have been used in a broader sense to indicate physical and emotional support for the child/children, at least in the case of single parent family headed by a woman.

The respondent did not call any witness(es). They intimated that they would only be putting in written submissions. That was on the 21st of March 1991, no such submissions had been received from them by this court. Mrs Mushota for the applicant sent in hers at the beginning of May.

Upon consideration of the evidence and said submissions in this case I have found the following facts as proved; that:

- (1) The petitioner is a Zambian.
- (2) She is single.
- (3) She is the mother of David Kayivwambile Siwakwi and Mbwiga Mlozi Siwakwi.
- (4) David will be eight years old on 31st July 1991 and Mbwiga three years old on 10th June 1991.
- (5) David's unknown father is/was a Zambian.  
Mbwiga's unknown father is/was a Tanzanian.  
I have used the words is/was because both or either of those men may/could have died since the 21st March 1991 when the petitioner last appeared and gave evidence before this court in this case.
- (6) The Plaintiff applied for and was issued with a Zambian passport number Za 088728. This passport was issued on 24th June 1980.
- (7) On the 8th of October 1985 David's personal particulars were endorsed in that passport. The procedure she went through before David's particulars were endorsed in the said passport will be explained later in this judgment. Mbwiga's particulars were endorsed in the passport in London. I will also explain how that was done in the course of this judgment.
- (8) As time went on, that passport expired. The applicant then applied for a new passport and that her two children's particulars should also appear.
- (9) She was issued the new passport No. ZB10738; but her children were endorsed in it.
- (10) In order to have those children endorsed in the new passport she was asked to swear fresh affidavits in respect of them to show their parentage.
- (11) She was not keen to swear fresh affidavits.
- (12) Because of her refusal to comply with the fresh affidavits requirement her children were not and I think have not up to now been endorsed in her new passport.

In this matter it was not disputed that in order to get the birth certificate of David the petitioner was asked by the office of the Registrar of Births, Deaths and Marriages to swear an

affidavit showing David's parentage. That was done and the birth certificate Number LUS/67/84 was issued. She then took that certificate to the Passport Office and applied for the endorsing of David's particulars in her passport. She was again asked to swear an affidavit, identical to the one she had sworn for the birth certificate. The essence of that/those affidavit/s was that they showed that the petitioner was the mother of the child/children and that they were born out of wedlock. Upon production of that affidavit to the passport office, David's particulars were endorsed in the first passport, as already found.

As for Mbwiga, his endorsement was done in London at the Zambian High Commission with relative ease. This is because his Tanzanian father was in attendance and filled-in all the relevant documents.

The facts revealed by this case show that a mother of a child is not regarded by the Government to be an equal parent to a father. The father has been made to have more say over the affairs of a child at least in so far as the endorsement of the particulars of the child and the issuing to a child of a passport or a travel document are concerned. This has been done by the Government of this country through the institution of the practice of asking for a father's letter of consent when matters of passports and travel documents affecting children have had to be dealt with at Passport Offices; as well as when obtaining children's birth certificates, at least during the life times of the fathers. This practice is discriminatory to mothers on no other basis than the fact that they are females.

Yet the mother is the one who must have conceived and carried that child in her womb for nine months more or less and then gone to the maternity ward to deliver. Having delivered she is again the one with the responsibility of looking after that child through the tender stages, feeding it and doing all the motherly chores until it gets out of its infancy. Some fathers have had to do those chores mothers do for infants but those have been in cases where due to one reason or the other the mother is not able to do those herself. Such situations are exceptions to the general rule. The mother, in a normal situation, continues to perform some very essential roles in the up-bringing of the children. The father also plays equally important roles, if he is a responsible father. In my considered view it is not at all justified from whatever angle the issue is looked at, for a father to treat himself or to be treated by the institutions of society to be more entitled to the affairs of his child/ren than the mother of that child or those children. The mother is as much an authority over the affairs of her child/ren as the father is. There would of course be some cases where one of the parents may lose, temporarily or forever, his/her share of that entitlement. Such a situation may arise where a parent abandons a child or children or becomes so mentally sick that the best interests of the child or children would dictate his/her exclusion from him/her or them. Each such case would of course depend on its own facts.

The realities of these times have brought about another dimension to this problem of child/ren male parentage. This case now before this court is one in point. Here the petitioner is both the father and mother of the two children. She is an unmarried mother. She is bringing up her two children without a husband. Now is it fair for this society to have to require of her to have been or to be married in order for certain things to be possible to be done for her children? The answer, in my considered view, is in the negative! It is in the negative because firstly the reality of her situation and of many others like her, is that she has illegitimate children; and secondly because discrimination based on gender only has to be eliminated from our society. Men and Women are partners and not only partners but equal partners in most human endeavours. They must thus be treated equally.

