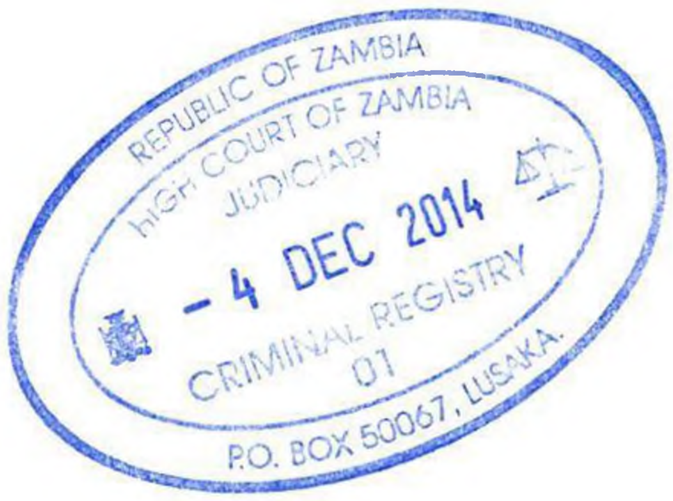
IN THE HIGH COURT FOR ZAMBIA **HPR/03/2014**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Criminal Jurisdiction)



BETWEEN:

MACDONALD CHIPENZI **1ST APPLICANT**

RICHARD SAKALA **2ND APPLICANT**

SIMON MWANZA **3RD APPLICANT**

AND

THE PEOPLE **RESPONDENT**

BEFORE The Honorable Mr. Justice I. C. T. Chali in Open Court, at Lusaka, the 4th day of December, 2014.

For the 1st Applicant: **Mr. E. S. Silwamba, SC with Mr. L. Linyama of Eric Silwamba, Jalasi & Linyama;**

Mr. L. Mwanabo of L. M. Chambers; and Mr. B. C. Mutale of BMC Legal Practitioners.

For the 2nd and 3rd Applicant: **Ms. M. Mushipe of Mushipe & Associates;**

Mr. M. Muchende of Dindi & Company; and Mr. K. Mweemba of Keith Mweemba Advocates.

For the Respondent: **Ms. M. C. Mwansa, Acting Principal State Advocate, with Ms. M. P. Lungu, Senior State Advocate**

J U D G M E N T

Cases referred to:

1. *Lt. Gen. Wilford Joseph Funjika v. Attorney General (2005) ZR 97.*
2. *Mumbuna v. The People (1974) ZR 66.*
3. *Oliver John Irwin v. The People (1993/ 1994) ZR 7.*
4. *Seaford Court Estates Limited v. Asher (1949) 2 KB 481.*
5. *Government of Namibia v. Cultura 2000 (1993) 3 LRC 175.*
6. *Thebus & Another v. The State (2003) AHRLR 230 (SACC 2003).*
7. *Charles Onyango Obbo & Anotehr v. Attorney General of Uganda (Constitutional Appeal No. 2 of 2002).*
8. *R. v. Zundel (1992) 10 CCR (2nd) 193.*
9. *Mark Gova & Another v. Minister of Home Affairs (SC. 36/2000, Civil Application No. 156/99).*
10. *Re Munhumeso & Others (1994) ILRC 284.*
11. *Mwewa Murono v. The People (2004) ZR 207.*

Legislation referred to:

1. *Constitution of Zambia, Chapter 1 of the Laws of Zambia.*
2. *Penal Code Act, Chapter 87 of the Laws of Zambia.*

International Instruments referred to:

1. *African Charter on Human and People's Rights.*
2. *African Union's Declaration of Principles on Freedom of Expression (October 2002).*
3. *International Covenant on Civil and Political Rights.*

The three Applicants were jointly charged before the Subordinate Court at Lusaka with one count of publication of false information with intent to cause fear and alarm to the public, contrary to Section 67 (1) of the Penal Code, Chapter 87 of the Laws of Zambia.

