

Righting the wrongs: Justice Clever Mule Musumali's legacy of judicial activism revisited

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I. INTRODUCTION

Many judiciaries in Africa have been carped for their allegedly complicit role in the violation of constitutions and the undermining of the rule of law in the post-independence state. In this connection, an African human rights lawyer once lamented that:

[t]he judiciaries in common law African countries must take substantial responsibility for the collapse of constitutional government The judiciary in many of these countries deliberately and knowingly abdicated its constitutional role to protect human rights and, in many cases, actively connived in the subversion of constitutional rule and constitutional rights by the executive arm of government.¹

Whether one agrees with this sentiment or not, it is, to many judges, a sobering indictment. It is undeniable that, perhaps with the general exception of the Kenyan, Malawian and South African judiciaries, which have consistently acquitted themselves fairly well and with remarkable decency too, especially in recent times, many judiciaries in the African region are still reeling from the devastating effects of political intimidation that has undermined their confidence to check on executive excesses and the blatant disregard of the rule of law. They are reproachable, not because they lack the intellectual equipment to wither political shenanigans but because, on balance, retreating into that unhealthy sense of judicial-restraint for fear of reprisals, is viewed as a safer option. Sometimes that attitude is also inspired by individual judges' personal ambitions and, in some cases, political patronage or the hope for elevation. This significantly limits the potential for appropriate, albeit sometimes politically indigestible verdicts but which would nonetheless advance constitutionality and respect for human rights. The tendency of African judiciaries to succumb to resigned acquiescence and to retreat

into tranquil comfort zones when judicial leadership matters the most, has invariably led, in many African countries, to subverted justice. This has subliminally contributed to a breakdown in the rule of law. To that extent, therefore, Odinkalu's sentiments as quoted above are aptly justified.

And yet, in the Zambian situation, it may interest jurisprudents concerned with the apparently debilitating problem of judicial passivity to learn that at least one judge could possibly lay claim to exemption from implication in this general judicial malaise: the late Mr. Justice Clever Mule Musumali, a significant judge of the Supreme Court of Zambia. Although 20 October 2019 marked the silver jubilee of his passing on to glory, his judicial legacy remains as brilliant today as it was while he lived. During his best moments on the bench he could easily pass as belonging to a rare breed of judges who were positively frank, absolutely brave and exceedingly independent. Yet, to many dispassionate observers, Mr. Justice Musumali manifested unusual resourcefulness in seemingly manipulating the law to support conclusions which he desired — sometimes making pronouncements that seemed to have little resemblance to interpreting black letter law.

Whenever faced with a situation which appeared to him to suggest underlying insincerity, blatant disregard for the law, unfairness or immorality, he would deploy all his ingenuity and intellect to finding a 'satisfactory' resolution even if at face value the 'troublemakers' appeared to be on the right side of the law. This was especially the case when stronger or more powerful entities in society seemed to oppress the weaker ones. It is, however, fair to say that in his time Mr. Justice Musumali was, above anything else, among the more independent and liberal-minded judges, unafraid to assume new judicial postures in the quest to entrench the rule of law and to promote and protect human rights norms enshrined in Zambia's constitution.

Notwithstanding his maverick zeal, many of his judgments depicted him not only as possessing qualities paradigmatic of a good judge, but also as an adjudicator with some traits of unusual courage and seeming judicial activism. He proactively used the law as armor for the weak, not as a rapier for the strong. That jurisprudential legacy is immortalised in the many decided cases that he presided over; initially as a High Court Commissioner, and later as a High Court Judge before he was elevated to the Supreme Court. Some of his many decisions are reported in the *Zambia Law Reports*, while several more are not. Certain of his more significant judgments, though not reported locally, found room, and

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¹Chidi A. Odinkalu, *The Judiciary and the Legal Protection of Human Rights in Common Law Africa: Allocating Responsibility for the Failure of Post-Independence Bills of Rights*, 8 Afr. Soc. Int'l & Comp. L. Proc. 124, 124 (1996)

fittingly so, in law reports outside Zambia — notably the *Commonwealth Law Reports*. A number of his judgments still command respectability internationally as evidenced by the reliance on them in foreign jurisdictions such as Kenya² and the Seychelles.³

Mr. Justice Musumali was doubtlessly an interesting subject in himself, especially in the way he lived the declining years of his life on the bench, but that is not a topic to be embarked upon here. For now, the focus is on reevaluating some of his surpassing judicial decisions with a view to highlighting the potential which the Zambian judiciary possesses in playing a positive role as an unshaken guardian of the constitution and enforcer and protector of human rights at the national level. The article takes this course not under any naive assumption that judicial protection of constitutionality, the rule of law and human rights can be a substitute for the grassroots development of a climate of legality, a human rights culture and indeed the nurturing of a conscious, self-restraining spirit on the part of government operatives, political parties and their functionaries in disregarding the law and in violating human rights obligations. Rather it does so with the full conviction that the judiciary can and should rightly play a pivotal role in developing a normative climate in which respect for human rights and constitutionality flourishes.

For purposes of the current contribution, the bare bones of Mr. Justice Musumali's judicial career are a desideratum. He joined the Zambian judiciary, then part of the Ministry of Legal Affairs, in 1974 immediately after graduating from Law School at the University of Zambia. He diligently served as a magistrate in various districts in the Republic of Zambia, rising to the position of Senior Resident Magistrate. In 1981 he was appointed as a High Court Commissioner and was confirmed as a High Court Judge on 20 December 1985, and later, as a Supreme Court Judge on 10 February 1993. He died on 22 October 1994 from complications arising from a road traffic accident in which he was involved while serving as a Judge of the Supreme Court.

Coming, as this article does, over a quarter of a century late, it will, to some observers, read much like a belated eulogy of a judge some of whose strident judgments the legal fraternity within and without Zambia will either fondly remember or perpetually despise. Whatever the case, however, some of his judgments got international traction and acclaim and, as intimated already, have remained a constant reference point, having qualified as good human rights jurisprudence. And there could perhaps be no better time to write in remembrance of Mr. Justice Musumali's judicial contribution than at this moment when the irony defining the reality of our time is readily apparent. That irony is explained momentarily. Most sobering of all is the forbidding reminder that,

professionally, Mr. Justice Musumali served, for the most part, in the one-party era, widely characterised by overly restricted fundamental freedoms and personal liberties, not least compromised judicial independence. Yet, with a pioneering spirit, he took positions in his decisions that were intrepid and risky.

Today, when theoretically the democratic space in Zambia has increased under multiparty rule, and with it, a proportional increase in the room for enjoyment of fundamental freedoms and, by logical extension, greater scope for judicial independence, there are in truth diminishing levels of public tolerance for legally solid, albeit politically uncomfortable and seemingly controversial judicial decisions. There is also ostensible timidity on the part of many individual judges to assert judicial independence probably for fear of victimization or reprisals by the executive which, not only appoints them, but disciplines and removes them too. Yet, the inability of judicial officers to cope with veiled political threats and pressures is also partly caused by an inhibiting conception of their own function and role within a democratic governance system.

It is not the place of this article to discourse the political climate in Zambia and how it may or may not have contributed to limiting, or even undermining the role of the Zambian judiciary. The contribution relevantly focuses, as a reflective case study, on Mr. Justice Musumali's jurisprudential legacy of fearlessness and evident judicial activism to remind those serving in the judiciary that loyalty to principle and ethical energy should be the abiding virtue. It is hoped that this review will spur reflection on why, rather than be in a state of regression, the current judicial attitude should be geared to deepen the enthronement of judicial excellence, judicial independence and respect for human rights and the rule of law. Taking 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.

Granted the limitation of space, the article revisits only a handful of the many important decisions passed by the late judge in the twelve odd years that he served in the superior courts of Zambia. As will be demonstrated all the cases considered have an indelible mark on the human rights and constitutional law landscape of Zambia.

The article has six parts. The three parts following this introductory one consider the broad issue of judicial activism; what it is, whether it is virtuous or debauched and why it may be a possible or even a significant panacea for qualitatively expanding the frontiers of the law in Zambia. The fifth part focuses on some identified judgments of the late judge which depict his judicial temper and disposition. The sixth part concludes the discourse.

² See the High Court case of *RM v Attorney-General* (2006) AHRLR 256 (KeHC 2006, Civil Case 1351 of 2002)

³ See the Court of Appeal decision in *Bar Association of Seychelles and Another v President of the Republic and Others* SCA 7/2004

II. JUDICIAL ACTIVISM: TOWARDS A DEFINITION

A senior Malawian judge once remarked that “the mere mention of activism and the judiciary in the same sentence might be enough to send shivers down the spine of many a judicial officer or indeed the ordinary citizen” because “activism at times conjures up images of persons demanding (not with a lot of civility) their perceived share of the national cake. It is not an image that one wants to associate with judicial officers and the judiciary.”⁴ This writer agrees entirely with that thought. Quite often judicial activism is viewed in a spirit of criticism rather than praise. At first blush it is suggestive of a judge engaging in an exercise that is inappropriate for his/her normal function. It is submitted, however, that the positive effects of judicial activism are often overshadowed by a misperception of what the concept really entails.

