RESIDENT DOCTORS ASSOCIATION OF ZAMBIA AND OTHERS v THE ATTORNEY-GENERAL

Supreme Court
Sakala, CJ, Lewanika, DCJ, and Mambilima, JJS
26th September, 2002 and 28th October, 2003
(SCZ Judgment No. 12 of 2003)

Flynote

Constitutional Law – Protection of fundamental rights and freedoms – Right to expression and assembly – fundamental to liberal democracy.

Headnote

This is an appeal by the petitioners against the decision of the High Court which decided that they had breached Section 6 (7) of the Public Order Act which prohibited the holding of public meetings, processions or demonstrations, where the police notify the conveners, that they cannot adequately police such events and the denial by the High Court to award them damages after having found that the police had violated the Act.

Held:

1. The rights to free speech and freedom to assemble are not only fundamental, but central to the concept and ideal of democracy.

2. Courts as final arbiters, when interpreting the Constitutional and the laws made thereunder, which confer the freedoms there is need for the court to adopt an interpretation, which does not negate the rights. Most jurisdictions adopt a generous and purposive construction of human rights instruments, so as to confer on a person the full measure in the enjoyment of the rights.

3. The Police fragrantly violated the Public Order Act and consequently, nfringed the petitioners rights as enshrined in Articles 20 and 21 of the Constitution.

Cases referred to:

1. *Mulundika and Others v The People* [1996] 2 LRC 175 at page 190.
2. *Shuttlesworth* v *Birmingham* US 394 [1969] Vol . 22 at page 66.
3. *Minister of Home Affairs v Fisher* [1979] 3 ALL ER 21 at Page 25.
4. *Attorney-General of the Gambia v Jobe* [1985] LRC (Const.) 556 at page 565
5. *Huntley v Attorney-General for Jamaica* (1995) 1 All ER 308 at page 316.
6. *Frank Jamakona v Attorney-General and Genge Talasasa* [1985] LRC (Const.) 569.

Legislation referred to:

1.The Public Order Act, No. 1 of 1996.

2.The Constitution of Zambia, Chapter 1 of the Laws of Zambia.

3.The Penal Code, Cap 87 of the Laws of Zambia.

Professor M. P. Mvunga, of Messrs Mvunga Associates for the appellants.
S. Chirambo, Chief State Advocate for the Attorney-General.

Judgment

MAMBILIMA, JS, delivered the judgment of the court.

In this Judgment, we shall refer to the Appellants as Petitioners, which is what they were in the court below and the Attorney-General as the respondent. This is an appeal by the Petitioners against the decision of the court below, which decided that they had breached section 6(7) of the Public Order Act (hereinafter referred to as the Act), which prohibited the holding of public meetings, processions, or demonstrations, where the Police notify the conveners, that they cannot adequately police such events: and the denial by the court to award them damages after having found that the Police had violated the Act.

The evidence which was before the lower court was that on 20th April, 2000, the 2nd petitioner gave a written notification to the Commanding Officer of Lusaka, that the petitioners would hold a public procession on 27th April, 2000, in order to raise public awareness on the pathetic situation prevailing in public hospitals and the poor conditions of service for doctors. The Commanding Officer, one Mr. Mayonda, informed them on 26th April, 2000, that he would not grant them permission to demonstrate because he had information that there was a group of people who did not agree with the Petitioners' demonstration and was ready to disrupt it. The Police, through the Commanding Officer, also indicated that they did not have enough manpower to police the situation. The said Mr. Mayonda then endorsed on the application the words: " the application is rejected on grounds that the demonstration will cause a breach of the peace". He did not suggest any alternative date on which the demonstration could be conducted. When the petitioners asked for an alternative date on which to conduct their match, Mr. Mayonda told them that the matter was closed.

