

Hichilema and Another v Lungu and Another (2016/CC/0031) [2016] ZMCC 4 (5 September 2016), Majority Judgment

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Hichilema and Another v Lungu and Another
(2016/CC/0031) [2016] ZMCC 4 (5 September 2016)

Majority Judgment

Muna Ndulo

The facts of this case were as follows: Following the August 11 Presidential and Parliamentary elections, the petitioners filed an election petition in the Constitutional Court to nullify the election of President Edgar Lungu, on the grounds that the conduct of the August 11 elections breached the Constitution, the electoral act and the electoral code of Zambia and that consequently, the incumbent was not validly elected. Articles 101 (5) and 103 (2) of the Constitution state that election petitions filed pursuant to those provisions must be heard within 14 days. The petition was filed on the 19th of August 2016, and as the 14 day period reached expiry, the hearing of the petition had not commenced. The full bench of the Constitutional Court decided unanimously on the night of Friday, September 2 2016, that a four day hearing of the petition would commence on Monday, September 5, 2016 and end on Thursday, September 8, 2016. Under this arrangement, the petitioners would have two days to present their case, and the respondent's two days to defend it. However on the morning of September 5, when the court met, purportedly to begin trial, three judges (Mulonda, Mulenga, and Sitali) issued a majority ruling dismissing the petition on the grounds that the 14 day period had expired and that as a result, the court had no jurisdiction to hear the petition. Writing on behalf of the three judges, Judge Sitali wrote, "The period for hearing the petition is prescribed by the Constitution itself. The time frame is rigid and this Court has not been given discretion to enlarge time". Deciding on the fate of the unheard petition, Judge Sitali noted, "the petition stood dismissed for want of prosecution...and therefore failed by reason of that technicality."

In this commentary, I argue that the September 5 decision of Justices

Sitali, Mulonda and Mulenga to overturn a decision of the full bench made on September 2, was illegal, irregular, and of no legal effect. First, from the dissenting judgment of Judge Chibomba, we learn that the dissenting judges had very little time to read the majority judgment. This raises the following very serious questions: Exactly when and where did the Judges' conference to overturn the September 2 decision and arrive at a new decision take place? Who called this meeting and in what context? How is it that three judges can overrule a properly constituted full bench decision at what was clearly an irregular meeting? Who reopened the issue? When was the application for reopening made and to whom? Was the application to reconsider the Friday ruling made to the full bench? When was the application heard? The only logical conclusion is that the three judges caucused over the weekend to arrive at the decision to overturn the full bench ruling. They made the decision and wrote the judgment without any submissions from the parties. This is conduct that clearly subverts the judicial system.

Moreover, without any prior permission from the court, the lawyers of the respondent were not in court on Monday for the scheduled hearing of the case, stating that they did not want to participate in an illegality. A critical question that immediately comes to the fore is this: do lawyers appearing before a court have the authority to determine the illegality of an act? Is the determination of legality and illegality not a hallowed judicial function? Even in matters that touch on jurisdiction, it is the duty of the Court to pronounce on its jurisdiction to hear a matter. However, in this case, the respondents absented themselves from court without permission. In so doing they not only demeaned the court, they also defiled the collective rights of the Zambian people that the Court represents. It was therefore unfortunate that the majority judgment, which condemned the disrespectful conduct of the petitioner's lawyer, did not equally condemn the disrespectful behavior of counsel for the respondents.

While it was right for the court to admonish the petitioners' lawyers for any misconduct, it is inconsistent and a show of partiality for the three judges not to censure the respondent's lawyers for failing to show up in court on September 5. Unless of course, these lawyers sought and received permission at the irregular weekend meeting that overturned the majority verdict. An impartial court would have admonished both sides.

Compounding the irregularities described, above, I argue that the so-called judgment is wrong on the law, for the following reasons.

- (1) First, the weekend meeting of the three judges that overturned the September 2 ruling and produced a new ruling was irregular. It cannot be justified under any tenet of law known to the Zambian legal system or perceivable in any part of the common law legal tradition. There was no motion filed to revisit the issue and there were no new facts to reconsider. Moreover the petitioners had reasonably relied on the unanimous decision of the Constitutional Court and if judicial rulings prove unreliable, that signals the end of democracy. A sub-group cannot form itself out of the whole and overrule the whole. The attempt to overturn the full bench ruling is a subversion of the judicial system and calls into question the fitness of the three judges to hold judicial office. The three judges must read the Commonwealth Bangalore Principles on Judicial Conduct to learn about appropriate judicial conduct.
- (2) The remedy the three judges purported to give is not provided for by the Constitution. Article 103 (3) provides that “the Constitutional Court may, after hearing an election petition- (a) declare the election of the President-elect valid; or (b) nullify the election of the President-elect and Vice President.” In their In their rush to deliver judgment, the three judges failed to read the law as it is; a court of law cannot give a remedy not provided in law. The purported majority judgment therefore has no legal basis.

