

SAIPAR Case Review

Volume 3
Issue 1 May 2020

Article 7

5-2020

Chishimba Kambwili v Attorney General 2019/CC/009

O'Brien Kaaba
University of Zambia

Pamela T. Sambo
University of Zambia

Follow this and additional works at: <https://scholarship.law.cornell.edu/scr>



Part of the [African Studies Commons](#), and the [Constitutional Law Commons](#)

Recommended Citation

Kaaba, O'Brien and Sambo, Pamela T. (2020) "Chishimba Kambwili v Attorney General 2019/CC/009," *SAIPAR Case Review*: Vol. 3 : Iss. 1 , Article 7.

Available at: <https://scholarship.law.cornell.edu/scr/vol3/iss1/7>

This Case Commentary is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in SAIPAR Case Review by an authorized editor of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

AI

Chishimba Kambwili v Attorney General 2019/CC/009¹

O'Brien Kaaba² and Pamela Towela Sambo³

Facts

The Constitutional Court on 18th February 2020 rendered its judgment in the case of *Chishimba Kambwili v Attorney General 2019/CCZ/009*. The petitioner, then an estranged Member of Parliament for the ruling Patriotic Front (PF), had his seat declared vacant in February 2019 by the Speaker of the National Assembly, Patrick Matibini, on the ground that by acting as a consultant for an opposition party (under which he was not elected to Parliament), he had crossed the floor.

Holding

The Constitutional Court found the action of the Speaker to have been unconstitutional as the office is not vested with power to interpret or resolve constitutional problems. This power is vested in the judiciary and the Speaker, therefore, usurped the powers of the judiciary. However, despite finding that the Speaker acted unconstitutionally in unseating the petitioner, the Constitutional Court dismissed the petition and declined to grant any remedy. This commentary argues that the decision of the Constitutional Court in this respect is incorrect, negates the supremacy of the Constitution and demonstrates lack of appreciation of basic considerations for constitutional adjudication.

Significance

One of the first things that is shocking about the judgment is the apparent failure to understand the remedy sought by the petitioner. Page 2 of the judgment lists the remedies sought by the petitioner. The first and arguably most important remedy is stated as “a declaration and order that the ruling of the Speaker dated 27th February, 2019 is null and void *ab initio*.” It is clear from this that the petitioner sought the remedy of a declaration of invalidity, whose effect would be to render null and void, the Speaker’s decision to unseat the petitioner. Nowhere in its entire

¹ An earlier version of this commentary was published as an opinion article in the *News Diggers* newspaper in March 2020

² LLB (University of Zambia); LLM (University of Zambia); LLD (University of South Africa); Lecturer in Law, University of Zambia

³ LLB (University of Zambia); LLM (University of Kwa Zulu Natal); PhD (Manchester University); Lecturer in Law, University of Zambia

judgment, does the Constitutional Court discuss this remedy. For reasons not stated in the judgment, the Constitutional Court instead discusses the remedy of a declaratory judgment and proceeds to assert that it has discretion to decline to grant it. The two remedies – declaratory judgement and a declaration of invalidity - are completely different.

On the one hand, a declaratory judgment simply defines the rights of the parties relative to the legal question under consideration. It indicates whether the parties may seek or are entitled to the relief they desire. In the words of Borchard, “their distinctive characteristic lies in the fact that they constitute merely an authoritative confirmation of the already existing relations.”⁴ Such declaratory judgments at common law are granted at the discretion of the Court. From the record, it is clear that this is not the remedy the petitioner sought from the Constitutional Court.

On the other hand, a declaration of invalidity as a constitutional remedy nullifies any law or action that violates the provisions of the Constitution. Once the Constitutional Court arrives at the conclusion that a provision of the Constitution has been violated, it retains no discretion, and must issue a mandatory order of invalidity. The mandatory order or declaration of invalidity is premised on the supremacy of the Constitution for the reason that anything done in violation of the Constitution is a nullity. This is the unambiguous import of Article 1(1) and (2) of the Constitution of Zambia, which provides that the Constitution is the supreme law of the Republic of Zambia and any other written law or practice that is inconsistent with its provisions is void to the extent of the inconsistency. Further, Article 1(2) of the Constitution unequivocally provides that any act or omission that contravenes the Constitution is illegal. The consequences of any illegality, more so in violation of the Constitution, must be remedied; and the Constitutional Court is accordingly enslaved to so act by the supreme law.