The term judicial activism has been variously defined.⁵ Two principal thoughts underlie the many definitions given of this otherwise nebulous concept. The first implicates the relationship between the judicial branch of government and its executive counterpart, while the second reflects on how the courts perform their role of interpreting the law in the process of settling disputes. Considered in relation to the rapport between the judicial and the political branches of government, judges are regarded as activist when they determine issues which are normally thought of as belonging in the realm of the executive branch; when they adopt an attitude that promotes horizontal accountability — entailing the capacity of the courts to say ‘no’ or ‘enough’ to the executive and making their decision stick. This attitude of course has the obvious benefit of allowing little room for any idle gossip that the executive is toying with the judiciary to achieve sectional or partisan political interests, or that the judiciary has conspired with the executive arm of government to entrench a culture of unconstitutionality and impunity for sections of the public.

There is, of course, not much room for disagreement as regards the expectation that judges will resolve cases brought before them on the basis of the law as it stands. In this connection, however, judicial activism refers to court decisions that arguably go beyond applying and interpreting the law and extending into the realm of changing or creating laws, or going against legal precedents. This implies that judicial decisions are made based on the judge’s personal

philosophies and sometimes, political sympathies.⁶ Thus a judge, who makes his judgments beyond ordinary constitutional, statutory law considerations or legal precedent, is said to be ‘legislating from the bench’ and is considered to be a judicial activist.

Writing in the context of international law, but projecting a position which resonates as much with domestic situations, Thirlway distinguishes between ‘formal’ and ‘substantive’ judicial activism.⁷ In the formal type of judicial activism, “the judge deals with legal issues ... other than those which could suffice to constitute the logical structure leading up to his ruling” in order to contribute to what the judge perceives as the development of the law. Substantive judicial activism thus refers to instances where a judge is dissatisfied with the current law or with what he sees as lacunae in the prevailing law, and thus indulges in “something close to open law-creation in order to base his decision.” On the contrary, a judge who holds back from being a ‘judicial activist,’ is said to exercise judicial restraint.

More unassumingly perhaps, Kmiec presents a number of ‘core meanings’ of judicial activism to include: ‘(i) invalidation of arguably constitutional actions of other branches; (ii) failure to adhere to precedent; (iii) judicial “legislation”; (iv) departing from accepted interpretive methodology and (v) ‘result-oriented judging’’. Equally Harwood defines activism as designating one of the following adjudicative practices: ‘(1) refusing to take an attitude of judicial deference ... for legislative or executive power or judgment; (2) relaxing requirements for justiciability ...; (3) breaking precedent ...; and (4) loosely or controversially construing constitutions, statutes or precedents.’⁸

What clearly emerges from these postulations is that judicial activism should be viewed within the overall context of the need to prevent any one of the three branches of government (i.e., the executive branch, the legislative branch, and the judicial branch) from becoming too powerful or usurping the functions of the other. Under the separation of powers doctrine, parliament has the power to create laws while the judicial branch interprets and applies them.

III. JUDICIAL ACTIVISM: GOOD OR BAD?

The question whether or not judicial activism is a decent thing and the related issues of when and how to engage in it are important ones and will solicit different responses. The uncontroverted truth is that judicial activism is not a value-neutral concept. What one may consider as judicial activism another may regard as a normal interpretation or application

⁴L. P. Chikopa SC JA, ‘Judicial Activism and the Protection of the Rights of Vulnerable Groups in Malawi,’ *Using the Courts to Protect Vulnerable People: Perspectives from the Judiciary and Legal Profession in Botswana, Malawi, and Zambia*, (Southern Africa Litigation Centre, 2015) 10-17

⁵ See for example, B. C. Canon, ‘A Framework for the Analysis of Judicial Activism’ in S. C. Halpern and C. M. Lamb (eds), *Supreme Court: Activism and Restraint* (Lexington Books, 1982) 385; S. Harwood, *Judicial Activism: A Restrained Defense* (Austin & Winfield, 1996); W. Mendelson, ‘The Politics of Judicial Activism’ (1975) 24 *Emory LJ* 43; and A. H. Young, ‘Judicial Activism: Just Do It’ (1993–1994) 24 *Mem St UL Rev* 267.

⁶ See the definition in *Black’s Law Dictionary* 6th ed. (1990) 847 that it is a “judicial philosophy which motivates judges to depart from strict adherence to judicial precedent in favour of progressive and new social policies which are not always consistent with the restraint expected of appellate judges”

⁷H. Thirlway, ‘Judicial Activism and the International Court of Justice’ in N Ando (ed.), *Liber Amicorum Judge Shigeru Oda* (2002) 75

⁸K. D. Kmiec, ‘The Origin and Current Meanings of Judicial Activism’ (2004) 92 *California LR* 1441

of the law. The questions whether or not judicial activism is good can be viewed from two broad perspectives, namely first, the statutory interpretation function of the judge and second his/her development of the law task through case law. Both involve the judge giving his/her views on what the state of the law is or what the law means in a specific context. What is also beyond debate is that it is rather uncomplimentary to say of a judge that they are overstepping their proper role.

In the process of judicial decision making, judges have to interpret statutes and apply them. Words being an imperfect means of communication entails that sometimes difficult questions arise bordering on word or phraseology ambiguity, word usage change through time, oversight on specific points, a failure to adapt legislation to new developments, or some critical omissions may have occurred at the drafting stage. As Lord Denning put it:

Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts and even if it were, it is not possible to foresee them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much poorer if it were.⁹

The judge then has the duty to interpret the statute to fit the purpose for which the statute was drafted and to get rid of the inconsistencies, uncertainties and ambiguities. He/she therefore has to find solutions to these kinds of problems so as not to commit injustices using the rules of statutory interpretation.

The literal rule of statutory interpretation, requiring assigning the plain ordinary meaning to the words being interpreted, normally poses no problem where it is possible to do so. It is, however, the other rules that create an element of discretion that are germane to judicial activism. Where the literal rule creates an absurdity, the golden rule may be invoked to modify the reading of the words in order to avoid an offensive situation. Likewise the mischief rule allows judges slightly more latitude. It directs consideration of the gap or the mischief which the statute intended to address. The purposive approach requires that judges look beyond the contents of the statute and discover the original purpose for the enactment of the legislation and its meaning should be defined from that purpose.

Additionally, courts may resort to rules of language, intrinsic and extrinsic aids and presumptions to assist their statutory interpretation function. *Ejusdem generis* (words of the same genre); *noscitur a sociis* (words identified by the company they keep); and *expressio unius est exclusio alterius* (express mention of one thing excludes others) are all part of the arsenal of tools at the disposal of a judge facing the task of statutory interpretation. There are also intrinsic aids taken

from the Act itself, including the long or short title, the preamble, headings, side notes and contextual punctuation. Extrinsic aids include previous case law, international conventions and official reports. Presumptions within law are numerous and may range from presumption against alterations of the common law to a presumption against ousting the jurisdiction of the courts, to name but a few.

From a normative perspective, the use of these rules and aids of statutory interpretation in objective conditions creates opportunities for activist judicial intervention, as judges are called upon to determine and moderate different interests in a plural society. However, although the process of interpreting laws that might have been drafted vaguely gives the judge some degree of leeway and creates a window for judicial activism, it is always important that judges know when they should remain silent or passive.

There is an important call for thorough reflection on the important question of judicial activism/passivism as it implicates judicial independence and impartiality. One view is that the courts must always resist the temptation to engage, under the façade of statutory interpretation, in what is really judicial legislation; they should keep to their lane and avoid encroaching on parliamentary ground. Lord Diplock, for example, once declared that parliament makes laws while the judiciary interprets them, meaning that, where Parliament has legislated, it is for the courts to interpret the legislation, not to rewrite it.¹⁰ This position resonates with the literal approach to statutory interpretation.

Another view, however, more aligned with the golden and mischief rules, is that as parliaments cannot anticipate and solve in advance all the glitches that will arise in the practical administration of the statutes they enact, the judicial duty of statutory interpretation is not confined to merely reading the statute; it is a duty to help the legislature achieve the aims that can reasonably be inferred from the statutory design, and it requires judges to pay attention to the spirit as well as the letter of the statute.

Lord Denning, one of the sturdiest enthusiasts of judicial creativity, pertinently remarked in *Seaford Court Estate v. Asher*¹¹ that:

A judge believing himself to be fettered by the supposed rule that he must look at the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity, it would certainly save the judge trouble if Acts of Parliament were drafted with divine prescience and perfect clarity. In the absence of it, when a defect appears, a judge cannot just fold his hands and blame the draftsmen. He must set out to work on the constructive task of

⁹*Seaford Court Estate v. Asher* (1949) 2KB 481

¹⁰*Duport Ltd v Sirs* [1980] 1 WLR 142, 157, per Lord Diplock; See also Lord Mustill in *Ex p Fire Bridges Union* [1995] 2 AC 513 at 597

¹¹ *Supra* n 9

*finding the intention of Parliament, and he must do this not just from the language but also from the consideration of the social conditions which give rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written words so as to give 'force and life' to the intention of the Legislature.*¹²

In her address to judges at the launch of the Amended High Court Rules, Zambian Chief Justice, Irene Mambilima, quoted with approval the following passage from the authors of *N.S. Bindra's Interpretation of Statutes*¹³ by Katju and Kaushik regarding the role of a judge in interpreting statutes:

*It is no doubt that the felt necessities of the times must, in the last analysis, affect every judicial determination, for the law embodies the story of a nation's development through the centuries and it cannot be dealt with as if it contains axioms and corollaries of a book of mathematics. A judge cannot stand aloof on chill and distant heights. The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judge by ... Of course, in this process of interpretation; he enjoys a large measure of latitude inherent in the nature of judicial process. In the skeleton provided by the legislature, he pours life and blood and creates the organism which is best suited to meet the needs of society and, in this sense, he makes and moulds the law in a creative effort.*¹⁴

Plainly statutory interpretation creates a window which can be exploited by activist judges to bring their personal perspectives into the adjudication function.