The particulars of the offence were that the trio, on the 10th day of December 2013, at Lusaka, in the Lusaka District of the Lusaka Province of the Republic of Zambia jointly and whilst acting together did publish a false article in the DAILY NATION Tabloid Volume 3, issue number 632 dated 10th December 2013, stating that "THE SECRET POLICE RECRUITMENT HAS BEEN CONDEMNED AT AS A CONDUIT OF FUSING FOREIGN TRAINED MILITIA INTO THE MAIN STREAM POLICE SERVICE" a statement or report likely to cause fear and alarm to the public or disturb public peace.

Each of the Applicants pleaded not guilty to the said charge.

Counsel for the Applicants then applied under Article 28 (2) of the Constitution of Zambia to have the matter referred to the High Court for the determination of the legality or constitutionality of Section 67 (1) of the Penal Code.

Article 28 (2) of the Constitution provides thus:

> **"28 (2)(a) If in any proceedings in any Subordinate Court any question arises as to the contravention of any of the provisions of Articles 11 to 26 inclusive, the person presiding in that Court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion the raising of the question is merely frivolous or vexatious."**

The learned trial Magistrate, after hearing submissions from Counsel for the Applicants in support of the application, as well as from the prosecution in his Ruling of 5th March 2014, found the application to have merit and accordingly referred the matter to the High Court for determination of the Constitutional issue.

Both before the lower Court as well as before this Court, Counsel for the parties made very lengthy and spirited submissions, both oral and written, in support of their respective positions. I am grateful to Counsel for the said submissions, which I have considered and taken into account in arriving at my decision.

I must first deal with the objection raised by Counsel for the Respondent at the hearing of the matter before me. They argued that the application to have the matter referred to the High Court having been granted, the Applicants ought to have proceeded to make an appropriate application before the High Court, highlighting the constitutional issue upon which the High Court should adjudicate. They said that the Applicants had instead proceeded to make submissions on issues which were raised in the Court below. They argued that that procedure was wrong. They said the matter ought to have come to the High Court, not as a criminal matter with the People as the Respondent, but as a constitutional matter and the right respondent should then have been the Attorney General. They cited the case of LT. GENERAL WILFORD JOSEPH FUNJIKA v. ATTORNEY GENERAL (2005) ZR 97 in aid of that submission.

What I can ascertain on a reading of the FUNJIKA case is that, at the trial of FUNJIKA before the Subordinate Court on criminal charges of corrupt practices and abuse of authority of office, the prosecution had sought to produce in evidence a deposition which had been sworn in the United Kingdom before a Magistrate who had also certified the deposition and the exhibits annexed to it. Objection to their production was on the ground that Section 38 (1) of the Mutual Legal Assistance in Criminal Matters Act, Chapter 98 of the Laws of Zambia, under which the documents were sought to be produced, was in serious conflict with Article 18 (2) (e) of the Constitution of Zambia. It was contended on behalf of the Accused that what had arisen was a question of

constitutional importance affecting the rights of the accused. Counsel then requested the trial Magistrate to refer the issue to the High Court for determination, and it was so referred.

However, I am unable to ascertain from the said report how the Attorney General thereafter came to be a party in the proceedings in the High Court. As such I do not find that authority to be of much assistance to the State, let alone to me.

As rightly pointed out by Counsel for the 1st Applicant, the FUNJIKA case does not deal with the mode of commencement of a constitutional case or the procedure to be followed when a matter is referred to the High Court for determination of a constitutional question.

In response to the issue raised by the State, Counsel for the 1st Applicant submitted that the matter was competently before the High Court pursuant to Article 28 (2). Article 28 (1) provides for applications by persons other than those appearing before a Subordinate Court. The distinction is, indeed, apparent when one reads the two clauses of Article 28. Therefore, the Applicants were not required to make a separate application, such as by way of petition, for them to be heard on their grievance.