Notwithstanding this refusal, the petitioners sourced 50 Marshals and conducted the Match on 27th April 2000. Clad in their doctors' gowns, they started off from Kabwe round-about through Cairo Road, using the outer lane. They observed the procedures required during processions, and there was un interrupted flow of traffic. The petitioners carried placards which conveyed various messages. No member of the public attacked them during the procession, but instead others joined the match. They were intercepted by the police between Freedom House and Findeco House and told to disperse. The petitioners refused to do so and told the police that they were a peaceful group, conducting a peaceful demonstration and requested the Police Officers to escort them up to Ndeke House where the procession was to end. The Police refused to escort them and insisted that the petitioners should disperse. The petitioners continued with their procession and joined Independence Avenue where again they were intercepted by the police. The police confronted the 2nd petitioner, Dr Jonathan Tembo, and told him that he would personally be held responsible since he was a signatory to the application for permission to march. The petitioners again ignored the Police order to abandon the march and they continued until they reached the Freedom Statue at about 1100 hours. The police then arrested the 2nd petitioner and took him to petitioner, the rest of the petitioners continued with the procession and before they reached the first traffic lights, the 7th petitioner, Dr Mary Shapi, was bundled into a police car and whisked away to Lusaka Central Police Station where she was detained in the cells.

The remaining petitioners continued with the march but just before reaching the Civic Centre, the Police stopped the match. They made the petitioners to sit down and later ordered them

to march to the Police Station, but the petitioners refused. They brought two trucks and ferried the Petitioners to Lusaka Central Police Station in the said trucks where they were detained until midnight.

Before the lower court, the petitioners contended that their freedom of expression, and their freedom of assembly and association, as guaranteed by articles 20 and 21 of the Constitution, had been violated. They also contended that the Police action, in its entirety, was in breach of the Public Order Act.

The respondent, through his witnesses contended that an alternative date for the procession was suggested to the petitioners, but that the petitioners insisted on marching on 27th April, 2000. According to the respondent, the petitioners even refused to appeal to the minister when they were advised that they could do so. The respondents' witnesses also alleged that the marching obstructed motor vehicles and that while on Independence Avenue, members of the public wearing UPND Party Chitenge materials, with the portrait of Mr. Mazoka joined the march. The witnesses further testified that the petitioners, on several occasions disobeyed orders to disperse until they were stopped and invited to jump on to the trucks and they did so on their own. They were ferried to the Police Station where they were arrested for unlawful assembly and detained. They were later released after being told not to repeat the offence.

The learned trial judge after considering the evidence on record and the submissions by counsel, reached the conclusion that what brought about this action was the Police's perception of the law in Section 5 of the Public Order Act. He then reviewed the history of Section 5 of the Act, culminating into the amendment of 1996. He concluded, rightly so, that Section 5 of the Act, in its current form, does not require a person wishing to hold a public meeting or procession or demonstration to obtain a permit from the Police for such an event. All that is required by the law, is a notification to the Police at least 7 days before the event. Once a notification has been received, the regulating officer has an obligation to propose an alternative date and time, on which the said event should take place, if the Police cannot adequately police it.

The learned trial Judge found, on the evidence before him, that the regulating officer in this case, Mr. Mayonda, acted capriciously and oppressively, contrary to the provisions of the Act, when he endorsed on the notification that the permit was refused. He also accepted the contention by the petitioners that a notification cannot be rejected on the grounds that the regulating officer thinks that the event will cause a breach of the peace. The learned trial judge found that having breached the law, the police had violated the petitioners' fundamental rights and freedoms as guaranteed by articles 20 and 21 of the Constitution. He was satisfied that the procession conducted by the petitioners was peaceful and that the issue of UPND members joining the procession, and as to who showed solidarity with the petitioners was irrelevant to the matter under consideration.

On the prayer for damages by the petitioners, for false imprisonment, humiliation and inconvenience, the learned trial judge was of the view that having taken part in a procession against the will of the Regulating Officer, the petitioners committed an offence of unlawful assembly and their arrest was, consequently, lawful. He opined that on this premise, there could be no false imprisonment. The trial judge then dismissed the claim for damages for false imprisonment.