As regards the development of the law through case law, activist judges often engage in what may be referred to as result-oriented judging. This often entails a general interpretation of the law in a manner that departs from the ordinary and usual method with a view to attaining a predetermined result, usually unprecedented. Yet, it is beyond argument that it is desirable for courts to maintain stability and predictability by sticking, as much as possible, to their past decisions. They should ideally respect judicial precedents. This is why critics of judicial activism complain that the free license to stray from the normal judicial interpretational text leads to judicial arbitrariness. When judicial officers succumb to the temptation of dealing with issues before them in their own way, the ensuing lack of uniformity in approach is bound to create uncertainties which could in turn cause mayhem to the doctrine of precedent and the predictability which all judiciaries crave.

Lord Bingham suggested a number of situations where it would be inappropriate for judges to engage in anything resembling judicial activism. These include: (i) where reasonable and right-minded citizens have legitimately ordered their affairs on the basis of a certain understanding of the law; (ii) where, although a rule of law is seen to be defective, its amendment calls for a detailed legislative code, with qualifications, exceptions and safeguards which cannot feasibly be introduced by judicial decisions, not least because wise and effective reform of the law calls for research and consultation of a kind which no court of law is fitted to undertake; (iii) where the question involves an issue of current social policy on which there is no consensus within the community; (iv) where an issue is the subject of current legislative activity; and (v) where the issue arises in a field far removed from ordinary judicial experience.¹⁵

A slightly different view is that judges should never shy away from surpassing expectations in trying to attain justice — even when they might, in effect, be going on some kind of voyage of discovery. Lord Denning, for example, remarked in *Parker v. Parker*¹⁶ that “If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on; and that will be bad for both.” In a different context but much to the same effect, the Zimbabwean Supreme Court in *Zimnat Insurance Company v. Chawanda* stressed that:

*Today the expectations amongst people all over the world, and particularly in developing countries, are rising, and the judicial process has a vital role to play in molding and developing the process of social change. The judiciary can and must operate the law so as to fulfill the necessary role of effecting such development. It sometimes happens that the goal of social and economic change is reached more quickly through legal development by the judiciary than by the legislature. This is because judges have a certain amount of freedom or latitude in the process of interpretation and application of the law. It is now acknowledged that judges do not merely discover the law, but they make the law. They take part in the process of creation. Law is an inherent and inevitable part of the judicial process.*¹⁷

Lord Denning himself unsurprisingly believed that:

[t]he truth is that the law is often uncertain and it is continually being changed, or perhaps developed, by the judges. In theory the judges do not make law. They only expound it. But as no one knows what the

¹² *ibid*

¹³ Markandey Katju and S.K. Kaushik, 9th ed. LexisNexis Butterworths, 2002

¹⁴ Remarks by the Hon Chief Justice of Zambia Mrs. Irene C. Mambilima to Judges of the High Court during the Webinar launch of Statutory Instrument No 58 of 2020, on 27th August, 2020, p 7

¹⁵ Lord T Bingham, *The Judge as Lawmaker: an English Perspective in the Struggle for Simplicity in Law: Essays for Lord Cooke of Thoroton* (1997), The Rt Hon Lord Dyson, Master of the Rolls 12 March 2014 Bentham Presidential lectures at UCL.

¹⁶ [1954] All ER 22

¹⁷ [1990](1) ZLR 143 (SC)

*law is until the judges expound it, it follows that they make it.*¹⁸

Lord Reid equally leaned towards this line of thought as his remarks show:

*There was a time when it was thought almost indecent to suggest that judges make law—they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the common law in all its splendour.... But we do not believe in fairy tales any more.... we must accept the fact that for better or for worse judges do make law, and tackle the question how do they approach their task and how should they approach it.*¹⁹

This writer has elsewhere expressed the view that judges risk acting like automatons if they pay mechanical reverence to precedent and fail to exploit lacunas in the law to deliver a just result.²⁰ Judges' attitude to inhibiting judicial precedents will be no doubt be worthwhile if it resonates with the view expressed by Lord Atkin in *United Australia Limited v. Barclays Bank Limited*²¹ when he spoke of judicial precedents that:

[w]hen these ghosts from the past stand in the path of justice clanking their medieval chains, the proper course for the judge is to pass through them undeterred.

It is clear that within the parameters of statutory interpretation and those of general application of the common law involving precedents do afford an opportunity to judges to engage in activism.

IV. JUDICIAL ACTIVISM IN ZAMBIA: ANY GOOD CASE FOR IT?

Many judiciaries in African's fledgling democracies face insurmountable obstacles. Generally speaking, the extent of intolerance to opposing political views tends to be higher in developing democracies than in more consolidated ones. Constitutionalism and the rule of law remain fragile as incumbency and political privilege are routinely abused. The temptation for the governors to rule in perpetuity and their yearning to hold on to power at all costs, even at the expense of respecting the rule of law and constitutionality, manifests through the administration of public affairs. Civic institutions like public order enforcers, political parties' registrars and media regulation authorities, are often exclusionary in approach and generally seem to be adjuncts to the political rulers of the time and thus are less open to allow

unhindered political participation of individuals and groups with opposing views. Judiciaries themselves are not spared as authoritarian governments and their functionaries issue direct and indirect threats against them and sometimes resort to subtle schemes that may include underfunding their operations.

Put differently, many African democracies employ calculated efforts to silence and weaken the impact of political dissent. Many such initiatives pugnaciously encroach upon fundamental freedoms and liberties. And this is where the courts, as guardians of the constitution and the rule of law, are expected to make a difference.

In their work, judges — especially good ones — must, upon evaluation of competing interests, curtail wherever possible, the entrenchment of self-serving standards set by public officials including political officeholders, and stem the tendency to circumvent the rule of law, violation of fundamental rights and the entrenchment of impunity. As 'umpires' in the democratic process, they are expected to ensure that a climate of legality prevails, a leveled playing field is created and maintained and legal protection afforded to those who stand disadvantaged. As most of the issues that arise are human rights, constitutional and rule of law related, there is an obvious case for encouraging the judicial branch of government, whenever these matters come before them, to take an interventionist stance in favour of upholding the rule of law and democratic tenets. In the African setting, this should be particularly so owing to a number of factors, three of which are: (a) the widespread non-domestication of international human rights law into national legislation; (b) the entrenched cultural norms and values and with it, the precarious cultural balance between these and universal human rights norms and finally (c) the state of human rights in the aftermath of political independence.

It is unsurprising that many national courts in Africa have sometimes tended to be reluctant to interpret the fundamental rights enshrined in their postcolonial bills of rights in light of international norms. There is, in this regard, a generally self-limiting judicial attitude. This was evidently the case in the one-party era in Zambia. If one looked back in time, one would find numerous instances of the restricted approach of the courts when it came to delivering a just result where the position of the domestic law may not have been clear.

The diffidence of the courts when it came to championing human rights causes was horrifyingly evident in first Republic Zambia. One is bound to agree with Odinkalu in his assessment quoted at the commencement of this article, especially when one considers the three factors alluded to above, in relation to Zambia, namely: the non-domestication of international human rights norms; ill-disposed cultural beliefs and practices and precarious the state of human rights in post-independence era.

4.1. *Non-domestication of international human rights norms*

¹⁸T. Alfred Denning, *The Changing Law* (Universal Law Publishing Co., 2005) vii

¹⁹Lord Reid, 'The Judge as Law Maker' (1972-73) 12 *Journal of the Society of Public Teachers of Law*, 22

²⁰M. Malila, *The Contours of a Developing Jurisprudence of the Zambian Supreme Court*, Boutiques Books, 2015)

²¹(1941) AC 1 at p 29

Zambia is a party to numerous international and regional human rights instruments, key among which are the International Covenant on Civil and Political Rights (ICCPR),²² the International Covenant on Economic Social and Cultural Rights (ICESCR),²³ the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),²⁴ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)²⁵, the Convention on the Rights of the Child (CRC)²⁶, the African Charter on Human and People's Rights (ACHPR),²⁷ and the Protocol to the African Charter on Human and People's Right on the Rights of Women in Africa (the Maputo Protocol).²⁸ In addition some of the sub regional organisations of which Zambia is party have adopted regional instruments.²⁹

Unlike in monist States where the provisions of treaties ratified by a state apply without more, Zambia follows a dualist approach, meaning these treaties and instruments require implementing legislation or domestication. Without it their provisions do not become part of enforceable local law. Yet, being a party to international treaties is not without legal consequences. By ascribing to international and regional instruments, Zambia has assumed obligations of varying degrees to ensure that the commitments undertaken in those instruments are observed.