The relevant part of Article 28(1) of the Constitution provides:

"28(1).....if any person alleges that any of the provisions of Articles 11 to 26 inclusive has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply for redress to the High Court which shall -

(a) hear and determine any such application;

(b) Determine any question arising in the case of any person which is referred to it in pursuance of clause (2);

and which may make such order, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of Articles 11 to 26 inclusive"

Counsel argued that this was not a Court of first instance for the Applicants but because of the matter having been referred to this Court when the lower court had no jurisdiction to deal with questions relating to the Constitution.

Indeed what I have is a "reference" rather than an originating process. As can be observed from a reading of the whole of Article 28, Clause (1) governs the originating process when an individual seeks to enforce the protective provisions enshrined in Articles 11 to 26, whereas Clause (2) relates to persons appearing before a Subordinate Court.

As Counsel for the 1st Applicant pointed out, the issue as to how cases such as the present ought to come before this Court was settled as far back as MUMBUNA v. THE PEOPLE (1974) ZR 66 and OLIVER JOHN IRWIN v. THE PEOPLE (1993/1994) ZR 7 in which the Supreme Court approved of the procedure such as was adopted in the instant case.

The State's argument as to the proper procedure by which to bring the matter to the High Court under Article 28 (2) therefore falls away.

Having decided that the matter is properly before this Court, I now proceed to consider whether Section 67 of the Penal Code contravenes the Constitution and, if so, if it ought to be struck off the statute books.

Section 67 (1) of the Penal Code under which the Applicants were charged falls under Division 1 of Part II of the Penal Code which deals with offences against public order and reads:

> **"67 (1) Any person who publishes, whether orally or in writing or otherwise, any statement, rumour or report which is likely to cause fear and alarm to the public or to disturb the public peace, knowing or having reason to believe that such**

statement, rumour or report is false, is guilty of a misdemeanor and is liable to imprisonment for three years."

For completeness, I also re-cast here subsection (2) of Section 67, and it reads:

"(2) It shall be no defence to a charge under subsection (1) that he did not know or did not have reason to believe that the statement, rumour or report was false, unless he proves that, prior to publication, he took reasonable measures to verify the accuracy of such statement, rumour or report."

The Applicants' challenge of Section 67 is anchored on the provisions of Article 20 of the Constitution of Zambia which relates to the protection of the freedom of expression, which I now set out hereunder:

"20 (1) Except with his own consent, a person shall not be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions without interference, freedom to receive ideas and information without interference, freedom to impart and communicate ideas and information without interference, whether the communication be to the public generally or to any person or class or persons, and freedom from interference with his correspondence.

(2) Subject to the provisions of this constitution, a law shall not make any provision that derogates from freedom of the press.

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that it is shown that the law in question makes provision

(a) That is reasonably required in the interests of defence, public safety, public order, public morality or public health; or

(b) That is reasonably required for the purpose of protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the Courts, regulating educational institutions in the interests of persons receiving instruction therein, or the registration of, or regulating the technical administration or the technical operation of, newspapers and other publications, telephony, telegraphy, posts, wireless broadcasting or television; or

(c) That imposes restrictions upon public officers;

and except so far as that provision, or the thing done under the authority thereof as the case may be, is shown not to be reasonably justifiable in a democratic society."

The state's position, as submitted by Counsel, is that the freedom of expression as enshrined in the constitution, like any other rights and freedoms under the Bill of Rights, is not absolute, but is subject to derogation as stipulated under Clause (3). In as much as an individual has his or her freedom of expression protected, the enjoyment of that freedom may be restricted. They submitted that society is entitled to place some legitimate restrictions on the exercise of that freedom in order to prevent its abuse.