- (3) On the question of the 14-day period, Article 103 (2) provides that “The Constitutional Court shall hear an election petition relating to the President-elect within fourteen days of the filing of the petition.” There is no consequence provided for exceeding 14 days. Besides, the section speaks about “hearing.” It nowhere mentions “determining.” The article seems to have been drafted along the lines of a similar provision in the 2010 Kenyan Constitution. In marked contrast, the Kenyan provision talks about “hearing” and “determining”. Article 140 (1) of the 2010 of the Kenyan Constitution provides that: “(a) A person may file a petition in the Supreme Court to challenge the election of the President elect within seven days after the date of the declaration of the results of the Presidential election; (b) Within fourteen days after the filing of the petition, under clause (1) the Supreme Court shall hear and determine the petition and its decision shall be final”. The three judges cited the 2013 Kenyan Supreme Court Presidential election petition as authority for their decision. Apart from the difference pointed out in the Kenyan provision concerning the 14-day limit, the Kenyan Supreme Court ensured that all evidence presented by the parties was admitted via affidavits and decided the case on the merits and not on procedural grounds. The Kenyan court used the pre-trial conference to lay the ground rules for the expeditious, fair, and efficient disposal of the petition. Judicial powers ought to be exercised judicially and judiciously. That is, judicial power must be exercised in the interest of substantial justice and not to defeat the common will of the people.
- (4) A hearing must be fair and equitable and not just a farce or a choreography of absurdities as was seen in this case. Article 103 (2) should not and cannot be interpreted to deny petitioners their constitutionally guaranteed right to be heard. A constitutional court ought not to pander to narrow constructions that leave substantial justice prostrate. Several courts from various parts of the world have

dealt with this matter. First, is *R v. Sussex Justices, exp. McCarthy*¹, a leading English case on the impartiality and recusal of judges. It is famous for establishing the precedent that mere appearance of bias is sufficient to overturn a judicial decision. It also brought into common parlance the oft-quoted aphorism: “Not only must justice be done; it must also manifestly be seen to have been done.” Procedure and technicalities are handmaids of law, they should never be made a tool, to deny justice or perpetuate injustice by any oppressive or punitive use. They should not become tyrannical masters and agents for the destruction of justice.

The above point may have been most eloquently stated by Justice Chuckwadifu Oputa in the Nigerian case of *Aliu Bello & Others v. Attorney-General of Oyo State*² when he held:

The picture of law and its technical rules triumphant and justice prostrate may no doubt have its admirers. Nevertheless, the spirit of justice does not reside in forms of formalities, or in technicalities, nor is the triumph of the administration of justice to be found in successfully picking one’s way between pitfalls of technicality. Law and its technical rules ought to be but a handmaid of justice and legal inflexibility (which may be becoming of law) may, if strictly followed, only serve to render justice grotesque or even lead to outright injustice. The court will not endure that mere form or fiction of law, introduced for the scale of justice, should work a wrong, contrary to the truth and substance of the case before it.

As the Philippines Court of Appeal also put it in *Aguam vs. Court of Appeals*³ :

1 [1924] 1 KB 256, [1923] All ER Rep 233.

2 (1986) 12 iLAW/SC.104/1985

3 388 Phil. 587 (2000).

Technicalities, however, must be avoided. The law abhors technicalities that impede the cause of justice. The court's primary duty is to render or dispense justice. A litigation is not a game of technicalities. Lawsuits unlike duels are not to be won by a rapier's thrust. Technicality, when it deserts its proper office as an aid to justice and becomes its great hindrance and chief enemy, deserves scant consideration from courts. Litigations must be decided on their merits and not on technicality. Every party litigant must be afforded the amplest opportunity for the proper and just determination of his cause, free from the unacceptable plea of technicalities.

It is quite clear that the legal reasoning of the three judges was fatally flawed and defied comparative jurisprudence from around the world. The petitioners were denied the panoply of their due process rights guaranteed under the Zambian constitution – the right to be heard by an impartial tribunal. The technical argument used by Justices Mulonda, Mulenga and Sitale was simply an excuse and does not appear to be the real reason for their conduct. This judgment indicates that there is no clear separation between the judicial and executive branches of government and that this lack of separation has led to a harmful politicization of the judicial system. The Judiciary branch of government is clearly beholden and subservient to the Executive branch, and the courts are plagued by political influence. Moreover, the lack of a transparent system for the appointment of judges and the concentration of the appointment system in the presidency has meant that appointments and promotions in the judiciary are based on political patronage rather than merit, undermining both the professionalism and the independence of the institution.