I noticed at the bottom right side of Form D the words October 1963. I interpreted this to mean that either that was the month and year when that Form came into effect or that that was the month and year when the Form was printed or reprinted as the case may be. It may then be argued that that form did not emanate from the Zambian Government but was one of the colonial left-overs, which is still to be redressed by the Zambian Government. My answer to this is that this country has been independent for more than a quarter of a century now, and it does not need such a long time to comb public service of remnants of colonial discriminatory practices. It is my view that this form ought to have been rectified when the Zambian Court of Arms which it carries were put on it. So there can be no excuse for its use in its form in independent Zambia.

Going back to the facts of this case Zambia has to accord every mother of a child, single or married, the same powers that the father enjoys. Anything less would not be justified. The fear that the mothers may be stealing children if they are allowed to include their young children in their passports is a very unreasonable argument because in all honesty they are entitled to have those children where they want them to go. One cannot steal what belongs to oneself. It should be a matter between the father and the mother of a child to resolve as to

whether to allow a child to go to country A and not to B. If they cannot agree then one or both of them should be free to apply to court for a solution. Such a situation would not arise in the case of single parent.

Talking about passports, I think it is opportune to say here that the holding of a passport by a Zambian is not a privilege. It is not a privilege because he/she has a right of movement enshrined in the Constitution: Article 24 of the Constitution. In order to travel outside the country a Zambian Citizen needs a valid Zambian passport or travel document. Just as they don't get permission from the authorities to travel from one part of the country to another, so do they not need to get permission to travel outside the country. Since they cannot travel outside the country without passports, they are entitled to have them, unless legal restrictions attaching to the freedom of movement imposed by the Constitution validly apply.

During cross-examination of the petitioner, the respondent raised the question the locus standi of the petitioner in these proceedings. Their argument appeared to have been that since she has been issued the passport she applied for, she has no cause of action in this matter as the aggrieved parties are her children and not herself. To this argument I have to say that since the children in question have not yet attained maturity to be able to sue on their own and the petitioner is a Zambian citizen she has legal standing as a petitioner in this case. In other words she has the locus standi to sue the state or indeed any other person when she feels that the interests of her children so dictate.

It is imperative to also say one or two things about the offices of the Registrar of Births, Deaths and Marriages as well as the Passport Office and some of the procedures they have put in place there. The first issue is whether or not those offices are public offices which fall under Article 25(2) of the Constitution. My answer is that they are public offices. They are public offices because they belong to the Zambian Civil Service i.e they are offices of the Government of the Republic of Zambia. Article 25 Clause 3 defines the expression 'discriminatory' as used in that Article. That definition does not include 'sex' or 'gender'. Be that as it may it is my very considered view that the intentions of the framers of this Constitution when they passed the Bill of Rights (PART III) of the Constitution could never have been to discriminate between males and females in the way the Passport Office and its sister Department have been doing. I have no doubt in my mind therefore that if these practices were to have been brought up to the attention of those people who were passing this Constitution into law they would have not sanctioned them. I am not sanctioning them either. Forms A and D of the Passport Office have not been issued, on the basis of any legal provision. And even if they were so issued, that law would be unconstitutional as it would be discriminatory between mothers and fathers in matters relating to their children's inclusion in the mothers' passports or getting passports or travel document, for no good reason than the fact that one is a female and the other a male.

That discrimination is unacceptable and untenable legally or otherwise in these times of enlightenment.

Further this court did not appreciate the logic in the refusal by the Passport Office to transfer all details which were in the expired passport; in particular those relating to the children and asking the petitioner to start all over again swearing affidavits. It is my considered view and I hold that in a case such as the petitioner's the practice of the Passport Office should from now onwards be to renew a passport of a Zambian female with all the details and/or endorsements which were on the expired one. Common sense dictates this approach to the one that has been in use over all these years.

Thus when all is said and considered I find and hold that (1) the petitioner has been unfairly discriminated against on the ground of sex (2) the petitioner's children's particulars be endorsed in her present passport without a requirement for her to furnish fresh affidavit or other fresh documents in respect of them, (3) a single parent family headed by a male or female is a recognised family unit in the Zambian society (4) a passport is part of the freedom of movement and as such it is a right for every Zambian to have one or be endorsed in one unless there is a valid legal excuse barring such possession or endorsement; and (5) A mother of a child does not need to get the consent of the father to have her child/ren included in her passport or for him/her or them to be eligible for obtaining passports or travel documents. Either parent has the inalienable right to be a recommender, in whatever form the recommendation is required to be made, for the child or children. This applies to birth certificates and passports in this country as they do to other things.

I also award the costs of this action to the petitioner!

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