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Daniel Mwale v Njolomole Mtonga and Another Appeal No.004 (2019)

*Dunia P. Zongwe*¹

This is a classic case of sour grapes. After failing to secure a favourable decision from the judges, the losing party accused them of prejudice. This happened in the *Mwale v Mtonga* matter, decided by the Supreme Court of Zambia in 2019². When his appeal failed, Daniel Mwale reacted by accusing that court and the entire judiciary of corruption.

Though this sort of reaction lacks grace, most people can expect the losing side to sling mud at the court. What people can hardly predict, however, is what the court will do when a losing litigant melts down in this manner. The court faces at least five choices: (1) The court could completely ignore the loser's rantings; (2) it could discharge them but warn against such outbursts; (3) it could convict them of contempt but without imposing any effective sentence; (4) it could convict them of contempt and mete out a sentence often dished out by judges in cases of contempt; or (5) it could convict them and impose a harsh sentence to make an example of them.

The question is: What would a Solomon-like judge do in this case? Almost certainly, they would think twice before stepping on and crushing sour grapes that they find on the floor, crying for mercy.

The facts

The certificate of title relating to a farm located in Lusaka described Mwale and Njolomole Mtonga as co-tenants of the farm. In January 2007, Mwale applied to the High Court for two orders: an order declaring Mwale the sole owner of the farm and another order directing the Chief Registrar of Lands and Deeds to cancel the certificate and replace it with a new one.

The defendant, Mtonga, objected to Mwale's application by arguing that, because the title in question was issued in 1991, the Limitation Act 1939 (UK) prevented him from recovering land. Indeed, section 4(3) of that Act bars anyone from recovering land after 12 years have elapsed. The High Court accepted Mtonga's preliminary objection and rejected Mwale's application.

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² Daniel Mwale v Njolomole Mtonga and Another Appeal No. 004 (2019)

Mwale then appealed to the Supreme Court of Zambia. But on 19 August 2015 the court sided with the High Court and dismissed Mwale's appeal.³ At that moment, Mwale lost his composure. According to Malila JS, the Supreme Court's appeal judgment so annoyed Mwale that he "went into a frenzy" and denigrated the Supreme Court judges and the whole judiciary.⁴ On 26 October 2017, he wrote the letter that got him in trouble with the Zambian Supreme Court – a letter that he addressed to the Deputy Chief Justice M.S. Mwanamwambwa and copied to several high-ranking state officials, including the Chief Justice, the Minister of Justice, the Minister of National Guidance and Religious Affairs, and the Director of the Anti-Corruption Commission.

In that letter, Mwale accused the Supreme Court of turning a blind eye to the "obvious fact" that corrupt practices prevent ordinary poor Zambians from getting title to their property because the Court was determined to apply the British Limitation Act. In doing so, the Supreme Court sought – still according to Mwale – to appease "corrupt civil servants at the Ministry of Lands and the white collar criminals that work in league with senior officers."

Significance of the Judgment

The Supreme Court could have ignored what Mwale described himself as "the rantings of a confused man" "in a state of emotional trauma" after he lost the farm.⁵ Surely, judges have the right to protect the reputation of the courts, and a judge may thus try and punish a person for vilifying the courts. As Malila J reminded, scandalizing the court constitutes a *sui generis* (i.e., unique) offence and does not form part of the ordinary criminal law.⁶

The offence of scandalizing the court falls under the general crime of 'contempt of court', which comprises several types of conduct that intentionally and unlawfully violates the dignity, repute or authority of a judge or a judicial body.⁷ Snyman defines "scandalizing the court" as consisting in publishing, in writing or verbally, allegations which, objectively, tend to bring judges, magistrates or the administration of justice through the courts generally into contempt,

³ *Daniel Mwale v Njolomole Mtonga* (Selected Judgement No 25 of 2015).

⁴ *Daniel Mwale v Njolomole Mtonga* [2019] Supreme Court of Zambia J3.

⁵ *ibid* J9-10.

⁶ *ibid* J15.

⁷ CR Snyman *Criminal Law* (6th edn, LexisNexis 2014) 315-317 and 322-324.

or unjustly to cast suspicion on the administration of justice.⁸ As Malila held, the offence of scandalizing the court permissibly derogates from freedom of expression guaranteed under the Zambian Constitution.⁹ Article 20(3)(b) of the Constitution allows laws that derogate from freedom of expression when such laws become necessary to maintain the authority and independence of the courts.

