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# Mutembo Nchito v Attorney General 2016/CC/0029 (27 October 2020)

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## *Mutembo Nchito v Attorney General 2016/CC/0029 (27 October 2020)*[1]

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### Facts

The facts giving rise to the *Mutembo Nchito* case are well known as they largely played out in the public arena. The petitioner, Mutembo Nchito, was appointed as Director of Public Prosecution (DPP) in 2011 by President Sata (who later died in office in October 2014 and was succeeded by Edgar Lungu). In March 2015, President Edgar Lungu suspended Nchito from office and established a Tribunal to investigate his suitability for remaining in office. The terms of reference for the Tribunal revolved around two categories of allegations. The first category impugned his irregular entry of *nolle prosequi* allegedly in abuse of his power, including in a criminal case against him. The second category related to taking over and subsequently discontinuing prosecution of criminal cases in matters he allegedly had personal interest. The Tribunal had three members: retired Chief Justices Annel Silungwe (as chairperson), Mathew Ngulube, and Ernest Sakala. Following the Tribunal's conclusion of its work, the President in August 2016 wrote Nchito a letter to the effect that he had relieved him of his duties, on the recommendation of the Tribunal, pursuant to Article 144 of the Constitution. The Tribunal's findings and report were never made public and Nchito himself was not availed the report. On that basis alone, it is impossible to know whether or not the President exercised his powers to remove the DPP on proper motives. Nchito challenged his removal but the Constitutional Court ruled that the President acted constitutionally in removing him.

### Holding

The Constitutional Court held that the President acted constitutionally in removing Mutembo Nchito as DPP.

### Significance

Constitutional Courts were designed to superintend constitutional order through adjudicating constitutional disputes in a manner that fosters the deepening of democracy and vindicates

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constitutional norms. Historically, constitutional courts have been associated with the entrenchment of the rule of law and liberal democracy, following their emergence and development around the world, from the time they appeared in Europe in the early 20th century, and are now dotted all over Asia, Latin America and Africa. These specialised courts have been hailed as enforcers of democratic norms and mediators of democratic allocation of constitutional power in a manner that thwarts excessive accumulation of power in one individual or entity, thereby maintaining a reasonable balance between and among the key branches of government.

Constitutional courts have been seen as symbols of constitutionalism and the rule of law. It is undoubtedly for this reason that the Constitution of Zambia (Amendment) Act No. 2 of 2016 enacted the establishment of the Constitutional Court (Concourt). Upon reading the various Constitutional Commission Review reports that recommended the establishment of the Constitutional Court, one gets a clear perspective that Zambians wanted a departure from judicial escapism, inefficiency, a formalistic, narrow, and superficial adjudication of constitutional matters. Zambians have, in essence, been looking for a court that would bring positive change to constitutional adjudication by being a midwife of contextually relevant jurisprudence through interpreting the Constitution in a manner that advances constitutionalism and democracy. The problem is that the Zambian Constitutional Court, judged by the depth of its jurisprudence, does not seem to fit into the legacy of other progressive constitutional courts such as the South African Constitutional Court. The latest demonstration of this is to be found in the recent decision of the Court relating to the removal of Mutembo Nchito as Director of Public Prosecution (DPP).

The Constitutional Court on 27 October, 2020 rendered its judgment in the case of *Mutembo Nchito v Attorney General 2016/CC/0029 (27 October 2020).* Taking the *Mutembo Nchito* judgment as a microcosm of the Constitutional Court judgments, the decisions of the Court tend to be thinly reasoned, under-researched, lacking in critical reflection, deficient in rigorous legal analysis, demonstrating a mechanical and unreflective reliance on precedents, and above all, contextually irrelevant. The Court is simply sanctifying the jurisprudence of executive righteousness, akin to what former Kenyan Attorney General, Amos Wako, stated in 1991 that

"a characteristic of the rule of law is that no man, save for the president, is above the law."[4] The globally respected Ghanaian constitutional law scholar, Professor Kwesi Prempeh aptly described this problem in the following words: "[t]he result, in the African context, is what I have called a 'jurisprudence of executive supremacy'- a jurisprudence that is unduly deferential to executive power, and, at best skeptical of 'novel' claims rooted in modern conceptions of constitutionalism."[5]