For a long time, the courts in Zambia maintained a non-committal attitude towards international human rights standards as set out in treaties to which Zambia is a party. Neither the state nor the courts seemed inclined to move away from the fixed position that unless a treaty was domesticated; its provisions could not be relied upon in domestic litigation. The position as obtaining was repeatedly explained by the Zambian government in its engagement with treaty bodies during the presentation of periodic reports. On one such exchange, the government explained that:

Zambia has ratified regional instruments for the protection and promotion of human rights and fundamental freedoms. It is worth noting that international instruments are not self-executing and require legislative implementation to be effective in Zambia as law. Thus, an individual cannot complain in a domestic court about a breach of Zambia's

²² Adopted 16 Dec 1966; Zambia accede on 10 Apr 1984

²³ Adopted 16 Dec 1966; Zambia accede on 10 Apr 1984

²⁴ Adopted 21 Dec 1965; Zambia ratified on 4 Feb 1972

²⁵ Adopted 18 Dec 1979; Zambia acceded on 21 Jun 1985

²⁶ Adopted 20 Nov 1989; Zambia accede on 6 Dec 1991

²⁷ Adopted 27 Jun 1981; Zambia ratified in 1987

²⁸ The Maputo Protocol was adopted on 13 Sep; Zambia ratified on 5 Sept 2005

²⁹ See for example the SADC Protocol on Gender and Development (August 2008), available at <http://www.safaids.net/content/sade-heads-state-and-government-signsadc-protocol-gender-and-development>

*international human rights obligation unless the right has been incorporated into domestic law.*³⁰

This position was also articulated by the Supreme Court of Zambia as late as 2002 in *Zambia Sugar Plc v. Fellow Nanzaluka*³¹ where the court stated that:

International instruments or any other law although ratified and assented to by a state cannot be applied unless domesticated.

A similar sentiment was expressed in the case of *Attorney General v. Roy Clark* where the Supreme Court again stated that:

*In applying and construing our statutes we can take into consideration international instruments to which Zambia is a signatory. However these international instruments are of persuasive value unless they are domesticated in our laws.*³²

However, while the average Zambian judge remained generally reluctant to rely upon international and comparative law sources as interpretive devices to constitutional and statutory interpretation, there was progressively a world movement towards discarding that restrained stance by judiciaries, particularly as they relate to determining human rights cases. A discernably novel approach, which assumed a more protective department of human rights, factoring into the interpretation equation, international human rights norms, was quickly taking root. This new course had something to do with the series of meetings underwritten by the Secretariat of the Commonwealth of Nations, where judges from around common law jurisdictions assembled to deliberate the topic of the domestic application of international human rights norms. The first of these meetings, convened in Bangalore, Pakistan in 1988, culminated in the adoption of the Bangalore Principles.³³ These Principles encouraged domestic courts in deciding human rights cases to have regard to international norms where national laws are ambiguous or incomplete. It declared that:

*[i]t is within the proper nature of the judicial process and well established judicial functions for national courts to have regard to international obligations which a country undertakes—whether or not they have been incorporated into domestic law—for the purpose of removing ambiguity or uncertainty from national constitutions, legislation or common law.*³⁴

³⁰ National Report submitted in accordance with paragraph 15(A) of the annex to Human Rights Council Resolution 5/1. Zambia. Human Rights Council. Working Group on the Universal Periodic Review, Second session, Geneva, 5-16 May 2008, A/HRC/WG.6/2/ZMB/1, 9 April 2008.

³¹ Appeal 82/2002

³² Supreme Court Judgment No. 4 of 2008

³³ See Bangalore Principles, reprinted in 14 *Commonwealth Law Bulletin* 1196 (1988)

³⁴ Bangalore Principles, 1 *Developing Human Rights Jurisprudence*, Commonwealth Secretariat ed., (1988)

To this, one can add, with endorsement, the following statement of principle by Bhagwati, writing in support of the Bangalore Principles in relation to a constitutional democracy with a bill of rights and which has furthermore subscribed to international human rights instruments:

*Judicial activism on the part of the judiciary is an imperative, both for strengthening participatory democracy and for realization of basic human rights by large numbers of people in the country.*³⁵

This is where, in his work as a judge, Mr. Justice Musumali stood tall and responded to calls made within the framework of the Bangalore Principles. In the process he made a significant difference. Although this writer has not been able to establish whether Mr. Justice Musumali was a participant in those Commonwealth of Nations sponsored high level meetings, his judgments resonated with the spirit of the Bangalore Principles in a manner the late Chief Justice Dumbutshena of Zimbabwean, who regularly participated in those judicial colloquia, articulated it when he stated that:

*In order to advance human rights through the courts there are two essentials to be met. The judge's personal philosophy must have a bias in favour of fairness and justice. There must exist an activist court. Judicial activism in human rights cases is a prerequisite for the development of human rights jurisprudence.*³⁶

For the most part, Mr. Justice Musumali adopted the purposive approach to constitutional and statutory interpretation, playing an activist role in broadening the scope of the sometimes indeterminate language used to define fundamental rights. He apparently did so without any local precedent, consciously alive to the emerging consensus or trends in guaranteeing fundamental rights. He saw the value in resorting to international human rights treaties and to the jurisprudence of treaty bodies, articulating and applying them. And this earned him a place among progressive judges.

A perusal of Zambian human rights case law reveals that it was principally after Mr. Justice Musumali's bold beginning that an emergent brave inclination towards referring to international standards in interpreting human rights cases became evident. Thus, in *Sata v. Post Newspapers Limited and Another*³⁷ Ngulube CJ, sitting as High Court judge has the following to say:

I make reference to the international instruments because I am aware of a growing movement toward acceptance of the domestic application of international human rights norms not only to assist

to resolve any doubtful issues in the interpretation of domestic law in domestic legislation but also because the opinions of other senior courts in the various jurisdiction dealing with a similar problem tend to have a persuasive value...

Likewise in *Kangaibe and Another v. Attorney General*³⁸, Muyovwe J, as she then was noted that:

This court is at large to consider and take into account provisions of international instruments and decided cases in other courts. Zambian courts are not operating in isolation and any decision made by other courts on any aspect of the law is worth considering.

4.2. Cultural beliefs and practices

On the cultural front, many Zambian societies still embrace internalised value systems based on their traditions and culture. Many of these values conflict with provisions of the Zambian bill of rights and a plethora of international and regional human rights standards including those mentioned in part 4.1. above to which Zambia has subscribed. Considerable human rights violations occur under the façade of observing custom and tradition some of which are archaic and plainly undermine the dignity of the human person. Defilements justified under traditional beliefs and customs, child labour, marrying off of underage children, marriage and cleansing practices, polygamy, ill treatment and dehumanisation of suspected witchcraft practitioners and failure to observe due process requirements by traditional authorities in their courts as they administer customary law, are but part of a long catalogue of customary law related human rights violations.

Unless the reality of culture and its impact on human right to its fullest extent is internalised and admitted, neither the existence of a perfect bill of rights, nor a full corpus of international human rights law and standards will do much to stop the practice of contesting some human rights on the basis of tradition and culture. The country needs judges to take up the challenge and interpret both constitutional provisions and international conventions in a manner that shows sensitivity to the objectives of the norms contained in those documents. This speaks volumes on the value that domestic courts should attach to international human rights instruments and the jurisprudence of treaty bodies.

If there are two cases that really stand out in regard to discrimination against women which had some customary law underpinnings as they relate to the place of a woman in a predominantly patriarchal society, they are the cases of *Sara Longwe v. Inter-Continental Hotel*³⁹, and *Edith Nawakwi v. Attorney General*⁴⁰ which are discussed below. Mr. Justice Musumali presided over both, and his judicial activism could not have been more evident.

³⁵ P. N. Bhagwati, 'The Role of the Judiciary in the Democratic Process: Balancing Activism and Judicial Restraint,' 18 Commonwealth L. Bull 1262, 1262 (1992)

³⁶ E. Dumbutshena, 'Role of the Judge in Advancing Human', Rights 18 Commonwealth L; Bull. 1298, 1301 (1992)

³⁷ [1995/ZMHC/1]

³⁸ [2009/HL/86]

³⁹ [1992/HP/765]

⁴⁰ [1990/HP/1724]

4.3. *The state of human rights in post-independence Zambia and judicial passivity*

In the whole time that Dr. Kenneth Kaunda was President, Zambian courts showed unmitigated timidity, if not a complete absence of judicial activism, to espouse human rights causes. Apart from the entrenched notion that sovereignty dictated that only Zambian legislation and foreign legislation specifically extended to apply should be applied in Zambian courts, the notion of *solus populist supremalex* (the safety of the nation is the supreme law) as well as the general fear of the executive branch by the judiciary, played an incredibly huge role in the passivity of the courts.

Cases such as *Feliya Kachasu v. Attorney General*⁴¹ *Patel v Attorney General*⁴² *Nkumbula v. Attorney General*⁴³ *Nkumbula & Kapwepwe v. UNIP*⁴⁴, and others show judicial inclination to hold in favour of the State in human rights cases brought before the courts. In *Nkumbula v. Attorney General*⁴⁵ the Court of Appeal for Zambia, in a judgment that clearly goes against every grain of human rights, dismissed the petition as the petitioner was said not to have had *locus standi* because the proposed law could not be said to have infringed the petitioner's rights before it was passed. This is a position that Mr. Justice Musumali would probably never have accepted given his reasoning in his dissenting opinion in the case of *Maxwell Mwamba and Stora Solomon Mbuji v. Attorney General* discussed in part 5.6 of this article.⁴⁶ Prof Shimba, commenting on the *Nkumbula* decision, could not have put the position any better when he stated that:

*In a situation as that which arose in Zambia, however justified the applicant might have been in law, it is questionable whether a judge presiding over the case would be courageous enough to dare decide that the government inquiring into introducing a single party system was unlawful and null and void.*⁴⁷

A case that perhaps exemplifies the deepest judicial sympathy to the executive branch at the expense of upholding human rights is that of *Re Buitendag*.⁴⁸ Among the many disagreeable things from the perspective of human rights protection which the Court stated in that case was that:

[t]he President has been given powers by Parliament to detain persons who are not even thought to have committed any offence or to have engaged in activities prejudicial to security or public order but who, perhaps because of their

association or for some other reason, the President believes it would be dangerous not to detain...

