

JUDICIAL PERSPECTIVE ON RELIGION AND HUMAN RIGHTS

BY

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The programme director
Conference organisers,
Conference participants,
Ladies and gentlemen

I feel honoured and privileged to have been invited to this important conference and to make this presentation

INTRODUCTION

Before I turn to the core subject of this presentation, I would like to give a brief overview of my country Zambia.

An Overview of Zambia

Zambia was formerly a British Protectorate and formed part of the federation of Rhodesia (now Zimbabwe) and Nyasaland (now Malawi) which collapsed in December 1962. On 24th October, 1964, Zambia (then Northern Rhodesia) attained her independence. The Constitution of Zambia provides for, among other things, a unitary, multi-party and democratic State. As a matter of fact, Zambia is a multi-ethnic, multi-racial and multi-religious Republic.

According to the 2010 Census Report released in July 2012, the population of Zambia stands at 13,817,419.

Religion

It is a truism that religion touches the profoundest and most delicate emotions of people. Hence, it is a matter that needs to be approached with circumspection, sensitivity and tolerance.

In general, Zambians are profoundly religious people. Happily, Zambia enjoys freedom of religion which is one of the fundamental rights and freedoms guaranteed by the Republican Constitution. For instance, Article 19(1) of the Constitution reads:

“19(1) Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of conscience, and for the purposes of this Article, the said freedom includes freedom of thought and religion, freedom to change his religion or belief, and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate his religion or belief in worship, teaching, practice and observance.”

In a South African case of *S. v Lawrence*¹, the Constitutional Court, defined the “essence of the concept of freedom of religion²” in the following terms:

“.....the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.”

The foregoing definition serves to illustrate that freedom of religion implies an absence of coercion or constraint.

The dominant religion in Zambia is Christianity which accounts for eighty-seven percent of the total population. The Preamble of the current Constitution (1996 edition) declares the country as a Christian nation, “while upholding the right of every person to enjoy that person’s freedom of conscience or religion.” Indigenous beliefs constitute twelve percent while Muslims, Hindus, Jews, Buddhists, Baha’is, Sikhs, et cetera, collectively stand at one percent. This clearly demonstrates that Zambia enjoys a rich and diverse range of religions.

It is here necessary to stress that, although Christianity is in the ascendancy over other religions, in law and in its observance as well as in practical terms, Christianity is not favoured as against other religions in so far as the enjoyment of religious liberty is concerned.

It is fair to say that, in general, various religions in Zambia co-exist harmoniously and collaborate their efforts at local and national levels by having inter-faith prayers on specific important national occasions or meetings to share ideas on issues of common interest or national significance.

JUDICIAL PERSPECTIVES ON RELIGION AND HUMAN RIGHTS

For one reason or another, national jurisprudence in relation to religion and human rights is in short supply.

In their work on Civil Liberties Cases in Zambia¹, Muna Ndulo and Kaye Turner were able to identify one authority only on Freedom of Religion, namely, *Kachasu v Attorney-General* (1967) ZR 145. This, as far as my research on the issue is concerned, is the only leading case in Zambia.

In the *Kachasu's* case, *supra*, the applicant claimed, *inter alia*, that her suspension from school and the refusal of her application for unconditional readmission thereto constituted a hindrance in the enjoyment of her right to freedom of conscience, thought and religion guaranteed to her by sections 13 and 21 of the Constitution. In that case, an application was brought before the High Court² by Feliya Kachasu, a young girl aged between eleven and twelve years, through her father Paul Kachasu, as next friend. The Applicant's father, was a Jehovah's Witness and the applicant herself had been raised in the religion of Jehovah's Witnesses and had been taught that it is against God's law to worship idols or to sing songs of praise or hymns to anyone, other than Jehovah God Himself. The applicant and her father, as well as many other Jehovah Witnesses, regarded the singing of the national anthem as the singing of a hymn or prayer to

¹ 1983 (First) Edition at p:83

² Before Bladgen, J., as the then was, but he subsequently became Chief Justice of Zambia

someone other than Jehovah God Himself. They also regarded the saluting of the national anthem and saluting of the national flag as worshipping an idol. As far as they were concerned, the singing of the national anthem and saluting of the national flag were religious ceremonies or observances in which they could not actively take part, because these ceremonies were in conflict with their religious views and beliefs.

