

IN THE SUPREME COURT OF ZAMBIA

APPEAL NO. 166 OF 2006

HOLDEN AT NDOLA

(Civil Jurisdiction)

B E T W E E N:

RICHARD NDASHE CHIPANAMA

APPELLANT

AND

ZAMBIA RAILWAYS LIMITED

RESPONDENT

CORAM: Lewanika (Deceased), D.C.J., Silomba, J.S. and Kabalata, Acting J.S.

On the 6th March, 2007 and the 6th October, 2008

For the Appellant: Mr. D. Mulenga, Derrick Mulenga and Company

For the Respondent: Mr. M. Nsefu (deceased), then in-house Legal Counsel

J U D G M E N T

SILOMBA, JS, delivered the judgment of the Court.

We regret the delay in the delivery of the judgment, which has been due to a very busy work schedule. Further, when we heard the appeal the Hon. Deputy Chief Justice, Mr. Justice David M. Lewanika, was a member of the panel and the presiding Judge. Regrettably, he passed on before the judgment was delivered and in that respect this judgment must be seen as the judgment of majority.

This appeal is against the judgment of the Industrial Relations Court (IRC) dated the 21st July, 2006. In that judgment, the lower court, in its appellate

jurisdiction, rejected the assessment of the learned Registrar of the IRC in favour of the appellant.

The brief background to this case is that there was an earlier appeal to this Court on what was due to the appellant under the respondent's pension scheme. The earlier appeal involved the same parties. The case was disposed of in our judgment of the 4th July, 2003 under APPEAL NO. 143 OF 2002. In that judgment, we found for the appellant, then respondent in the said appeal, that he was entitled to be paid the employer's contribution to the Zambia Railways Pension Scheme.

When the issue of what was due to the appellant under the employer's contributions was placed before the learned Registrar of the IRC, she assessed and awarded the appellant a pension under Rule 7 of the Zambia Railways Pension Scheme of 1975. The assessment based on the foregoing Rule 7 meant that the appellant had proceeded on early retirement under Clause 11 of the Pension Rules and yet there was no evidence to prove that he had gone on early retirement.

The respondent then appealed to the full court of the Industrial Relations Court. After considering the arguments of counsel on whether the appellant was entitled to be paid a pension under Rule 7 of the Zambia Railways Pension Scheme of 1975, the court found that there was no evidence to show that he had gone on early retirement under Rule 11 of the Pension Rules. The court found that the learned Registrar had misdirected herself in awarding a pension under the foregoing Rule 7.

According to the lower court, what was in issue at assessment was the refund of the employer's contribution to the Zambia Railways Pension Scheme of

1975 and not a pension because the appellant did not qualify. In the premises, the lower court directed that the appellant be paid 100% of the employer's contributions to the Zambia Railways Pension Scheme.

The appellant being dissatisfied with the ruling of the Industrial Relations Court, appealed to this Court and filed three grounds of appeal. These are outlined below as follows:-

The full court of the Industrial Relations Court erred in law and fact -

- 1. When it ordered that the appellant herein be paid what the respondent contributed to the Pension Scheme plus interest which was awarded by the trial court;**
- 2. When it ruled that the respondent must be paid what the respondent actually contributed to the Pension Scheme, without going further to explain how the same should be arrived at in the light of the abundant evidence to the effect that the respondent failed to calculate or provide a formula for employer's contribution at assessment; and**
- 3. When it ruled that the appellant herein is only entitled to 100% cash value of the employer's contributions but failed to interpret the same in monetary figures the said 100% cash value.**

The appellant and the respondent filed their respective heads of argument on which they relied upon. Both counsel made oral submissions to reinforce their respective heads of argument.

We have considered the judgment of the court below, the evidence on record as well as the submissions of counsel in support of and in opposition to the grounds of appeal. In the view we hold of this appeal, we do not think that it is necessary for us to go into the issues counsel have raised in their respective

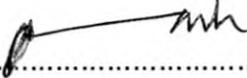
submissions. This is so because we have already pronounced ourselves on the issue raised in this appeal.