Although there were clear opportunities for judicial activism in the area of human rights in Zambia where judges could play a visible role in bringing life to the rights enshrined in bill of rights of the constitution, the courts never seized them, choosing instead to narrowly interpret the law. Part of the reason for that position lies in the reaction of the executive to judgments it disliked. Examples abound. In *Silva and Fritas v. The People*⁴⁹ a High Court judgment acquitting two Portuguese soldiers who had earlier been found guilty by a Magistrate's court of illegal entry into Zambia, so riled the executive that an apology was demanded from Chief Justice Skinner. Refusal to apologise led the executive to unleash riotous political party cadres to invade the court premises. The Chief Justice was forced to leave the country for good as a result.

In *Eleftheriadis v. Attorney General*,⁵⁰ Chief Justice Doyle allowed a habeas corpus application in favour of a person perceived to be a security threat. The state was livid. A week after the judgment, while the Chief Justice was attending a conference abroad, the executive used the opportunity to replace him. Upon his return, he was, as a compromise, shunted to the Zambia Law Development Commission as its chairman.

*Mike Kaira v. Attorney General*⁵¹ was another case that infuriated the executive. Justice Brendan Cullinan found the continued detention of the appellant unlawful and ordered his release. The executive was so incensed with the decision that the judge's contract was not renewed when it expired. He was instead sent to head a statutory body known as the Legal Services Corporation which the Zambian government had established for the purpose of providing legal services to state corporations and agencies.

Even when it came to interpreting non-human rights issues Zambian courts manifested fatalistic judicial restraint.⁵² One cannot but agree with Justice Mzikamanda of the Malawi Supreme Court when he observed that "the judiciary in some cases has been its own enemy by limiting its exercise of judicial functions through its own restricted notion of what constitutes the proper role."⁵³

One should make no mistake. It was not all doom and gloom. There were some brilliant High Court judgments that touched on human rights in which the courts rose squarely to

⁴¹ (1968) ZR 145

⁴² (1968) ZR 99

⁴³ (1972) ZR 204

⁴⁴ (1978) ZR 378

⁴⁵ (1972) ZR 204

⁴⁶ SCZ Appeal No. 12 of 1993; (1993) LRC 166

⁴⁷ L.S. Zimba, 'The Constitution of Zambia (Amendment) Act No. 22 of 1975: Legal Recognition of the Principle of Party Supremacy in Zambia,' *Zambia Law Journal* vol 12 (1980) p 50

⁴⁸ (1974) ZR 156

⁴⁹ (1969) ZR 121

⁵⁰ (1970) ZR 19

⁵¹ (1980) ZR 65

⁵² See for example *Zambia Democratic Congress v Attorney General* (2000) ZR 6; *Attorney General v The Speaker of the National Assembly & Ludwig Sondashi* (2003) ZR 42; *Frederick J. T. Chiluba v Attorney General* (2003) ZR 153

⁵³ Justice RR Mzikamanda, "The Place of the Independence of the Judiciary and the rule of Law in democratic Sub-Saharan Africa" paper presented on 4th November at the South African Institute for Advanced Constitutional, Public, Human Rights and International Law, p57

the occasion. In *Attorney General v. Thinxton*,⁵⁴ for example, Bladgen CJ, in declining to support a deportation order, boldly held that when it came to considering human rights issues, the courts should be slow to place an interpretation which restricted rights. In this regard, the cases of *Re Thomas Mumba*⁵⁵ and *Simataa and Simataa v. Attorney General*⁵⁶ tower above ordinary High Court judgments. They properly decided totally unprecedented human rights questions of jurisprudential moment, and they were not appealed against. Mr. Justice Bobby Bwalya dealt with presidential discretion in a compulsory land acquisition matter in *William David Wise Carlisle v. Attorney General*,⁵⁷ brashly holding that the state's acquisition of some farms from a private party and letting them to another private party was not in public interest.

The case of *John Banda v. The People*⁵⁸ occupies a place among good human rights jurisprudence. High Court Judge Esau Chulu found that corporal punishment amounted to cruel and degrading punishment or treatment contrary to the bill of rights. This led to the outlawing of corporal punishment in Zambia.

Judicial activism at work: Justice Musumali's decisions

Mr. Justice Musumali's streak of judicial activism is evident from some of the many judgments he passed. He was particularly sensitive to the power relations in society and in his characteristic fair-mindedness he strove to ensure that the strong were just, the weak protected and the supremacy of the law and respect for human rights, respected.

4.4. *Datson Siulapwa v Faless Namusika*

It would seem that when Mr. Justice Musumali served as a High Court Commissioner, he was already in the habit of making surplus commentaries in his judgments beyond what was necessary to interpret the law for purposes of resolving a dispute before him. In *Datson Siulapwa v. Faless Namusika*,⁵⁹ although he ventilated ideas that were clearly beyond what he, as a judge, was expected to say in the circumstances, his decision showed quite plainly that he had not, at that stage, been fully initiated in judicial activism. To his credit, perhaps, he identified and candidly explained the limitation of his role when faced with the provisions of a statute that caused injustice to sections of the society but chose to stick to the literal rule of statutory interpretation. But this he did only after he had fully expressed his own views thus revealing his potentially activist disposition.

The question which *Siulapwa* presented was whether section 13 of the Land Conversion of Titles Act requiring presidential consent for any transfer of land applied to land in a traditional or customary area. Although Justice Musumali held that to the extent that section 13 provides no exceptions, all types of dealings in land, including the sale of village houses, required presidential consent, he made many observations and directions which, in their import, were activist. After quoting from section 13 of the Land (Conversion of Titles) Act, the judge stated [at pp 26-27] for example, as follows:

The wording of this subsection has not made any exception to any kind of land.... This means that even ordinary villagers in some very remote parts of this country have to apply for State consent if they propose to deal in land. Now examining the history of why it was deemed necessary to pass this piece of legislation, one finds that it was not meant to cover every kind of land tenure other than the former freeholds which under section 5 of Cap.289 were converted into statutory leaseholds. When it came to drafting the necessary legislation every type of land was embodied.

My own view is that it is not possible for some classes of people in this country to comply with the Act in question. This is because their systems of land tenure are and have been typically traditional and have not known the kind of procedure covering the British type of land ownership where we derive our land tenure system.... The other problem which would come in with making Cap 289 applicable to all types of land tenure is the very exorbitant charges attendant on conveying matters. Many villagers would not be able to afford the charges. There is also the general problem of the Act... greatly inconveniencing the rural populace.... It is my considered view that in enacting the Land (Conversion of Titles) Act... the draftsman ought to have excepted land held other than by former freeholds. But whatever the consequences of an Act of Parliament the duty of this court is to construe what it says and not to modify the language of an Act of Parliament in order to bring it into accordance with (my) own views as to what is right or reasonable ... Thus much as I may have reservations regarding the wording of s.13 (1) Cap.289 in so far as it provides for no exceptions to its provisions of land previously held and/or to be held otherwise than as freeholds or statutory leaseholds respectively my task is to interpret what has actually been enacted by that section. According to that section all types of dealings in land in this country after 1st July, 1975, have to comply with it. This means that the sale of the house in question was illegal and void ab initio as there was no State consent obtained before entering into that sale.... As

⁵⁴ (1967) ZR 10

⁵⁵ (1984) ZR 38 Justice Chirwa then of the High Court struck off section 53(1) of the Corrupt Practices Act for being unconstitutional for offending the Constitution in that it took away an accused's right not to be compelled to give evidence at his/her trial. A similar challenge and reasoning were made in *Simataa and Simataa v Attorney General*

⁵⁶ 1986/HP/488

⁵⁷ 1992/HP/688

⁵⁸ (2000) AHRLR 260

⁵⁹ (1985) ZR 21

an illegal transaction courts of law would not have anything to do with it....

4.5. *The People v Kambarage Mpundu Kaunda and Raffick Mulla*

If one had any doubt at all about Mr. Justice Musumali's fearlessness and bravado, one would only have to follow what transpired in the case of *The People v. Kambarage Mpundu Kaunda*⁶⁰ to erase such enduring reservations. To many observers, however, the judge's handling of the case was largely suggestive of iconoclasm, given the personality involved and the timing of the case. It involved President Kaunda's youngest son, Kambarage, who was accused of causing the death of a young woman in Lusaka in September 1989. This was at a time when the general public was increasingly showing their impatience with the one party dictatorship of President Kaunda.

Kambarage had fired seven shots at a group of people, killing 19-year-old Tabeth Mwanza. The case generated several satellite issues which could easily have deviated public attention or focus from the main matter, or at best, delay its conclusion. Justice Musumali maintained his focus and consistently manifested fearlessness of a rare kind.

Kaunda was initially charged with manslaughter. When the matter came up for hearing, the defence raised the preliminary issue whether the prosecution of the accused was not an abuse of court process granted that the Director of Public Prosecutions (DPP) had publicly informed the accused that no charges would be proffered against him.