Before addressing substantive defects of the judgment, we would like to say a few words about the Constitutional Court's seeming inefficiency. It took four years for the Court to dispose of this straightforward case. The court largely blames the delay on the parties for being "locked in interlocutories." The Court does not explain how and why resolving interlocutory matters took so long. A perusal of the record shows that the case was concluded in September 2019. It therefore took the Court more than a year to render a mere 50-page judgment. The Court offered no apology or explanation for its own delay, which is manifestly a violation of Article 118(2)(b) of the Constitution which requires that "justice shall not be delayed." Obviously, this delay cannot be justified on the basis of the depth of research conducted, as the judgment, apart from routine references to case law and statutes, only made reference to two other publications: Black's Law Dictionary and Garth Thornton's Legislative Drafting book. Considering the importance of the case to the constitutional life of the state, the display of inadequate research in this judgment is by any standard shocking. It also bears noting that the Constitutional Court is a new court which has no case backlogs and has a very low caseload (as compared, for example, with the Supreme Court which had in excess of 4,000 case backlogs prior to the establishment of the Court of Appeal).

Courts are creatures of the Constitution and accountable under the Constitution. Article 118 (1) of the Constitution provides that judicial authority derives from the people and should be exercised in a manner that promotes accountability. Delivering a judgment more than a year after the case closed, without any explanation or apology, is inconsistent with the spirit of accountability dictated by the Constitution. In the case of the Constitutional Court, this is not

[4] Makau Mutua, 'Justice Under Siege: The Rule of Law and Judicial Subservience in Kenya,' (2001) 23 Human Rights Quarterly, 96-118

[5] H Kwasi Prempeh, 'Presidential Power in Comparative Perspective: The Puzzling Persistence of Imperial Presidency in Post-Authoritarian Africa' (2008) 35 Hastings Constitutional Law Quarterly 829

an isolated case, this having been reflected in a number of cases such as the appeals relating to the Lusaka Central and Munali constituency election disputes.

An accountable court is sensitive to the inconvenience it may cause to the litigants and keeps those concerned well updated. The inconvenience is also apparent in relation to the development of constitutional precedence, not to mention the ever-learning general citizenry that looks forward to speedy resolution of contentious constitutional matters. A relatively recent UK High Court judgment involving Zambian litigants (see the case of *Dominic Liswaniso Lungowe & Others v Vedanta Resources Plc and Konkola Copper Mines [2016] EWHC 975 (TCC)*) is instructive in how other judges take matters of efficiency seriously. The Judge delayed issuing the decision by only a few weeks, but apologized profusely and offered the following convincing explanation for the delay:

> The applications were heard over three days in mid-April 2016. The first full draft of this Judgment was prepared in the four days immediately thereafter, after which I went on circuit until the end of May. As I explained to the parties at the outset of the hearing, the logistical difficulty that I faced was that I could not take the 24 lever arch files on circuit, which meant in consequence that the final 'polishing' stage in the production of this Judgment was delayed for longer than I would have wished.

Unlike the UK High Court which only delayed handing down its decision by a few weeks but apologized and offered a cogent explanation, the Constitutional Court in the *Mutembo Nchito* case offered no apology or explanation for handing down a judgment more than a year after the case closed.

Now to the substance of the judgment. A reading of the *Mutembo Nchito* judgment makes one wonder where the Court is taking the country in terms of constitutional jurisprudence. It should be recalled at this stage that the terms of reference for the Tribunal empanelled to probe Nchito relate to his granting of the *nolle prosequi* and the taking over and discontinuance of trials he is alleged to have had personal interest in. The Constitutional Court had a golden opportunity to develop progressive jurisprudence that would ensure the DPP would be accountable for the exercise of their constitutional powers when it considered the case of *Milford Maambo and Others v The People 2016/CC/R001 [2017]*, but squandered it. It instead held that the DPP enjoyed absolute or unfettered discretion in the exercise of their powers, and was not even answerable to the courts. Although we do not agree with this decision (because in a

constitutional democracy power is given for purposes consistent with underlying constitutional values), it represents the current position of the 'law' until a future court reverses it. This being the 'law', it follows that how the DPP exercises power under the Constitution is unassailable. Taking the *Milford Maambo* decision to its logical conclusion would actually mean that it was unconstitutional to set up a Tribunal to probe into how the DPP exercised unfettered discretion. Ironically, whatever the findings of the Tribunal, the authority of *Milford Maambo* (a very bad precedent) suggests that Nchito was removed from office for doing no recognizable wrong under the Constitution. Perhaps that is why the *Nchito* judgment does not point at any wrong he committed. In granting *nolle prosequi* and discontinuing criminal matters, Nchito as then DPP was simply exercising his unfettered discretion, as propounded by the very Constitutional Court! How ironic.