Malila quoted *Savenda*¹⁰ to affirm that the offence exists to protect the administration of justice:

We stated in [*Savenda*] that one of the factors which eat at the public confidence in the Judiciary as an important estate of government is the frequent and often unjustified assault on the integrity of the institution or its members.¹¹

Through his letter, Mwale impugned the integrity of the courts in Zambia, and that itself would entitle the Supreme Court to try him for scandalizing the court. But does that mean that the court *ought to* exercise its right to protect the integrity of the judicial office?

The Supreme Court concluded that Mwale's letter had the effect of scandalizing the court and undermining the administration of justice.¹² It then reacted to the letter in two stages. Initially, on 12 December 2017, Mwanamwambwa DCJ replied to Mwale's letter to explain the procedure in the Supreme Court and how that court reaches its decisions. In particular, the learned judge explained the court's decision to uphold the High Court judgment that rejected Mwale's application. Even so, Mwanamwambwa's reply did not seem to move Mwale. On the contrary, Mwale wrote a second letter.

Although Malila J's majority judgment does not say what Mwale's second letter actually contained, the Supreme Court ordered Mwale to appear before it and present arguments why the Court should not cite him for contempt of court. Eventually, in 2019, the Supreme Court convicted Mwale of contempt of court and sentenced him to pay a fine of K20,000 within seven days, failing which he would spend nine months in prison.

A lawyer who looks closely at this matter can easily take issue with the manner in which the Supreme Court treated Mwale. While most lawyers would agree with the Supreme Court's

⁸ *ibid* 322.

⁹ *Mwale* [2019] (n) J16.

¹⁰ *Savenda Management Services Limited v Stanbic Bank Zambia Limited, Ex parte Gregory Chifire* (Selected Judgment No 47 of 2018).

¹¹ *Ibid*

¹² *Mwale* [2019] (n) J8.

decision to uphold the High Court's ruling, they would balk at the proposition that the Supreme Court should have cited Mwale for or convicted him of contempt. Mwanamwambwa's initiative to reply to Mwale's letter and use this opportunity to educate the old man on the ways of the Supreme Court was very wise. Nevertheless did the Court really need to proceed against Mwale after he disregarded Mwanamwambwa's reply and sent the second letter?

Granted, the summons issued to Mwale prompted him to write a letter of apology. In that letter, written on 18 September 2018, Mwale "unreservedly" apologized to Mwanamwambwa for the first letter that he wrote and that scandalized the court. Given that Mwale withdrew the contemptuous statements by addressing his apology letter to Mwanamwambwa and all the high-ranking state officials to which he had copied the first letter, could the judges in that case still argue that the Supreme Court and the judiciary suffered prejudice?

Even assuming that the Court suffered reputational harm and that it should thus act against him, Mwale readily admitted to the charge. The Court claimed that it considered Mwale's ready admission to the charge,¹³ but failed to follow up on what this consideration implies. Specifically, the lawyer representing Mwale cited the case of *Banda v Mumba*,¹⁴ in which the Supreme Court of Zambia discharged the contemnor¹⁵ after he admitted the charge and withdrew the contemptuous material. The court brushed aside the *Banda* case merely by observing that *Banda* cannot be equated to Mwale's contempt matter.¹⁶ It did not give any facts that distinguish the two matters. Yet the defence lawyer characterized the two cases as closely similar, "slightly different".¹⁷

In fact, the court missed the gist of the defence counsel's argument: if the Supreme Court discharged the contemnor in a case where he published the contemptuous material in the media (a more serious circumstance), then surely the self-same court should treat Mwale more leniently as he addressed the contemptuous material to a few individuals only. If the court had fully considered the admission charge and the *Banda* case, it would have provided facts to distinguish the *Banda* and the present case, and it would have explained why *Banda* does not apply here.

¹³ *ibid* J19.

¹⁴ *Leonard Banda and Dora Siliya v Nevers Mumba* (Selected Judgment No 20 of 2013).

¹⁵ A 'contemnor' is a person who makes statements that scandalize a court or the judiciary.

¹⁶ *Mwale* [2019] (n) J20.

¹⁷ *ibid* J14-15.

At one point while reading his apology to the court, Mwale collapsed in the witness box. Several factors suggest that the Supreme Court punished Mwale unfairly. To begin, Mwale apologized “unreservedly” and quickly admitted to the charge without wasting the court’s time. And the court noted that he showed contrition.¹⁸ In his letter of apology, he presented himself as “very remorseful” and claimed that he wrote the first letter “in a state of emotional trauma arising from the demolition of my retirement house as a senior citizen.” He further described his first letter as “venting [his] anger”, “careless words”, “unbridled”, “illogical”, and “contradictory”. He invited the court to see the sentiments he expressed in the first letter as “the rantings of a confused man!”