The petitioners have filed two grounds of appeal, namely, that the learned trial judge, having held that the regulating officer or the Police have no power to refuse a notification on the basis that there will be a breach of peace, misdirected himself at law and in fact in proceeding to hold further that petitioners were in breach of section 5(7) of the Act; and that the learned trial Judge, having held the petitioners' freedom as contained in articles 20 and 21 of the Constitution were violated and that the Police breached the Public Order Act as amended,

cannot deny the petitioners' damages as prayed Submitting in support of the first ground of appeal, Professor Mvunga, in his written heads of arguments augmented by oral submissions, stated that from the evidence on record, it emerges that the petitioners complied with all the requirements of section 5 of the Public Order Act, in that they submitted a written notification for the procession 7 days before the event; they indicated that order and peace shall be maintained; they indicated the route of the procession, they provided an adequate number of marshals who were to co-operate with the Police to ensure peace and order; and that the commencement, duration and destination of the event were notified to the Police. According to Professor Mvunga, the evidence on record established that the venue for the event had not been granted by the Police to another convener. He submitted that on the basis of this evidence, the conclusion by the learned trial Judge that the petitioners were in breach of section 5(7) of the Act is not well founded.

Professor Mvunga further argued that the learned trial Judge cannot put an interpretation on section 5(7) of the Act to justify the conclusion that the petitioners were in breach of that provision. In this regard, he referred us to the observation by the trial Judge on page 30 of the record of appeal when he stated that "…in the way the provisions of sub-section (7) aforesaid are drafted, the petitioners were bound to follow the law" and submitted that the petitioners should only have been in breach of this provision if the Police had informed them in writing five (5) days before the event that they did not have adequate personnel to Police the event and suggest an alternative date.He went on to state that the learned trial Judge made a finding of fact that it was the Police who were in breach of section 5(7) of the Act and not the petitioners. The trial Judge made other findings of fact that; the rejection of the notification was not addressed to the petitioners in writing; the rejection of the notification was on the basis that if the event went ahead, it would cause a breach of the peace; and that the regulating officer was intent upon refusing the petitioners to conduct their peaceful procession at all costs. Professor Mvunga argued that consequently, the learned trial Judge ought not to have found that it was the petitioners who were in breach of the law.

Another limb of Professor Mvunga's arguments in support of the first ground of appeal, was that it was unfounded for the learned trial Judge to hold that by taking part in the procession, the petitioners committed an offence of unlawful assembly, rendering their arrest to have been lawful. He argued that after complying with the provisions of the Act, there can be no offence of unlawful assembly committed in terms of Section 6 of the Act. He argued further, that it was a misdirection by the trial Judge to have converted his function to that of a criminal court without following the procedure, thereby convicting the petitioners without a criminal trial having been commenced. He referred us to our holding in the case of *Mulundika and others v The People (1),* in which after finding that Section 5(4) of the original Public Order Act contravened articles 20 and 21 of the Constitution, we stated that the "…*invalidity and the constitutional guarantee of the rights of assembly and expression preclude the prosecution of persons and the criminalisation of gatherings in contravention of the sub-section pronounced against"*. Professor Mvunga submitted that, having found the Police action and conduct to have violated the petitioners' freedoms of expression and assembly as guaranteed in articles 20 and 21 of the Constitution, the court cannot in the same vein, criminalize the procession by the petitioners by virtue of section 6 of the amended Act. For this submission, he referred us to the American case of *Shuttlesworth v Birmingham (2),* in which it was stated that "….a person faced with such unconstitutional law may ignore it and engage with impunity in the exercise of the right to free expression for which the law is supposed to require a licence". He stated that in this case, it was not the law which was obstructive but the Police action and conduct. He further argued that for the purposes of the Penal Code, there are three instances of unlawful assembly which needed to be proved in order to constitute the offence. These are that those assembled should do so with intent to commit an offence; or that those assembled, with intent to carry out some common purpose, of their conduct, cause persons in the neighbourhood reasonably to fear that these persons would commit a breach of the peace; or that they will needlessly and without occasion, provoke others to commit breach of peace. Professor Mvunga went on to state that from the evidence on record, none of the three categories of unlawful assembly emerged from the procession by the petitioners. On the contrary, the court below made findings of fact which were favourable to the petitioners. In

support of this argument, Professor Mvunga referred us to a portion of the Judgment on page 27 of the record of appeal in which the learned trial Judge stated, inter alia, that there was evidence to the effect that the petitioners conducted a peaceful procession and they were not attacked by anybody. The learned trial Judge also found that the only interruption to the procession came from the Police themselves.