In our judgment of the 4th July, 2003, under Appeal No. 143 of 2002, we observed thus - **We have said before that the Industrial Relations Court is a court which has to do substantial justice, not bound by the rules of evidence. The court found as a fact on the evidence on record that two other employees in similar circumstances as the respondent (now the appellant) had been paid the employer's contributions. We find no misdirection."**

Our position of 2003 has not changed an inch in 2008. The parties are strongly advised to go back to assessment with the knowledge that it is the employer's contributions to the Pension Scheme that is the subject of assessment and not otherwise. In the course of assessment, the parties are advised to take note of the useful comments of the lower court in its judgment of the 21st July, 2006 and avoid bringing in extraneous considerations.

The appeal is dismissed with costs to the respondent to be taxed in default of agreement.

.....
D. M. Lewanika,
DEPUTY CHIEF JUSTICE


.....
S. S. Silomba,
SUPREME COURT JUDGE


.....
T. A. Kabalata,
ACTING SUPREME COURT JUDGE

Library

IN THE SUPREME COURT FOR ZAMBIA
HOLDEN AT LUSAKA

APPEAL NO. 147/2007

In the matter of an application under S. 28 of the Constitution and
in the matter of Protection of Fundamental Rights Rules 1969

B E T W E E N:

MWIYA KANYENGO

APPELLANT

AND

THE ATTORNEY-GENERAL FOR
THE REPUBLIC OF ZAMBIA

RESPONDENT

CORAM: MAMBILIMA, DCJ, CHITENGI, JS, KABALATA, A/JS
On 20th May, 2008 and 22ND August, 2008

For the Appellant:

In Person

For the Attorney-General:

Mr. D.Y. SICHINGA, Solicitor-General

JUDGMENT

MAMBILIMA, DCJ delivered the judgment of the Court.

This is an appeal against the judgment of the High Court dismissing the Appellant's Petition under Article 28 of the Constitution of Zambia.

The Petition which the Appellant filed in the Court below is not on record but from the judgment of the lower Court in which the said petition was quoted extensively, the Appellant moved the Court under Article 28 of the Constitution, claiming that his rights as enshrined in Articles 13(1)©, 15, 19(1) and 22(1) of the Constitution were contravened in relation to him. In

the Court below, the Appellant had also sued Zambia Railways Limited and Livingstone Hospital Board of Management as 2nd and 3rd Respondents respectively. For some reason, this appeal has been directed against the Attorney-General, the 1st Respondent in the court below.

The first claim by the Appellant in the lower Court was that his rights as enshrined in Article 13 (1)© of the Constitution had been breached. Article 13 guarantees every individual personal liberty. Under this Article no person should be deprived of his personal liberty. There are claw back clauses and one such derogation is in respect of executions carried out under an order of a Court of record to secure the fulfillment of any obligation imposed on a person by law. It was the Appellant's contention that in contravention of this Article, he was kidnapped while under the influence of tranquilizers in 1977 in Choma by police officers from Choma and some employees of Zambia Railways Limited. He alleged that he woke up twenty four hours later and found himself in a mental asylum. According to the Appellant, there was no valid High Court order for his detention. He further alleged that from 1977 up to 2003, he had been detained on more than 20 occasions in various psychiatric units without any High Court order to validate the said detentions.

The second claim by the Appellant was under Article 15 of the Constitution. This article prohibits the infliction of torture or inhuman treatment or degrading punishment or other like treatment on any person. The particulars given by the Appellant to support his claim that he was subjected to inhuman treatment are that on 3rd July, 1979, he was shot through ball and socket joint and later detained at a mental asylum in Livingstone where according to him, he was treated privately without any detention orders from the High Court. The Appellant further alleged that on 13 and 14 October, 2004 at Livingstone General Hospital, he underwent a bizarre treatment whereby without his consent, he was put on quinine without any ailment being diagnosed. He contended that as a result of the said quinine treatment he suffered life threatening side effects.