In arriving at the conclusion that the President acted constitutionally in removing Nchito, the Court refused to consider the process leading to his removal. The Court actually went out of its way to preclude him from producing witnesses before it on the pretext that the matters he raised were purely legal in nature. By concluding that the President acted constitutionally in removing Nchito, the Court simply relied on its interpretation of Article 58 of the Constitution (now repealed). There are many things wrong with how the Court dealt with the process leading to the removal of the DPP. Due to limited space, only three shall be highlighted here.

First, the Tribunal's findings were never made public. But more significantly, the petitioner was not furnished with a copy of the Tribunal's report. The petitioner had actually applied to the Court to order that he be furnished with the report. A single judge of the Court in a ruling of 19 October, 2016 declined to grant the application on the pretext that ordering the release of the report would require the interpretation of the Constitution, which power, according to his reading of Article 129(1) and (2) of the Constitution, a single judge did not have. This is mere casuistic sophistry. It is logically impossible to reach the conclusion the judge reached without actually interpreting the Constitution. In arriving at the conclusion that he could not grant the order as a single judge, the judge was actually interpreting the text of the Constitution. His decision was based on the interpretation of provisions he believed divested him of jurisdiction to interpret the Constitution. He did not just close his eyes and pick lots. He simply preferred an interpretation that did not advance the interests of the petitioner and justice. There is actually no provision in the Constitution that divests a single judge from interpreting the Constitution in order to resolve an interlocutory matter. In any case, considering that the Constitution is the

supreme law that gives life to all other laws, it is impossible to conceive of an interlocutory ruling a judge can give in a constitutional matter that does not directly or indirectly involve interpretation of the Constitution. All the interlocutory rulings made by single judges of the Court so far actually demonstrate that they were interpreting the Constitution. Otherwise what else could have been the source of their authority to make those rulings?

The full bench of the Constitutional Court later considered the issue of the petitioner not being furnished with the Tribunal report. Surprisingly it placed the blame on the petitioner in not renewing the application for discovery of the report before the full bench of the Court. Although the Court ordered that the petitioner was entitled to the report, it made no consequential orders arising from that finding. Put simply, this Court's finding did not alter the fate of the petitioner. If the petitioner was entitled to a copy of the report but did not get one, that is a violation of his rights, for which the Court should have provided redress. Strangely, the Constitutional Court did not link this to the violations of any constitutional norms, not even any of the basic national values and principles enshrined in Article 8 and decreed to "apply to the interpretation of the Constitution and enactment and interpretation of the law" by Article 9 of the Constitution.

Comparative jurisprudence shows that failure to furnish a concerned person with reasons for an adverse decision affecting them should be fatal to the process. For example, a three-member panel of the Kenyan High Court in the case of *Joseph Mbalu Mutava v Attorney General & another [2014] eKLR* considered a similar situation where the Judicial Service Commission commenced the process of the removal of a judge and escalated the process to the president to suspend the judge without giving the concerned judge a report of their findings. The Court not only considered that this was a violation of the judge's right to fair administrative action (a constitutionally protected right under the Kenyan Constitution), but also that this was a violation of fundamental constitutional values. It stated:

> In addition to implementing the provisions of the Constitution, the Commission is guided by the values of Article 10 which include the value of good governance, transparency and accountability. Giving reasons for actions undertaken by a constitutional body is in our view a key hallmark of good governance, transparency and accountability. In this case, it is our finding and we hold that the Commission had a duty to furnish the Petitioner with the reasons for its decision that it abdicated this constitutional duty.[6]

The Court considered this fatal to the process and ordered another more transparent process to start. The Zambian Constitution contains similar constitutional values to those of the Kenyan

[6] Joesph Mbalu Mutavu v Attorney general and Another [2014] eKLR

Constitution. These are enshrined under Article 8 and include democracy, constitutionalism, good governance and integrity. Article 9 demands that these values and principles are binding and should be considered when interpreting the Constitution and other laws.

Yet for unclear reasons, the Constitutional Court generally tends to make decisions at variance with these constitutional values and principles. Constitutional values are not mere lofty aspirations or decorations. The express inclusion of fundamental values in national constitutions was pioneered by Germany in the aftermath of World War II and this has become a common standard in recent constitutions. Fundamental values are purposed to ensure that a constitution should never be viewed as a neutral document that merely regulates state power, but as a document that aims to impose a normative value system on the country. The implication of this development is that whenever the constitution is interpreted, the courts should choose an interpretation that accords, promotes and effects those values embodied in the constitution. It is, therefore, mandatory for judges to justify their decisions in relation to the enshrined constitutional values and principles. It is the only way the constitution can retain its transformative character and avoid being a dead letter. The late former Chief Justice of South Africa, Pius Langa, emphasized the importance of this transformative approach, which puts constitutional values at the centre of constitutional adjudication in the following words:

> The Constitution demands that all decisions be capable of being substantively defended in terms of the rights and values that it enshrines. It is no longer sufficient for judges to rely on the say-so of parliament or technical readings of legislation as providing justifications for their decisions. Under a transformative Constitution, judges bear the ultimate responsibility to justify their decisions not only by reference to authority, but by reference to ideas and values.[7]

It is, therefore, anomalous that while the Zambian Constitution now expressly enshrines underlining constitutional values and principles, these were never articulated and honoured in this case. There remains no consequence for their violation as it is.