In his further arguments in support of the first ground of appeal, Professor Mvunga submitted that the trial Judge, in holding that the petitioners breached section 5(7) of the Act, seems to have been in part influenced by the failure on the part of the petitioners to appeal to the minister. He pointed us to page 30 of the record of appeal at which the learned trial judge observed that ignorance of the law is no defence. Professor Mvunga argued that the petition in this case was brought under article 28 of the Constitution and not the Public Order Act. He further stated that the minister is not seized with the interpretation of the Constitution. On the wording of section 5(8) of the Act, Professor Mvunga stated that the procedure of appeal is not mandatory, where one is alleging that freedoms of association and speech have been violated and that Section 5(8) of the Act cannot supercede article 28 of the Constitution. He submitted that the petitioners should not suffer any disadvantages for having resorted to the High Court.

Submitting in support of the second ground of appeal, Professor Mvunga argued that once a question of breach is settled in favour of the petitioners, an award of damages is consequential, if it is a relief being sought from the court. He submitted further that the award of damages in this case should reflect three heads; compensatory, aggravated and exemplary.

In response to the arguments by Professor Mvunga, Mr. Chirambo submitted, on the first ground of appeal, that section 5(7) of the Act is simple and straightforward. It uses mandatory words to the effect that no procession, demonstration or public meeting shall be held after the police have notified the conveners of such an event that it is not possible for them to police it. He also referred us to section 5(8) of the Act which provides the right of appeal to an applicant who is not satisfied with the reasons given by the regulating officer. According to Mr. Chirambo, the petitioners in this case did not follow the law after the rejection of their notification. He submitted that instead, the petitioners became arrogant and went ahead with the procession, thereby contravening section 5(7) and (8) of the Act. Mr. Chirambo further argued that fundamental rights are not absolutely enjoyed by any human being in Zambia or elsewhere because they are subjected to various circumstances which have been enacted into laws.

On the second ground of appeal, Mr. Chirambo submitted that the petitioners are not entitled to any damages, let alone, compensation or damages whether aggravated or exemplary. He went on to state that the appellants are the ones who breached the Public Order Act by contravening section 5(6) (7) and (8) of the Act. He argued that consequently, articles 20 and 21 of the Constitution were not violated by the regulating officer. According to Mr. Chirambo, the petitioners' assembly was unlawful, and contrary to section 74(1) of the Penal Code, because their notification was rejected by the regulating officer.

We have considered the judgment of the court below, the submissions of Counsel and the issues raised. On the first ground of appeal, the question to be resolved is whether, having found that the petitioners' rights of freedom of expression and freedom of assembly and association were violated by the police, the court below was in order to have found that by going ahead to conduct their match, after the regulating officer had rejected their application, on account that there was a likelihood of a breach of peace, the petitioners committed a criminal offence.

On the evidence which was before the lower court, we find that the learned trial judge properly directed himself on the law and facts and properly found that the police action and conduct in

rejecting the application and stopping the march was in breach of the Public Order Act and that it violated the petitioner's freedoms of expression, assembly and association, as guaranteed in articles 20 and 21 of the Constitution.

The gist of the first ground of appeal is that having found the state authorities to have been in breach of the law, the petitioners could not, on the other hand be held to have breached Section 5 (7) of the Public Order Act. The rights to free speech and freedom to assemble are not only fundamental, but central to the concept and ideal of democracy. It is accepted the world over that the enjoyment of these rights is not absolute. They have to be balanced against the public interest in the laws and regulations restricting these rights. Courts, as final arbiters, when interpreting the constitution and the laws made thereunder which confer the freedoms, determine the content and parameters of these rights. While it cannot be denied that not all manner of speech and assembly are acceptable, there is need for the court, when interpreting provisions conferring fundamental rights, to adopt an interpretation which does not negate the rights. Most jurisdictions have adopted a generous and purposive construction of human rights instruments, so as to confer on a person the full measure in the enjoyment of the rights.

Faced with a dispute on the Bill of Rights for the State of Bermuda, Lord Wilberforce, sitting in the Privy Council, after noting the Origins of that Bill of Rights stated that: "These antecedents, and the form of Chapter 1 itself, call for a generous interpretation avoiding what has been called "the austerity of tabulated legalism; suitable to give individuals the full measure of the fundamental rights and freedoms".