Another claim by the Appellant was that Article 19(1) of the Constitution was breached in relation to him. Article 19(1) guarantees citizens of Zambia freedom of conscience. The Appellant contended that in the contravention of his human right, he was retrenched from his employment on 31st March, 1995. He contended that this retrenchment was illegal and it violated his conscience. He also cited some decided cases in which he was involved, fighting for an improved retrenchment package.

Lastly, the Appellant claimed that his rights as enshrined in Article 22 of the Constitution were breached. Article 22(1) guarantees freedom of movement. To prove that his rights under this Article were infringed, the appellant alleged that from 1995 up to now, he had no title deed for a shack where he was staying in Zambia Railways compound, Livingstone. He contended that he is caged in this house where there is no clean water, electricity and food which are basic to a person's survival.

In the Court below, the Attorney-General, together with the other two Respondents filed answers to the Appellant's petition.

The Attorney-General's answer was that although this suit was brought against him in his capacity as the principal legal representative of the Government of Zambia on behalf of the Police Service, he was never a party to the cases which the Appellant referred to in his petition. He further stated that:

- the circumstances as to how the Petitioner was admitted to Livingstone General Hospital were within the peculiar knowledge of the Appellant and Livingstone Hospital Board of management.
- Since the Appellant claims that he was kidnapped by agents of the State and Zambia Railways in 1977, the claim was in fact statute barred under the Limitation Act of 1939 and the Law Reform (Limitation of Actions) Act Cap 72 of the Laws of Zambia.

- The claims by the Petitioner should have been directed to Zambia Railways Limited and Livingstone Hospital Board of Management and not the Attorney General.

Zambia Railways Limited in their answer also stated that the events complained of which are alleged to have happened in 1977 could not now be brought to Court since such an action is now statute barred. On the claim that Zambia Railways assisted to incarcerate the Appellant on various dates, Zambia Railways Limited admitted to have moved the Petitioner from Choma to Livingstone in order for him to undergo psychiatric treatment when it became obvious that he needed such treatment. According to them, the Appellant exhibited strange behavior which led him to argue with his supervisors and fellow workers and refusing to work. They also stated that whilst on a train, the Appellant threatened to commit suicide.

According to Zambia Railways Limited, all the necessary legal procedures were followed to get the Appellant to be treated for his erratic behavior. He was taken before a Magistrate Court in Choma where, after all the relevant procedures had been followed, the Appellant was hospitalized at Livingstone psychiatric unit and later transferred to Chainama psychiatric unit where he received treatment as a psychiatric patient. After the said treatment, the Appellant was transferred to Livingstone so that he could continue receiving psychiatric treatment. Zambia Railways Limited denied

that the Appellant was ever kidnapped or detained contrary as alleged in his Petition.

On the Appellant's claim relating to his retrenchment and resultant payments, it is the position of the Zambia Railways Limited that these matters are labour issues and not Constitutional matters because they arose from a contract of employment. Zambia Railways Limited also denied that any of its servants or employees ever shot the Appellant. They argued that if ever the Appellant was shot by any body, the resultant claims would not be constitutional issues. They stated that any claims in this regard should have been brought to Court by Writ of Summons and not a Petition under Article 28 of the Constitution.

The Livingstone Hospital Board of Management in its answer admitted that the Appellant was brought to Livingstone General Hospital on 26th August, 1977. It is the position of the Hospital that its medical personnel attended to him and diagnosed him as having a drug induced psychosis. The Hospital attached to its Answer, an affidavit sworn by one Dr. Francis HADUNKA, Acting Manager, Clinical Care. According to the Hospital, the Appellant suffered from mental disorders which resulted in him being a danger to himself and others and he was brought to the Hospital under an Order given by a Magistrate. The Hospital also denied that the

Appellant was kidnapped using tranquillizers as he alleged in his Petition. It was further stated in the Answer that from 1977, the Appellant was detained at the hospital on various occasions on the strength of Orders given by the Courts which were initiated by the Appellant's own various next of kin.