As constitutional law scholar, Pierre De Vos has asserted, it is mandatory for the Court to issue an order of invalidity against laws or actions that violate the provisions of the Constitution and further that this “obligation to declare law or conduct that is inconsistent with the Constitution to be invalid flows logically from the fact that the Constitution is supreme.”⁵ In relation to granting of an order of invalidity as a constitutional remedy, the Constitutional Court, therefore,

⁴ As cited in James Schoonmaker, ‘Declaratory Judgment’ (1920) *Minnesota Law Review*, 33

⁵ Pierre De Vos, *South African Constitutional Law in Context* (Oxford University Press 2014) 393

enjoys no discretion and should have unambiguously declared the Speaker's action null and void.

It is beyond comprehension that a specialised Constitutional Court could misdirect itself in such a manner as evidenced by this judgment. It is clear that the petitioner sought an order of invalidity but the Constitutional Court instead, and unmoved by anyone, formulated its own remedy and dismissed it of its own accord. No reasons are advanced by the Constitutional Court for this decision. It however appears, that the Constitutional Court was following its own precedent of substituting claimants' legal questions, on its own motion as established in *Danny Pule and 3 others v. The Attorney- General and Davies Mwila*⁶ (the 'Presidential Eligibility' Case) where the applicants' two questions were substituted by the Constitutional Court's new and single one. If we were to hazard a guess, it would seem that the Constitutional Court was apprehensive of the political consequences of invalidating the Speaker's unconstitutional decision. The Constitutional Court cited two potential 'disruptions' it sought to avoid. First, the Constitutional Court took the view that the petitioner was already replaced as a Member of Parliament in a by-election; and secondly, that nullifying the Speaker's decision would mean having two Members of Parliament for the same constituency, which, in the eyes of the Constitutional Court, would result in a constitutional crisis.

Two things can be said about the approach taken by the Constitutional Court. First, when a Court is overly concerned about the political consequences of its decisions, and makes decisions on the basis of its interpretation of supposed consequences without elaborating any objective standard test for its action, such a Court opens itself to perceptions of acting in furtherance of personal inclinations and against the rule of law. Having judicial officers who make decisions that tie their findings to political consequences, basically invites them to make subjective evaluation of consequences of their prospective decisions. Such an approach to constitutional adjudication, warned retired Ugandan Supreme Court judge, George Kanyeihamba, "transports the judge from the heights of legality and impartiality to the deep valleys of personal inclinations and political judgment."⁷

⁶ 2017/CCZ/004 Selected Judgment No. 60 of 2018

⁷ Kizza Besigye vs. Yoweri Kaguta Museveni Presidential Election Petition No.1 of 2006. See the dissenting opinion of Kanyeihamba, JSC, p.304. See also O'Brien Kaaba, *The Challenge of Adjudicating Presidential Election Disputes in Africa: Exploring the Viability of Establishing An African Supranational Elections Tribunal* (LLD Thesis, University of South Africa 2015) 105

Secondly, the position of the Constitutional Court that there would be a constitutional crisis as there was an already held by-election, which had replaced the petitioner, does not hold water. It in fact betrays a tragic misunderstanding of constitutional law by the Court. Where a law or an act offends the Constitution, it becomes wholly invalid, or *void ab initio*. In this case, it would have meant reverting to the status quo prior to the Speaker's decision. There would, therefore, be no other Member of Parliament for the concerned constituency except the petitioner in the eyes of the law. There is a lot of comparative academic literature and jurisprudence that the Constitutional Court could have explored to settle at a more informed decision. For instance, the Nigerian case of *Amaechi vs. Independent National Electoral Commission and Others*,⁸ involving a state governorship election is illustrative. The Nigerian Constitution and electoral laws required parties to have primary elections for selecting candidates. Those who won primaries were the legally recognised political party candidates. The petitioner stood as a candidate for a governorship primary and won the election and, was therefore, by law, supposed to be the concerned party's candidate in the election. His political party, however, declined to adopt him and gave the adoption certificate to another person who was not selected through primaries. This new person stood as a state governor and won the election. In the ensuing legal battle, the Nigerian Supreme Court held that the person who was declared winner of the state governorship position was in fact not the rightful winner and therefore annulled his election and declared the petitioner as the legitimate governor. The Nigeria Supreme Court reasoned that the replacement of the petitioner was illegal and a nullity as his candidature was in violation of the Constitution and the law. Consequently, in the eyes of the law, the petitioner was the one who was adopted as a candidate, and therefore, the rightful governor.