This view was echoed by Lord Diplock in the case of *Attorney-General of the Gambia v Jobe (4),* when he said:

"A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the State are to be entitled, is to be given a generous and a purposive construction".

Lord Woolf in the case of *Huntley v Attorney-General for Jamaica (5),* seems also to have been endorsing this view when he said that the court should "look at the substance and reality of what was involved and should not be over concerned with what are no more than technicalities." We agree entirely, with these decisions. The Police, in this case, flagrantly violated the Public Order Act and consequently infringed the petitioners' rights as enshrined in articles 20 and 21 of the Constitution.

The petitioners complied with the law and duly notified the Police within the time allowed by law. The regulating officer had a duty to inform the petitioners in writing at least five days before the event, if they were unable to police the march and propose alternative days. The petitioners' right to assemble and march therefore accrued at this stage. The regulating officer's endorsement of a purported rejection of the march, a day before the event for reasons that the demonstration would cause a breach of the peace, was not a valid exercise of power under the Act. Section 5(7), which prohibits the holding of the event after the Police have indicated in writing their inability to police the event can only be invoked when there has been a valid notification to that effect. The learned trial Judge therefore fell into error to have invoked this clause and find that the Petitioners were in breach of the law. In our view, the learned trial Judge completely negated the petitioner's rights of expression and assembly when he held that the Petitioners had breached the Provisions of the Act. As we stated in the case of *Mulundika and others v the People*, (1) "… invalidity and constitutional guarantee of the rights of assembly and expression preclude the prosecution of persons and the criminalisation of gatherings in contravention of the subsection pronounced against". We therefore, allow the first ground of appeal and find that the learned trial judge misdirected himself in law and fact to have held that the petitioners were in breach of the Public Order Act when they proceeded with their march on 27th April, 2000.

In the second ground of appeal, the petitioners contend that the court below ought to have awarded them damages after having held that the petitioners' freedoms as guaranteed by articles 20 and 21 had been violated. They pray that these damages should reflect three heads: compensation, aggravated and exemplary. The petitioners brought this action under article 28 of the Constitution. In enforcing the protective provisions of the Constitution, the High Court is empowered "…to make such orders, issue such writs, and give such directives as it may consider appropriate for the purpose of enforcing, or securing the enforcement of " the fundamental rights and freedoms in Part III".

In their petition to the court below, the petitioners sought a declaration that, the Police action and conduct violated their freedoms as contained in articles 20 and 21 of the Constitution. In his judgment, the learned trial Judge held that the Police action and conduct in this case breached the Public Order Act and also violated the petitioners' freedoms of expression and assembly and association as guaranteed by articles 20 and 21 of the Constitution.

The petitioners also claimed general damages for false imprisonment, humiliation and inconvenience; and exemplary damages for the oppressive manner in which the agents of the state conducted themselves. This prayer for damages appears to have been made in tort. It would appear that for the affront to their freedoms, the petitioners were satisfied with a declaration. In the way article 28 of the Constitution is couched, the High Court is at large to make any order, including an order for compensation against any body for breach of the provisions contained in articles 11 to 26, of the Constitution. An aggrieved party is also at liberty to seek remedies for tortuous injuries arising from such breach.

It is on record that the petitioners were bundled on to a truck and held at Lusaka Central Police Station where they were released late in the night. Having been illegally curtailed from completing their march, they were subsequently incarcerated in police cells. There is no doubt that they were falsely imprisoned and no doubt suffered humiliation and inconvenience. They are entitled to damages. The petitioners also sought exemplary or aggravated damages for the oppressive conduct of the Police. Such damages are usually awarded to express indignation by the court at the conduct of the defendant, which inflicted the injury on the plaintiff. It calls for a more generous, rather than a moderate award to provide an adequate solatium.

We have anxiously considered the circumstances of this case. State action which impedes the citizen's enjoyment of their constitutional freedoms should not be condoned. In showing our indignation, we award a figure of K500, 000.00 to each petitioner in respect of both general and exemplary damages, to be paid with interest, at the average short term deposit rate from the date of filing of the petition up to-date and hereafter, at the average bank lending rate up to the date of payment. We award costs to the petitioners in this court and in the court below, to be taxed in default of agreement.

Appeal allowed