On the allegation by the Appellant that he was treated privately without a detention order when he had a gun shot wound, it was the position of the Hospital that between 2nd and 7th July, 1979, the Appellant was admitted to their surgical ward with gun shot wounds and not as a psychiatric patient. After five days, he was discharged from the surgical ward. The Hospital explained that they did not require a detention order in order to treat the Appellant when he was brought into the surgical ward for gunshot wounds. On the allegation by the Appellant, that he was treated with quinine without his consent, it is the Hospital's position that from 13th to 14 October 2004, the Appellant presented himself to the hospital's outpatient department complaining of flu, cough, chest pains and general body pains. Upon attending to him, the medical personnel found that he had a high temperature and some malaria parasites in his blood. He also had gastroenteritis and respiratory tract infection. As a result of this diagnosis, the Appellant was put on quinine treatment and other medications for seven days.

At the hearing of the matter in the Court below, the Appellant gave evidence in support of his Petition while the Respondents opted to reply on their Answers and the affidavit filed in Court.

After evaluating the evidence given by the Petitioner, the Answers and the affidavit on record, the learned trial Judge found that it was a Magistrate who made an order for the detention of the Appellant in 1977 and a further order that he be medically examined by a registered medical officer. The medical certificate certified that the Appellant was a mentally disordered person. The Court also found that the Appellant was detained on Orders of the Court on numerous other occasions and these orders were initiated by the Appellant's own relatives. The learned trial Judge was satisfied, on the basis of the evidence and the exhibits before him, that the Appellant was never kidnapped by anybody but that when he was detained at medical facilities, he was being taken care of as a result of his mental disorders.

On the claims by the Appellant regarding his retrenchment and benefits from Zambia Railways Limited, the learned trial Judge agreed with the position of Zambia Railways Limited that retrenchment was a labour matter that did not raise any constitutional issues. The Court also agreed that any litigation on the same would be time barred under the statutes of

limitations. The Judge also agreed that any action in this respect should have been commenced by a Writ of Summons and not a Petition under Article 28 of the Constitution. On the other claims for a house, repatriation and rentals, the learned trial Judge found that these were already dealt with by the Magistrate's Court in Livingstone in the case of **MWEWA AND OTHERS** in which the Appellant was a party. The Appellant had also sued Zambia Railways, alone in another case. In the light of all these matters, the learned trial Judge dismissed the Appellant's petition.

The Appellant has now appealed to this Court advancing what he terms to be four grounds of appeal. We say "*what he terms to be grounds of appeal*", because in the manner in which they are formulated, it is difficult to understand some of them and their true import. They are in the following terms:

1. **Ground one**

Matias Haankumba who sworn an Affidavit that he was Zambia Police Officer was a false witness. Matias Hanukumba was an eligible worker in Zambia Railways. I was his works councilor for 4 years between 1981 to 1989 Exhibit FH 3 dated 26th August 1977.

2. **Ground Two**

The magistrates who singed detention orders for me to be detain in the mental annex and be examined by a non psychiatrists erred. The appropriate way is according to

exhibit MK 1 and MK 2 so that experts' judgment could come up to clarify my situation.

3. Ground Three

Drugs are mood altering substances. Certificates are shown abhorrent type of treatment chemotherapy in case of no cancer and psychiatric drugs without informed consent. Exhibit FH 7

Argument: a medical Act without consent constitutes battery. There is no absolute in medical world.

4. Ground 4

CAP 559 is wrongfully enforced order I was not pregnant to be examined by Doctor Chinyonga. Exhibit FH7 dated 24th March 1999 in the matter of Mental Disorders Act.”