In September 1966, The Education (Primary and Secondary Schools) Regulations, 1966, came into force. By regulation 25 of those Regulations, pupils attending Government and Government-aided schools were required to sing the national anthem and to salute the national flag on specific occasions. Regulation 31(1)(d) empowered the Head of a school to suspend from school any pupil who wilfully refused to sing the national anthem, or salute the national flag when lawfully required to do so.

In October 1966, the applicant refused to sing the national anthem and was consequently suspended from school. Thereafter, the applicant's father approached the school authorities and explained that the reason for the applicant's refusal to sing the national anthem was that it was against her religious conscience to do so. He then requested for his daughter to be re-instated at the school and to be excused from singing the national anthem or saluting the national flag. The request for readmission was turned down unless the applicant agreed to

abide by the regulations aforesaid. In the result, the applicant stopped attending school.

In her notice of motion, the applicant asked the Court for an order that the suspension was unlawful and that she was entitled to readmission to the school without having to give any undertaking that she would sing the national anthem and/or salute the national flag. She premised her application on specific grounds which included an assertion that her suspension constituted a hindrance in the enjoyment of her freedom of conscience, inclusive of the freedom of thought and religion, in terms of Chapter III of the Constitution of Zambia.

In his judgement, Bladgen, J. Held that, bearing in mind the compelling consideration, particularly at that present time of national unity and national security, without which there can neither be certainty of public safety nor guarantee of individual rights and freedoms. He thought it was a reasonable requirement that pupils in Government and Government-aided schools should sing the national anthem and salute the national flag.

He added that the position might well be different if the requirement to sing the national anthem and salute the national flag had gone outside Government and Government-aided schools as it might then not have been reasonable. But the true position there was that the applicant had not been compelled by the State to sing the national anthem or salute the national flag;

she was only required to do so as a condition - along with other conditions - if she wished to attend a Government or Government-aided school, that is to say, if she chose to accept education provided or financed by the Government. She was not compelled to attend a Government school, as education was (and still is) not compulsory in Zambia.³ Blagden, J went on to say that the applicant had not been denied freedom of religion since she was free to practise her religion as she pleased; it was not really her religion which was invaded; rather, it was her freedom of education that was invaded, but that was not a freedom which was guaranteed by the Constitution.

In addition, it was held that regulations 25 and 31(1)(d) were reasonably justifiable in a democratic society. Accordingly, the application was dismissed.

Blagden's findings may be summarized as follows:

1. The applicant suffered a hindrance in the enjoyment of her freedom of conscience (which, in terms of Article 19(1) of the Constitution, includes religion) in that she had been coerced to sing the national anthem at school which led to her suspension from school and refusal of her application for readmission.
2. However, the said hindrance did not constitute a contravention of the applicant's Constitutional right to the enjoyment of the freedom of conscience on the basis that the

³ In terms of the current final draft constitution, however, provision is made for primary and secondary education to become a right under a Part dealing with social, economic and cultural rights.

hindrance was reasonably justifiable in a democratic society.⁴

Another case on the freedom of conscience, religion, and so forth, is *Kelvin Hang'andu v. the Law Association of Zambia* Case No. 2010/hp/955 (unreported) in which judgement was handed down by the High Court on 31st December, 2012. In that case, the petitioner, being a practising advocate of the High Court of Zambia and a member of the Law Association of Zambia (the respondent), contended as follows:

“The respondent has wilfully set out and operated its affairs in a well-crafted discriminatory manner that has excluded the petitioner from practising in the professional affairs of the responded by virtue of the fact that the petitioner is a member of the Seventh Day Adventist (SDA) Church. Among the fundamental doctrinal beliefs of the SDA, is the immutable biblical command enshrined in the fourth commandment in the Old Testament of the Holy Bible in the Book of Exodus chapter 20, verses 8 – 11, that the seventh day of the week is the Sabbath of the Lord God and must be sacredly observed between Friday sunset and Saturday sunset, through public worship and complete abstention from any form of menial work and regular activity, such as participation in the regular and periodic business meetings customarily conducted by the respondent on Saturdays, on the occasion of any of its formal meetings, including but not limited to, the respondent’s Annual General Meeting (AGM)”.