In what seemed to have been the setting of a staid judicial tone that was to animate the rest of the hearing of the case, Mr. Justice Musumali dismissed the preliminary issue, holding that the DPP had not abused the process of court by reopening the case and allowing the law to 'take its course.' More interestingly perhaps, the judge appeared to have gone on a tangent, not to address the parties, but the public generally as follows:

... For those who are not used to the practice obtaining in the High Court in respect of criminal offences, I would like to inform them that copies of all the statements made by the witnesses are furnished to the judge; so that he reads them before the opening of the sessions... and appraises himself of the likely evidence to be led. That evidence is of course not subject to cross-examination. The prior reading of those statements informs the court roughly whether or not there is revealed by those statements of facts on which a criminal prosecution of the suspect may be based.... In this case my appreciation of the issues raised by the statements made by the witnesses dictates that the learned Director of Public Prosecutions should not have

made the statement that he made as there are facts which require that if justice is to be seen to be done to all the people of this country, the accused should be prosecuted for a criminal offence. It is therefore my view and finding that the incumbent Director of Public Prosecutions has not abused the process of this court by reopening this case and directing that the law should take its natural course against the accused person. The matter is properly before this court and I order that the trial should proceed.

Having set that sober-sided tone, the matter was set down for trial. Almost predictably, Mr. Justice Musumali changed the charge from manslaughter to murder, ruling that on the facts as he understood them, murder was the proper charge. Mr. Kaunda pleaded not guilty, insisting that he had fired in self-defense when a group of people threatened him and blocked the road he was driving on.

Another noteworthy aspect of the unfolding events in the same case involved the committal to prison on a charge of contempt of court of a very senior defence lawyer, Mr. Sebastian Saizi Zulu SC, who once served in the high Constitutional offices of Director of Public Prosecutions and Solicitor General. After the trial but before judgment, Mr. Zulu applied that the judge recuses himself from further handling the case as he was unlikely to be impartial. He submitted an affidavit accusing four judges, including Mr. Justice Musumali, of bias in favour of President Kaunda's political opponents. The affidavit was signed by a man identified as Elias Kundiona who claimed he saw a letter from the judges to the leader of the opposition Movement for Multiparty Democracy expressing antagonism towards Kaunda, his family and his supporters.

At the time the affidavit was produced in court Kundiona had allegedly fled from Zambia to an unknown destination. Mr. Justice Musumali could not buy that. He conducted a trial over a couple of days and found State Counsel Zulu in contempt of court for fabricating "very, very serious" allegations against him and three other judges that he was biased. The State Counsel was sentenced to a year in prison with hard labour. That conviction was unprecedented as it was the first time that a lawyer of that stature was imprisoned for contempt in Zambia.⁶¹

Perhaps the high watermark came when, at the end of the trial, Mr. Justice Musumali convicted Mr. Kaunda for murder and sentenced him to death. The judge rejected Kaunda's defense, saying he acted with malice aforethought and unlawfully. The sentence came only three weeks before President Kaunda went into a crucial presidential election battle with former trade unionist, Frederick Chiluba, his toughest political

⁶⁰ (1990-1992) ZR 30

⁶¹ On appeal to the Supreme Court (*Zulu v The People* (1990-92) ZR 62), while holding that some aspects of the decision of the High Court were improper, The Supreme Court upheld the conviction but substituted the sentence with one of three months suspended for one year

opponent in his 27 years as head of state.⁶² The bravery of convicting a sitting President's son spoke volumes about the character and sense of justice of the judge.

4.6. *Edith Nawakwi v. Attorney General*

The case of *Nawakwi v. Attorney General*⁶³ is a vivid example of judicial activism par excellence. Mr. Justice Musumali went beyond interpreting the law that was relevant for the purpose of resolving the grievance before him.

The applicant, a Zambian citizen, was a single mother of two boys aged seven and two and a half years respectively born of a Zambian and a Tanzanian father respectively. The applicant had previously held two Zambian passports which had expired at the time of the action. When the applicant had the first child, she had to get a birth certificate first. According to applicable regulations, the process involved swearing an affidavit showing that she was the mother of that child who was born out of wedlock.

Following the expiry of the first passport she applied for its renewal and the inclusion of her children in it. The passport authorities refused to include the children in it unless she swore a fresh affidavit of the sort she had sworn and filed to get her first child's birth certificate and to have him included in the expired passport. Although the details the Passport Office solicited about her and her children were available in the expired documents, which were in the possession of the Passport Office, the latter insisted on the same being given again. The implication of those regulations and procedures to her second child was that she had to get the consent of the Tanzanian father for the inclusion of that child in her Zambian passport. It meant also that she had to swear those affidavits every time she was renewing her passport and/or whenever she had a new child as a single parent. She petitioned the High Court contending that these procedures were lengthy, inconveniencing, costly, discriminatory and demeaning to her.

Mr. Justice Musumali agreed with her, holding that: (i) the petitioner has been unfairly discriminated against on the ground of sex; (ii) the petitioner's children's particulars be indorsed in her present passport without a requirement for her to furnish fresh affidavit or other fresh documents in respect of them; (iii) a single parent family headed by a male or female is a recognised family unit in the Zambian society; (iv) a passport is part of the freedom of movement and as such it is a right for every Zambian to have one, or be indorsed in one, unless there is a valid legal excuse barring such possession or endorsement; and (v) a mother of a child does not need to get the consent of the father to have her child/ren included in her passport or for him/or them to be eligible for obtaining passports or travel documents.

In his activist approach the judge went to great lengths talking about policy issues that had little to do with the law and to

giving directives on issues that had not been canvassed expressly by the applicant. He said among other things that:

I noticed at the bottom right side of Form D the words October 1963. I interpreted this to mean that either that was the month and year when that Form came into effect or that that was the month and year when the Form was printed or reprinted as the case may be. It may then be argued that that form did not emanate from the Zambian Government but was one of the colonial left-overs, which is still to be redressed by the Zambian Government. My answer to this is that this country has been independent for more than a quarter of a century now, and it does not need such a long time to comb public service of remnants of colonial discriminatory practices. It is my view that this form ought to have been rectified when the Zambian Court of Arms which it carries were put on it. So there can be no excuse for its use in its form in independent Zambia.

The judge continued:

Talking about passports, I think it is opportune to say here that the holding of a passport by a Zambian is not a privilege. It is not a privilege because he/she has a right of movement enshrined in the Constitution... In order to travel outside the country a Zambian citizen needs a valid Zambian passport or travel document. Just as they don't get permission from the authorities to travel from one part of the country to another, so do they not need to get permission to travel outside the country. Since they cannot travel outside the country without passports, they are entitled to have them, unless legal restrictions attaching to the freedom of movement imposed by the Constitution validly apply.

Further this court did not appreciate the logic in the refusal by the Passport Office to transfer all details which were in the expired passport; in particular those relating to the children and asking the petitioner to start all over again swearing affidavits. It is my considered view and I hold that in a case such as the petitioner's the practice of the Passport Office should from now onwards be to renew a passport of a Zambian female with all the details and/or endorsements which were on the expired one. Common sense dictates this approach to the one that has been in use over all these years.

The holding in the *Edith Nawakwi* case that possessing a passport is a right and not privilege contrasts sharply with another High Court of Zambia decision passed about a year later. The case of *Cuthbert Nyirongo v. Attorney-General*⁶⁴ was decided by the late Mr. Justice Weston

⁶² The appeal to the Supreme Court (*Kaunda v The People* (SCZ Judgment No 1 of 1992) overturned the conviction and acquitted the appellant

⁶³ 1990/HP/1724]

⁶⁴ 1991/HP/724

Muzyamba. The applicant, who had been charged with being in possession of dangerous drugs by the Anti-Drug Commission, had his passport and other possessions confiscated. He approached the court for an order for the release of the seized items. The judge held that possessing a passport was a privilege. Furthermore, that the passport remains the property of the State which was thus justified to withhold it. Using the literal rule of statutory interpretation, and seemingly employing no ingenuity or resourcefulness whatsoever, the Judge rationalised his decision in a dreadfully wanting manner. To the question whether it was a right or privilege to possess a passport, the Judge adverted to Article 24(1) of the Constitution which guarantees an individual's right of movement. It provides that:

24(1) No person shall be deprived of his freedom of movement, and for the purposes of this article the said freedom means the right to move freely throughout Zambia, the right to reside in any part of Zambia, the right to enter Zambia and immunity from expulsion from Zambia.

The Judge narrowly construed this provision to mean that the guarantee is for free movement of an individual *within* Zambia and entry *into* Zambia and not movement out of Zambia. In his word:

Quite obviously the purpose of a passport is to enable the holder to travel to countries specified or restricted in the passport itself by the issuing authorities. Since it is not a guarantee or constitutional right for an individual to leave Zambia I conclude that it is not a right but a privilege to possess a passport and this in essence means that the issuing authority has a discretion to either grant or refuse the application for a passport and to restrict its use by specifying the countries a holder may travel to and the period of its validity.

On the question who owns the passport, the Judge had this to say:

I have examined my own passport No. ZA 54210 issued on 13th February 1986 and expiring on that date in 1996, and I would like to take judicial notice of the fact that all passports issued by Government bear same writings. On the inside of the back cover are four notes and a caution. Only one caution is relevant to the question and it reads: "This passport remains the property of the Government of the Republic of Zambia and may be withdrawn at any time...I have no difficulties in coming to the conclusion that a passport issued by or on behalf of the Government of the Republic of Zambia is the property of the Government and not of the holder and that the Government has a discretion to withdraw it at any time.