The approach taken by the Nigerian Supreme Court is the more legally and procedurally correct one because no act that violates constitutional provisions must be given validity. As noted already, this derives from and gives effect to the doctrine of the supremacy of the Constitution. To hold otherwise is to desecrate the Constitution. This however, is not to argue that orders of invalidity cannot be disruptive. They can and there is well-developed comparative jurisprudence on how judges can tailor orders of invalidity to specific contexts in order to

⁸ (2008) JELR 56286 (SC)

contain the consequences of invalidity.⁹ This, however, is not what the Constitutional Court in Zambia did.

Finally, we wish to point out the potential dangers of the judgment. Democracy scholars, Steven Levitsky and Daniel Ziblatt, in a 2018 publication,¹⁰ extensively study the current global phenomena of democratic backsliding. Unlike in the past when democracies could be killed by dramatic events such military coups, the authors carefully demonstrate that the current backlash against democracy is subtle, invisible and lets democracy erode slowly through minor often seemingly inconsequential acts. This new phenomenon of killing democracy does not use generals or military personnel but *weaponises* the same institutions created to protect rule of law and democracy. This is facilitated by such institutions making subtle decisions which, cumulatively and overtime, prove extremely potent in undermining democracy.

The Constitutional Court judgment seems to validate Levitsky and Ziblatt's well-reasoned views. It is a decision that rewards rather than punishes those who mutilate the Constitution. The Constitutional Court's reasoning, when pushed to its logical conclusion, entails that where someone violates the Constitution, and that violation causes a disruption, it follows that the norms of the Constitution cannot be enforced. Obeying the Constitution becomes optional for the ruling elite. Under this thinking, the consequences of the misconduct take precedence over the supremacy of the Constitution. The ruling elite are, therefore, allowed to mutilate the Constitution and get away with it, given the full imprimatur of the Constitutional Court. It goes without saying that such an approach to constitutional adjudication is an abnegation of the rule of law and the abdication of the duty of the judge as a guardian of constitutionalism and enforcer of constitutional norms. Retired South African Constitutional law judge, Albie Sachs correctly admonished judges when he said, "it would be a strange interpretation of our Constitution that suggests that adherence by the government in any of its activities to the foundational norms that paved the way to its creation was merely an option and not a duty."¹¹

In his recently published book, Supreme Court judge, Mumba Malila, asserts that during his time as a law lecturer at the University of Zambia, he endeavoured to use *Zambian case law*

⁹ For a detailed discussion of constitutional remedies, see chapter 11 of Pierre De Vos, *South African Constitutional Law in Context* (Oxford University Press 2014) 60

¹⁰ Steven Levitsky and Daniel Ziblatt, *How Democracies Die: What History Reveals About Our Future* (Penguin Books 2018)

¹¹ Albie Sachs, *The Strange Alchemy of Life and Law* (Oxford University Press 2009) 46

authorities in his pedagogical work. He was, however, often disappointed that many decisions from the Courts tended to fall short in some vital respects as they were “poorly researched, lacklustre and deficient in depth or clarity.”¹² Justice Malila’s words ring true about this judgment as the decision is lacking in depth, undermines the supremacy of the Constitution and demonstrates a tragic misunderstanding of Constitutional law by the Court.

¹² Mumba Malila, *The Countours of a Developing Jurisprudence of the Zambian Supreme Court: Reflections on My First Five Years as Judge (2014-2019)* (Mumba Malila 2019) 20