⁴ see *Kelvin Hang'andu v. Law Association of Zambia*, *supra* at 41-42.

The petitioner further contended that, by long standing custom and usage, “the respondent has routinely held its AGM on a Saturday to conduct its elections. The respondents meetings have continued despite its petitioner’s formal written complaints that his fundamental rights to religious liberty and freedom faith-based segregation should be upheld by the respondent’s alteration of the days of convening meetings so that they are not held on the Holy Sabbath”.

Following the hearing of this matter, one of the authorities referred to by Matibini J, is the judgement of the Constitutional Court of South Africa, in the case of Christian Education South Africa v Minister of Education (2000) 9BHR C53, in that case the Constitutional Court (per Sachs J) made the following observations, as follows at pages 68 – 70, paragraph 35:

“The underlying problem in any open undemocratic society based on human dignity, equality and freedom in which conscience and religious freedom has to be regarded with appropriate seriousness, is how far such democracy can and must go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such society can cohere only if its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time, the state should, wherever reasonably possible seek to avoid putting believers to extremely painful and

intensely burdensome choices of either being true to their faith or else respectful of the law”.

Matibini J, then said that, on the facts of the case, two questions fell to be determined in this matter. The first question was whether or not the respondent had wilfully and continued to contravene the petitioner’s right of freedom of conscience in terms of Article 19 of the Constitution? The second question was whether the respondent had wilfully continued to contravene the petitioner’s fundamental right of protection from discrimination on the ground of creed pursuant to Article 23 of the Constitution. He accepted the submission by learned counsel for the respondent that hindrance, being the antithesis of freedom of conscience, an infringement by the respondent cannot be established without showing to the Court that the petitioner’s exercise of freedom was affected by some constraint, restriction, or form of coercion to which he was subjected by the respondent. He further accepted the the submission of the respondent’s counsel who had invited the court to take judicial notice of the fact that the respondent had been in existence since 1965 and that in the circumstances the respondent’s engagement in business on Saturdays had preceded not only the petitioner’s conversion to Adventism but also his admission to the bar as well as eventual enrolment as a member of the respondent in 1996.

In addition, Matibini J found that the petitioner had not proved that there had been any positive act take or threat made by the respondent or that the petitioner had been placed in a situation

where he had to make extremely painful and intensely burdensome choices of either being true to his faith or else risking forfeiture of his practice of the law and his eventual membership with the respondent. Matibini J found as a fact that the petitioner had not been denied his freedom of conscience; that he was free to practise religion as he pleased; and that there was equally no evidence to show that any sanction(s) had been meted out or threatened to be meted out against the petitioner by the respondent as a result of him professing Adventist beliefs or his inability to attend the respondent's AGMs. It was further found that the respondent does not even penalise or in any way disadvantage any of its members who fail to attend its AGMs. In the circumstances, therefore, the petitioner was free to practise his SDA faith without any hindrance whatsoever from the respondent.

A further finding was that the petitioner ought to have adduced evidence to show how the respondent had treated him differently. He found that no such evidence had been adduced. A further finding was that there was no evidence on record to show or even suggest that the respondent had been scheduling meetings to suit the religious belief or opinions of any particular religious group over another. Alternatively, there was no evidence to show that the decision by the respondent to hold its AGMs on Saturday was deliberately or subtly arrived at in order to force or influence the petitioner and any like members to stay away from the SDA or not to profess their religion against their will. Moreover, there was no evidence to show that any members of the respondent

had received more favourable treatment than the petitioner, hence, the allegation of discrimination against him had not been established as such discrimination is premised on the fact that different persons are accorded different privileges or advantages.

Matibini J came to the conclusion that the relief sought by the petitioner would in fact amount to sanctioning discrimination in his favour and against the respondent's non-SDA members in that activities and meetings would be held on any day other than that which SDA members consider to be reserved for non-secular activities. In the result, the petitioner's petition was dismissed.

The petitioner has since appealed to the Supreme Court against the High Court decision.

CONCLUSION

In conclusion, it is necessary to underscore the fact that the significance of the fundamental right of religion, like that of other fundamental rights, cannot be underestimated. In this regard, a decision of the Supreme Court is keenly being awaited in the case of *Kelvin Hang'andu v. Law Association of Zambia*.