Almost predictably the decision of Mr. Justice Muzyamba was reversed by the Supreme Court on appeal in *Cuthbert Mambwe Nyirongo v Attorney General*.⁶⁵ The superior court held that the right of a citizen to enter Zambia presupposes a right for such citizen to leave Zambia in the first place. A Zambian citizen has the right to the issued of a passport subject to restrictions referred to in the Constitution.

4.7. *Arthur Lubinda Wina and Others v Attorney General*

The case of *Arthur Lubinda Wina and Others v Attorney General*⁶⁶ arose in the aftermath of Zambia's return to multi-party politics. The Petitioners were members of the MMD which was then a newly created opposition party and was proving to be a thorn in the flesh of UNIP; a considerable irritant to the government of President Kaunda and a bad egg in a general way. The action, taken out in the name of the president of the MMD, Arthur Wina, was agitated by a statements issued by the Republican President at a news conference in November, 1990 to the effect that all state media were henceforth not to accept press statements or advertisements from members of the MMD. The petitioners contended that the President's pronouncement infringed their freedom of expression and freedom of the press. They sought declarations from the High Court to that effect.

For its part, the respondent contended that what the President said at the news conference was not a directive but merely an expression of his dissatisfaction that the press was giving prominence to people who were opposed to UNIP. Even assuming that it was in fact a directive, it was still in order because as Head of State, the President had power to give operational guidelines to parastatal companies. The newspapers in question were under a parastatal company called National Media Corporation Limited.

It was also contended that the Petitioners did not, in any case, have *locus standi* as they were not personally aggrieved by the directive. To be personally aggrieved their rights should have been transgressed or infringed upon, which was not the position in the instant case. The Petitioners, therefore, had no right to challenge the directive because it was not issued to them but to the newspapers. That being the case it was submitted that the Petitioners had not been discriminated against.

Mr. Justice Musumali held that the petitioners were entitled to petition before the High Court as the President's directive brought them within the ambit of Articles 23 and 25(2) of the Constitution. Second, that what the President issued in the course of his official duty to the newspapers was a directive, a discriminatory one at that, against the petitioners and their followers in favour of the UNIP leaders and their members. That directive was unconstitutional as it did not fall within any of the derogations allowed in the constitution (Article 25) and thus constituted a hindrance of the petitioners' enjoyment

⁶⁵ SCZ Judgment No 10 of 1991

⁶⁶ 1990/HP/1878 (1990) S.J

of their freedom of expression. In finding that the petitioners had *locus standi*, the judge stated that

Since the order affected their activities, it brought the petitioners and their many members within the provisions of Article 23 and 25(2) and (3) of the Constitution. This is especially so in this case where the reason for the order was that they held different political views from those held by the President and members of his party. The petitioners therefore have a legal basis for their petition before this Court.

It is a basic fact that in determining disputes before them judges in an adversarial system should not apply their own peculiar or special knowledge or perceptions not borne out of the evidence presented to the judge by the parties. Doing so risks depriving the parties of the opportunity to contest such knowledge and perceptions with counter evidence. Yet, Mr. Justice Musumali, in answering the question whether what the media outlets were told to do was or was not a directive, rather unconventionally, relied partly on his personal knowledge of the facts. He stated as follows:

The answer to this is that those who listened to that press conference, and I was one of them, would no doubt say that that was a directive, simple and clear. I accordingly find and hold that it was a directive. The reason for that directive has already been stated in this judgment.

On the ownership of the three newspapers, namely, *Times of Zambia*, the *Sunday Times of Zambia* and the *Zambia Daily Mail*, the judge made some totally unsolicited directions and policy statements, tracing the ownership history of the newspapers. He found that UNIP, through its wholly owned company called the Zambia National Holdings (ZNHL) Limited, purchased the Times Newspapers Zambia Limited from Lonrho using a loan from the parastatals Zambia National Provident Fund (ZNPf) and Zambia State Insurance Corporation (ZSIC) Limited which are regarded as public companies. The reasoning of the judge was result oriented and touched on issues that bore little relevance in determining the real issues before him.

Their assets and liabilities are thus public assets and liabilities... It should I think be pointed out that now Zambia has reverted to Multi-Party politics, if loans from parastatal companies are still found to be necessary by UNIP, or its companies, such loans must also be available to other political parties or their companies. It is not just or moral for one political party to be enjoying benefits deriving from institutions of a public nature. All the people of Zambia irrespective of their political affiliations are equally entitled. These could be the benefits accruing from the Civil Service and or parastatal companies, District Council House and markets to mention only these public institutions and amenities. Even a GRZ

personal to holder car is expected to serve the people of Zambia at large in that the services which it enables the particular officer to whom it has been given to perform have to benefit society at large and not just a section of society which identifies itself with the political party that may be in power at a given time.

The judge held that when the President gave his directive he did so as President of Zambia. "This nation embraced all the people of different shades. As such he could not have addressed them in any other capacity than that of Head of State."

That directive was discriminatory of the Petitioners and their cadres. The reason for the discrimination was that they held different political views from those of the President and his members. The newspapers which were given the directive are owned by the government.

In the light of these findings, the directive would be unconstitutional unless it falls within the one of the permitted derogations.

The judge then asked himself the question whether the presidential directive constituted a hindrance of the Petitioners from their enjoyment of their freedom of expression. He answered thus:

It did because in order for them or indeed anybody else to fully enjoy this freedom they must be able to receive and publish information. The receipt part is what I would call an in-let of information to the person. The publication is the out-let of information from that person to another person or other persons. In either of these: in-let or out-let is blocked without the consent of the individual in question and without any legal justification for the blockade then that is a denial of the Constitutional freedom of expression.... Since the Petitioners were not allowed to publish their views on political matters through the government newspapers, and by necessary implication even through radio and TV, they were denied the enjoyment of their freedom of expression. Thus they were hindered from exercising their said right. I have found and held that the directive in question and thus the hindrance already explained, was unconstitutional and therefore illegal... His Excellency the President ... is not allowed by law to make pronouncements which are contrary to any provision of the Constitution. Unless the Constitution is amended, everybody from the President down to the commonest of the common man is obliged to follow to its letter what it says. And this is so whether it is in a One Party or a Multi-Party arrangement. Since the directive in question was unconstitutional it is hereby quashed.

The judge, in a typical activism spirit, also gratuitously gave advice on how newspapers owned by the public are supposed to operate.

... they are supposed to be run on the basis of journalistic principles and ethics free from any outsider's interference. Those principles dictate the coverage of all news-worthy events regardless of the source of such news.... In respect of other public companies the President may put his views to the Board of Directors. It is up to the members of the Board to accept those views and adopt them as those of the Board to reject them. This is because not all proposals made by a Head of State may be in the best interests of a given public company. Even public companies have to be run on sound financial bases. Public money is involved in those companies and that money must be made to work in order to realise profits.

Sara H Longwe v. Inter-Continental Hotel

The *Sara Longwe case*⁶⁷ arose from a policy implemented by the respondent Hotel under which ladies who were unaccompanied by men, were denied admission to the hotel's safari bar. The underlying reason for the policy was that some women of incredulous virtue, often unaccompanied by male patrons, had taken to socialising in the bar and engaging in vices such as hooking unsuspecting male guests, especially foreigners, and robbing them of their possessions. Overtime, this phenomenon tarnished the good image of the hotel.

As a young legal practitioner, and largely uninitiated in human rights advocacy, this writer represented the hotel. The petitioner's contention was that: (i) the treatment she had received from the hotel was a violation of her human rights, as enshrined in Articles 11 (guaranteeing all rights), article 21 (freedom of movement) and 23 (prohibits discrimination on various grounds); (ii) the hotel is a public place, and must follow the law in its provision of services to members of the public patronizing its premises (iii) even if the court were to hold the hotel to be private premises, they would still be subject to Article 23 of the constitution in the light of the definition of a 'person' under Article 11 3 (1) of the constitution. (iv). Zambia has acceded to African Charter on Human and Peoples Rights and to the UN Convention on the Elimination of All Forms of Discrimination Against Women, where the behaviour of the hotel contravened articles 1-5 of the former and article 3 of the latter. Furthermore, the Bangalore Principles of 1988, which had been formulated by Commonwealth Chief Justices, had agreed on the relevance of looking at principles which had been ratified by a government in an international convention, even where this had not been domesticated

into local law.

In answer, the respondent argued that: (i) the principles outlined in the constitution were for the control of government and government institutions, and were not applicable to the hotel, which was not part of the government; (ii) even if the court were to hold that the principles of the constitution were applicable to all public places, these principles would still remain inapplicable to the hotel, since the hotel was private property; (iii) as a private property, the management of the hotel had absolute discretion concerning whom they might allow to enter, and whom to exclude; (iv) even if the hotel were subject to the requirements of Article 11 of the constitution by which people were entitled to freedom of movement, the constitution did not give unlimited freedom of movement.

On the contrary, the hotel had the right to exclude unwelcome visitors, and visitors also had the duty to abide by all reasonable conditions obtaining on the premises; (v) the hotel had previously had trouble with prostitutes causing a fracas on the premises, and its decision to deal with this problem by excluding unaccompanied women, was an entirely reasonable regulation in the circumstances; (vi) The rule excluding unaccompanied women was not discriminatory against women, since a woman was excluded on the grounds that she was unaccompanied, and not on the grounds that she was a woman. In fact other women, if accompanied, were admitted; (vii) the petitioner had no cause for complaint, because according to her own account she had previously been excluded from the hotel in 1984, and therefore must have known the hotel rules; (viii) the provisions in the cited international conventions had no relevance since Zambia had 'unfortunately failed to pass an implementing statute'.