Moreover, the proceedings apparently made Mwale sick. As indicated in the sick report produced in court,¹⁹ Mwale’s blood pressure shot up, he had to be rushed to hospital, he collapsed in the witness box, and he missed trial on four occasions because of his condition. Importantly, Mwale asked the Supreme Court for mercy. In his apology letter, he wrote:²⁰

I throw myself at the mercy of the court, just like in Bible times in the Old Testament when a person error [sic] they would run to the same Temple of God where laws were interpreted and get hold of the Altar horns as last resort for mercy! In similar fashion your lordship, I run to your court as the highest Institution of Justice in our land and ask for mercy!

The Court did not grant mercy; it remained unforgiving. It took the fact that Mwale served as a Christian reverend to make an example of him. It reasoned that, because a reverend is supposed to act and talk in an exemplary manner, his punishment had to be exemplary as well.²¹

The court’s reasoning raises more questions about the fairness of Mwale’s punishment. For it to make an example of a convicted individual, the court must visit him with a sentence “harsher than the sanction that this sort of offence normally attracts.” This suggests that Mwale’s ‘exemplary’ punishment did not fit the crime. Furthermore, for the exemplary punishment to

¹⁸ *ibid* J19-20.

¹⁹ *ibid* J13.

²⁰ As reproduced verbatim in Malila J’s judgment in *Mwale* [2019] (n) J9-11.

²¹ *Mwale* [2019] (n) J20.

send a message to would-be contemnors, the severe punishment had to treat Mwale as an instrument to achieve greater goals. At that moment, the punishment treats Mwale as an instrument used and sacrificed to serve the purposes of deterring future offenders. This utilitarian approach to punishment runs against some fundamental sense of justice. As explained by John Rawls in his *A Theory of Justice*,²² a just legal system does not trade a person's rights for the greater happiness of a greater number of people.

Conclusion

The *Mwale v Mtonga* dispute brings up a number of themes: perceptions of corruption in the courts, unjustified public attacks against the judiciary, constraints on judges' ability to respond to those attacks, the airing of corruption allegations in the wrong forum, concerns over the security of land titles in Africa, and the role of contrition and pleas for mercy in sentencing convicted persons. The Supreme Court of Zambia resolved Mwale's appeal against the High Court judgment impeccably, but it miscarried justice in the proceedings it instituted against Mwale for scandalizing the court, especially after he remorsefully apologized to the court and begged for mercy.

Of the five basic choices open to the court, it chose the harshest. The court could have restrained itself. In *Mamabolo*, the Constitutional Court of South Africa advised courts to refrain from quickly inferring that someone's words or conduct scandalize them.²³ To protect freedom of expression adequately, the Constitutional Court held that the courts must keep the scope for convicting someone for scandalizing the court very narrow.²⁴ Though it does not bind Zambian courts, this holding by the South African Constitutional Court could inspire judges in Zambia.

Rather than a thick-skinned court ignoring the contents of a disgruntled and bitter litigant's letter, the judges "agonize[d] long and hard"²⁵ over it. Rather than extend mercy, if not pity, the court wished to emphasize how "expensive" "thoughtlessness" can be to their authors.²⁶ But the court got it wrong when it assumed that, through its punishment, Mwale would bear the costs of his misdeed. When one realizes that the court adjourned the trial four times just so that it could punish Mwale and send a message to would-be offenders, it becomes clear that

²² John Rawls *A Theory of Justice* (Harvard University Press 1971) 3-4.

²³ *S v Mamabolo* 2001 (3) SA 409 (CC) [45].

²⁴ *ibid.*

²⁵ *Mwale* [2019] (n) J7.

²⁶ *ibid* J20.

the court wasted a lot of resources for what is at the end of the day a trifle. It sat four times, adjourned four times, and took hours and other resources to write the judgment. Contrary to what the court thought in punishing him, Mwale did not ultimately pay (most of) the cost of his scandalizing the court; taxpayers did, as nine judges sat and wasted limited resources to deliver a judgment in a trivial matter.

In a fundamental sense, Mwale dropped to the floor to ask for forgiveness, to cope with his medical condition, and to mourn the loss of his farm. Though Mwale's bitterness at losing his farm made him act angrily, this does not mean that the court had to take him further down. A good judge should expect his or her judgment to make the losing party bitter, but – as argued in this commentary on the *Mwale* matter – a judge should not step on and crush sour grapes lying on the floor.