The Appellant appears to have filed submissions in this appeal a copy which appears on page 74 of the record of appeal. It has been difficult for us to understand the gist and import of his arguments on the first page of his submissions. We have also been unable to relate them to any of the purported grounds of appeal. To illustrate our predicament, we hereby reproduce the first paragraph of the submissions

“I submit that this appeal is in the matter of an application under S. 28 of the constitution and in the matter of Protection of Fundamental Rights Rules 1969. This has its learning to an Appendix 1 civil procedure in the High Court for Zambia by R.G. CARE S.C. LL.M (London) Former Puisne Judge of the High Court for Zambia; solicitor of the Supreme Court of England; Head of the Department of Law at the University at Jos. Nigeria, and D.W. FLUCK Fellow of the Institute of Legal Executives. With FOREWORD by ANNEL M. SILUNGWE CHIEF JUSTICE

LUSAKA, ZAMBIA. JUNE 13, 1983. This case is exceptional there are detention orders in the mental Annex and Medical Certificates."

On the retrenchment package, the Appellant submitted that he was paid by deceit and not according to structural adjustment programme. He stated that he was not paid gratuity, pension and neither was he repatriated. He cited two cases which according to him are on all fours with his case. These are **OZOKWO VS THE ATTORNEY GENERAL, (1985) Z.L.R. 218** and the case of **DULY MOTORS VS KATONGO AND OTHERS, (1986), Z.L.R. 61**. Both cases urge for realistic award of damages to afford a successful litigant fair recompense. On the question that his action is statute barred, it is the Appellant's submission that lapse of time has nothing to do with this matter.

The Solicitor-General in his submission, asked the Court to consider the Appellant's own admission that he had a defective mental capacity.

We have considered the judgment of the Court below and we have laboured to understand the grounds of appeal as well as submissions which the Appellant filed in this Court. It is clear to us that the Appellant does not comprehend the issues at play in this matter. His main contention was that he was kidnapped against his will and subjected to various medical processes on several occasions. It is clear from the record that these processes were properly initiated under the Mental Disorders Act and that on

many of such occasions, the processes were initiated by his own relatives. It is also clear to us that the medical examination to which he was subjected found beyond doubt that he had a defective mental capacity, a mental disorder which was described as drug induced psychosis. We, therefore, do not fault the learned trial Judge in the Court below for having reached the conclusion that the Appellant had a defective mental capacity as there was ample evidence before him to support the said conclusion.

As regards the claims for the full repatriation package, we agree with the learned trial Judge that these claims are labour matters which were, as at the time of the commencement of this litigation, statute barred and that even if they were not, they could not validly be brought by petition under Article 28 of the Constitution which is exclusively for the enforcement of human rights. Had the Appellant complied with the Statute of Limitations, the actions should have been commenced by Writ of Summons. On the other matters regarding the claim for the house and rentals, the Appellant has himself exhibited a judgment of this Court on page 55 of the record of appeal in a matter involving **MWEWA AND OTHERS VS ZAMBIA RAILWAYS (Appeal No. 6 of 2000)** in which the Appellant and others sought a declaration that the retrenchment package given to them in February, 1995 was null and void. The Appellant cannot now bring this

matter before us when the matter was litigated upon, up to the highest court in the land. The Appellant also admitted in his testimony in the Court below appearing on page 36 of the record of appeal that he did bring a case against Zambia Railways Limited in a Livingstone Subordinate Court claiming rentals, upkeep allowance and repatriation. He cannot now bring the same claims under Article 28 of the Constitution.

It is our considered view that this whole appeal lacks merit and it is dismissed. On the facts of this case, we make no order as to costs.



I.C. Mambilima
DEPUTY CHIEF JUSTICE



P. Chitengi
SUPREME COURT JUDGE



T.A. Kabalata
SUPREME COURT JUDGE