In his stern attitude, Mr. Justice Musumali was intolerant to any calculated delays. In the course of the trial the respondent's only witness was asked why the policy of exclusion of unaccompanied women was implemented by the Hotel. He maintained that the rule was designed to keep "prostitutes" out of the hotel as they had a tendency to "cause a fracas", especially in the bar. When asked in cross examination whether he considered all unaccompanied women to be prostitutes, he most unexpectedly answered in the affirmative causing a general murmur of amusement from people in the public gallery.

Defence counsel pleaded with the judge that the witness may not have properly understood the question due to his limited command of English, and therefore that the matter be stood down as the services of an interpreter were requisitioned. Mr. Justice Musumali would have none of it. He asked what the witness's mother tongue was. Upon learning that it was Lozi, the judge immediately asked if

⁶⁷(1993) 4 LRC 221

there was present in court any member of the public who could pose the same question in Lozi. A member of the public duly obliged to serve as a translator, and the same question was then posed in Lozi to the witness. The witness gave the same answer, causing renewed mirth and open laughter.

In his judgment, given barely three months later, the judge agreed with all of the legal arguments put forward on behalf of the petitioner and found for the petitioner. He held that the exclusion of women on the basis of being unaccompanied contravenes the human rights provisions of the Zambian constitution, and the hotel's regulation to that effect were ordered to 'be scrapped forthwith'. He held that human rights provisions in the constitution applied both vertically and horizontally; that the hotel is open to the public, and must be considered a public institution and not private property; that the exclusion of unaccompanied women was not a reasonable way of avoiding fracas of women fighting over men in a bar, a problem which should instead be taken care of by invoking the public laws on law and order. Interestingly the judge, having made reference to the Bangalore Principles, found comfort in international human rights treaties to seal gaps or enhance his finding that there was violation of rights. He stated as follows:

Before I end let me say something about the effect of international treaties and conventions which the Republic of Zambia enters into and ratifies. The African Charter on Human and Peoples' Rights and the Convention on the Elimination of All Forms of Discrimination Against Women are two such example. It is my considered view that ratification of such documents by a nation State without reservation is a clear testimony of the willingness by the State to be bound by the provisions of such a document. Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by such international document, I would take judicial notice of the treaty or convention in my resolution of the dispute.

In the Kenyan High Court case of *RM v Attorney-General*⁶⁸ there was partial reliance on the method adopted by Mr. Justice Musumali with the court in that case stating as follows:

[22.] On the other hand, where the national law is clear and inconsistent with the international obligation, in common law countries, the national court is obliged to give effect to national law and in such cases the

*court should draw such inconsistencies to the attention of the appropriate authorities since the supremacy of the national law in no way mitigates a breach of an international legal obligation which is undertaken by a country. From this analysis the court does adopt the reasoning of Justice Musumali of the Zambian High Court in his holding in the case cited by the applicants and interested parties' counsel namely, *Sara Longwe v International Hotels (1993) 4 LRC 221*, where held: 'Ratification of such [instruments] by a nation state without reservations is a clear testimony of the willingness by the state to be bound by the provisions of such [a treaty] Since there is that willingness, if an issue comes before this court which would not be covered by local legislation but would be covered by international instruments, I would take judicial notice of that treaty or convention in my resolution of the dispute.'*

The *Sara Longwe* decision was not appealed against. It thus remains law binding on courts subordinate to the High Court unless it is over-ruled or reversed by the Supreme Court. It, however, is not binding on other judges of the High Court with coordinate jurisdiction but was expected to be respected for what it was. Regrettably other hotels did not appear moved by this decision to end discrimination against women in their own facilities.

A couple of years after *Sara Longwe* history repeated itself, only this time at a different hotel. In *Mwanza and Mulenga v Holiday Inn Garden Court Hotel*⁶⁹ two women were denied admission to the Holiday Inn hotel because they were not in the company of a man. The matter went before a different High Court Judge (Mr. Justice Peter Chitengi, also now late). The decision of the court would rattle jurists schooled in the common law tradition. The judge dismissed the petition on the basis that the two women were allegedly intoxicated and thus the hotel had a valid reason to deny them entry. What is strange was that even though the judge intimated that he was well aware of the *Sara Longwe* decision, he made no reference to the arguments on which that decision was based.

Maxwell Mwamba and Stora Solomon Mbuzi v. Attorney General

Mr. Justice Musumali spent a fairly short time in the Supreme Court. Perhaps one of the memorable decisions he is associated with in that court is his famous dissent in the case of *Maxwell Mwamba and Stora Solomon Mbuzi v. Attorney General*.⁷⁰ The two appellants had petitioned the High Court alleging that in appointing two persons

⁶⁸ (2006) AHRLR 256 (KeHC 2006 High Court of Kenya at Nairobi, civil case 1351 of 2002, 1 December 2006

⁶⁹ 1997/HP/2054

⁷⁰ SCZ Appeal No. 12 of 1993; (1993) LRC 166

who had previously been implicated in illegal drug dealing as Cabinet Ministers, the President (Chiluba) had breached the provision of the Article 44(1) of the Constitution then, which directed the President to “perform with dignity and leadership all acts necessary or expedient for, or reasonably incidental to, the discharge of executive functions of government...” The High Court dismissed the petition. On appeal to the Supreme Court, one issue that arose related to the locus standi of the appellants to pursue this action. Four judges of the five-man bench (literally so), which included the Chief Justice, shied away from determining that question holding as follows:

On the question of locus standi, we have to balance two aspects of public interest, namely the desirability of encouraging individual citizens to participate actively in the enforcement of the law, and the undesirability of encouraging meddling private ‘Attorney-Generals’ to move the courts in matters that do not concern them. For the present purposes, we are prepared to proceed without coming to any firm conclusion on the point on the footing that the appellants have legitimate interest in the national leaders and the governance of this country.

Mr. Justice Musumali did not agree with his learned brethren on this point, stating that the statement of the majority on locus standi was equivocal. “The citizen” he said “will not firmly know whether s/he has locus to sue or not to sue in this kind of cases.”

My firm view is that a citizen has a right to sue on constitutional issues unless the constitution itself explicitly or by necessary implication has taken away that liberty...a citizen has liberty to...seek redress... This freedom is particularly important in democratic countries as it is one way of enabling a citizen to have a say in the governance of his country. So the citizen needs to know that he enjoys this right, whether or not s/he is a meddling type.”

Mr. Justice Musumali’s dissenting opinion was approved by the Seychelles Court of Appeal in *The Association of Seychelles and Another v. President of Republic and others*⁷¹ after a review of comparative jurisprudence from many common law jurisdictions resonated with Justice Musumali’s thinking on the issue. It can be recalled that in the *Nkumbula case*⁷² the petitioner was not to have locus standi because the proposed law did not infringe any of the petitioner’s existing rights. This writer is in any doubt as to which of the two positions between that of

Zambian Court of Appeal and Mr. Justice Musumali’s dissenting judgment represents better jurisprudence.

V. CONCLUSION

Mr. Justice Musumali served for a relatively short period in the superior courts of Zambia. His judicial career was, nonetheless, fairly eventful and jurisprudentially rich. Whether he can be viewed as a judicial activist proper, or a regular applier of laws, is a matter of perception because after all judicial activism is itself not a value free concept. What is beyond peradventure is that in the exercise of a proper judicial function there is no licence for a court to act in an arbitrary way or to give effect to the court’s own idiosyncratic ideas and attitudes. Yet, the judicial function and what it comprises are not static. Eventual judicial value lies in impartiality which must not only exist, but must be manifest. The appearance of impartiality is ultimately displayed in the reasons for judgment. In this regard, exacting attention needs to be paid to reconciling the criticality of impartiality with the daring fact that different judges bring to the judicial mission a diversity of perspectives and values.

Mr. Justice Musumali’s human rights judgments were monuments of his intellectual energy. Everything about them suggests that he saw the role of a judge as going beyond being a mechanical applier of the law as it appears in the statute books or as it is to be found in precedents. He was not always right, and the reversal of some of his judgments on appeal is testimony to this. Yet, that is really not the point. He took brave and courageous decisions. Although judicial responsibility of ascertaining the law has always been circumscribed by the force of precedent and *stare decisis*, there were many questions of law which came before Mr. Justice Musumali which were not governed by earlier authority. He never abdicated responsibility by deciding a question of law by merely adopting a simplistic reading of the law or applying the views of someone else. He felt entitled, indeed bound, when opportunity arose, to go beyond logical and analogical reasoning, and examined and assessed relevant policy considerations or values. He effectively utilised the interpretive guidance of international human rights norms as an important aid to filling gaps in the law and clarifying uncertainties and ambiguities.

Justice Musumali’s bravery in his efforts to ensure the observance of the rule of law and respect for human rights is unimpeachable. Some of the methods he used to better the grieving applicants who came with different complaints before him are remarkable for their ingenuity, allure, vividness and outstanding quality. He often assumed the deportment of a facilitator of equal access to justice and equal treatment before the law for all citizens. While the late judge crossed over to higher life over a quarter of a century ago his human rights efforts on the Zambia bench remain memorable and his judgments shall live on.

⁷¹SCA 7/2004

⁷²Supra note