The second issue the Court ducked in relation to the procedure leading to the removal of the DPP relates to the alleged bias of two of the three Tribunal members. These are Justices Mathew Ngulube and Ernest Sakala. The petitioner considered that he would not get fair treatment from the two because he had previous negative encounters with both. In relation to

[7] Justice Pius Langa, 'Transformative Constitutionalism,' (2006) 3 *Stellenbosch Law Review* 351 -360

Justice Ngulube, the petitioner indicated that he played a role in exposing the ring of corruption and abuse of public resources during the Chiluba Presidency (1991-2001), which led to the resignation of Justice Ngulube, following an exposure to the effect that he (Justice Ngulube) was a beneficiary of secret payments from an account operated by security agencies. (The British High Court in the case of *Attorney General of Zambia v Meer Care and Desai and other [2007] EWHC 952)* did actually confirm these allegations). In relation to Justice Sakala, the petitioner indicated that he had made a personal complaint against him to the Minister of Justice about his improper involvement in a case involving Nchito's business interests. That being the case, the Constitutional Court was duty bound to establish that the alleged bias did not affect the integrity and findings of the Tribunal. Procedural fairness is a sacred standard in a constitutional democracy. The importance of this was articulated by the South African Constitutional Court in the case of *Janse van Rensburg NO v Minister of Trade and Industry NO 2001 (1) SA 29 (CC)* when it held:

> Observance of the rules of procedural fairness ensures that an administrative functionary has an open mind and a complete picture of the facts and circumstances within which the administrative action is to be taken. In that way the functionary is more likely to apply his or her mind to the matter in a fair and regular manner.[8]

More specifically in relation to bias, the South African Supreme Court of Appeal in *S v Roberts 1999 (4) SA 915 (SCA)* established a four stage test of bias, as follows:

> 1) There must be a suspicion that the judicial officer might (not would) be biased;
> 2) The suspicion must be that of a reasonable person in the position of the accused or the litigant;
> 3) The suspicion must be based on reasonable grounds; and
> 4) The suspicion is something that the reasonable person would (not might) have.

Assuming the facts were as the petitioner alleged, then the Tribunal members complained against would manifestly not meet the requisite standard of impartiality.

If the allegations of bias were taken into account and established, it would be clear that the DPP was not subjected to a fair removal process. The Constitutional Court, however, avoided dealing with this issue. In a ruling of 18 April 2019, the Constitutional Court held that the issue

[8] Janse van Rensburg NO v Minister of Trade and Industry NO 2001 (1) SA 29 (CC)

of bias was improperly before it as it was a matter which should have been commenced via judicial review in the High Court and not through the petition before it. The Court therefore, did not consider the alleged bias of the commissioners. Despite this, the Court went ahead to decide that the President acted constitutionally in removing the DPP. Considering that the report of the Tribunal was not before the Court and that the Court never considered the process leading to the removal of the DPP, the finding of the Court that the President acted constitutionally is problematic as it is not based on any proved facts. In fact, it is a finding not based on anything. Such an approach would give credence to suggestions by some stakeholders that the whole process of the removal of the DPP was pre-determined. Transparency International Zambia Chapter (TIZ), for example, had warned as follows:

> What is worrying is that essentially, President Lungu and those that complained against Mutembo Nchito have found him guilty of the offences alleged and now the Tribunal's only task is to determine whether he should be removed from office of DPP. This is [an] unfortunate precedent which should not be allowed in this country.[9]

This reasoning of the Constitutional Court on this score is manifestly troubling. How was the Court able to determine that the President acted constitutionally in removing the DPP from office without delving into the process leading to his removal? The exercise of constitutional power cannot be divorced from the manner by which that power is exercised. Constitutional power is given in order to further and not undermine constitutional values and goals. It follows that there must be a rational connection between the process and the exercise of constitutional power. The two cannot be splintered and dealt with in isolation, as did the Constitutional Court in this matter. This is the approach the South African Constitutional Court, for example, has taken in many cases. For instance, in the case of *Ryan Albutt v Centre for the Study of Violence and Reconciliation and Others [2010] ZACC 4*, the Court asserted that:

> courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved.[10]

[9] Transparency International Zambia Statement on the Mutembo Nchito SC Tribunal, 2016
[10] *Ryan Albutt v Centre for the Study of Violence and Reconciliation and Others [2010] ZACC 4*

The Court took the same approach in the case of *Democratic Alliance v President of the Republic of South Africa [2012] ZACC 24*, when it stated: '[i]t also follows that if the failure to take into account relevant material is inconsistent with the purpose for which the power was conferred, there can be no rational relationship between the means employed and the purpose.' That the Zambian Constitutional Court reached the decision that the President acted constitutionally on mere reading of Article 58, without consideration of the process leading to the President's invocation of the power to remove the DPP is shocking.

The third issue that is troubling about the decision of the Court is that the petitioner had sought several reliefs from it, including a determination on the issue of bias and conflict of interest by two of the members of the Tribunal. The Court of its own motion urged the petitioner to consider amending the petition in order to redact some reliefs sought but the petitioner did not see the need to do so. In a ruling of 30 May, 2018, the Constitutional Court decided to proceed to hear the matter on the basis of the petition as filed. However, at the instance of the Attorney General, in a ruling of 18 April, 2019, the Court capitulated and struck off several reliefs that the petitioner sought. The effect was that the main issues the petition was mounted around, such as compliance with the procedural requirements under which the petitioner was removed as well as the bias of the Tribunal members, were no longer under consideration by the Court. Only two relatively innocuous claims remained, to do with access to the Tribunal's report and the constitutionality of the exercise of the power of the President in removing the petitioner. In doing this, the Court seems to be developing a pattern of either changing the questions it is asked by litigants or simply dropping some claims that may be perceived as politically sensitive. The same approach was taken, for example, in the case of *Daniel Pule and Others v Attorney General and Others Selected Judgment No. 60 of 2018* where the Court was asked to specifically interpret whether President Lungu would have served two terms of office at the end of his current term, but the Court instead replaced the question, and proceeded to answer its own question. This approach could open the Court to suspicion that it is deliberately avoiding to deal with tough political questions which hinge on constitutional interpretation, the result of which may not endear the Court to the executive.

As Professor John Hatchard has argued, such an approach "can be seen as a way of ensuring that the most sensitive of political questions are avoided."[11] With their 'fig leaf' approach to

[11] John Hatchard, 'Election Petitions and the Standard of Proof' (2015) 27 *Denning Law Journal* 300

constitutional interpretation, it is very difficult for the Court to play a more meaningful role at critical junctures in the life of the nation (as, for example, did the Malawian judiciary with regard to the recent disputed presidential election). It must be said however, that by running away from difficult political questions and defying known rules and best practices of judicial practice, the Constitutional Court is undermining its own credibility and legitimacy, and in consequence adding fuel to the already increasing public ridicule of its decisions.

In conclusion, we wish to note that the constitutional interpretive approach the Constitutional Court has taken does not advance the values of constitutionalism and the rule of law. Interpretation is the judge's primary tool for articulating the law. The interpretive approach a court takes can either be used to advance democracy and constitutionalism or it can undermine the underlying values of the constitution. It is for this reason that Thomas Jefferson warned: "Our peculiar security is possession of a written Constitution. Let us not make it a blank paper by construction."[12] A judiciary committed to constitutionalism should interpret the Constitution in a manner that promotes the realization of its underlying values, not to undermine them. Judging by the *Mutembo Nchito* judgment, it is hard to see how the Constitutional Court's decision safeguards the integrity of the Constitution and advances the rule of law and constitutionalism. Perhaps it was for this reason that Supreme Court Judge, Mumba Malila, in a recently published and well-articulated article penned in honour of the late Justice Musumali, virulently admonished his colleagues in the Zambian judiciary: "[t]aking a leaf from Mr. Justice Musumali's sterling judicial performance, perchance it is after all not too late for adjudicators in Zambia to begin to shake off the entrenched foundations of judicial pusillanimity and the resultant self-restraint and lethargy, especially when it comes to espousing human rights causes or deciding good governance issues."[13] When will the Zambian judges take up this challenge and heed Justice Malila's plea?

[12] Ron Paul, 'Not Blank Paper: An Excerpt from "The Revolution: A Manifesto."' < https://www.rcreader.com/commentary/not-blank-paper-excerpt-revolution-manifesto > accessed 30 December 2020

[13] Justice Mumba Malila, 'Righting the Wrongs: Justice Clever Mule Musumali's Legacy of Judicial Activism Revisited,' < https://www.africanlii.org > accessed 30 December 2020