This, they said, means that the freedom may be restricted if it has the effect of causing fear and alarm in the public or to disturb the public peace. And Section 67 of the Penal Code is one of the many pieces of legislation that guard against abuse of that freedom. They argued that Section 67 conforms to the provisions of Article 20 (3) and ought not to be struck off the statute books. It was submitted that it is the will of the people that the rights and freedoms of individuals be restricted in order to protect the public safety, public order and in the interests of defence. It is also in the interests of defence and for the preservation of public order that the public is protected from the dissemination of false and alarming information, rumours or reports.

The state's position was that even from the press freedom point of view, information ought to be verified before it is published. For if the information is verified, the publisher cannot be said to have offended against Section 67. The requirements for verification may even be said to be superfluous because it is the ethical duty of the press to do so. Subsection (2), they said, does not in any way place any burden on an accused person to prove his innocence. It merely comes into play, they submitted, in the event that an accused person is put on his defence, when he must demonstrate the measures he took to verify the accuracy of the information before he published it. However, the state still has the onus of proving the falsity of the information published whether or not the accused raises the defence provided for in Subsection (2). It does not breach Article 18 (7) of the Constitution, which forbids compelling an accused to give evidence at the trial, because the Applicants have various ways of defending themselves once placed on their defence, including opting to remain silent.

Counsel for the State also submitted that Section 67 of the Penal Code and Articles 18 and 20 of the Constitution should be given their ordinary grammatical and natural meaning. Where issues of ambiguity arise and when the intention of the legislature cannot be ascertained from the words in the statute, then other rules of interpretation may be employed as stated in the FUNJIKA case. However, Counsel said, Section 67 is simple and clear and does not need any interpretation. Counsel cited the English Court of Appeal case of SEAFORD COURT ESTATES LIMITED v. ASHER (1949) 2 KB 481 where Lord Denning said at page 499 of the

report **"A Judge must not alter that of which (a statute) is woven, but he can and should iron the creases."** They submitted that there are no creases in Section 67 which need ironing over or on the basis of which it can be struck off for being unconstitutional.

Counsel for the State concluded their submissions by criticizing other matters raised by the Applicants as amounting to a fishing expedition, making it difficult to understand what exactly the Applicants need from the Court. Those issues include alleged defect in the charge sheet where the 1st Applicant's name was misspelt; whether to refer to the Police as a Service or a Force; etc.

However, the view I take of those so-called issues is that they are irrelevant to the matter that has come before me because they do not constitute alleged breaches of Articles 11 to 26 which are the issues that are properly to be brought by way of reference in terms of Article 28 (2) of the Constitution. I, therefore, do not propose to consider them in this judgment.

In the SEAFORD COURT ESTATES case, the Court was, in part, dealing with the approach a Court ought to adopt in interpreting a statute or particular words therein. Hence Lord Denning's sentiments cited earlier in this judgment. One of the cannons is to so interpret the statute or words therein as to give effect to the governing principles embodied in the legislation.

Lord Denning proceeded to state the following at pages 498 and 499:

> **"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 which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity..... A Judge, believing himself to be fettered by the supposed rule that he must look to the language (of the statute or document) 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 Judges 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 simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of parliament, and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it, and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give "force and life" to the intention of the legislature..... Put into homely metaphor it is this: A Judge should ask himself the question: If the makers of the Act had themselves come across this ruck in the texture of it, how would they have straightened it out? He must then do as they would have done."**

Approaching this case that way, what comes to mind first are the circumstances and social conditions surrounding the promulgation of that law. In that case, I cannot help but observe that the earliest point in the application of Section 67 in this country was 1938 and the latest amendment thereto was 1958. That was well deep in what we refer to euphemistically as the Colonial era. And it is not with any sense of euphoria that we do so. Applying Lord Denning's guidelines from the SEAFORD COURT ESTATES case, we are then compelled to first consider the intention of the makers of the law at the time. The answer, in my view, is not to be found in the language of Section 67, for the language is unambiguous.

The law simply prohibits the publication of any false "statement, rumour or report" which is false and which is "likely to cause fear and alarm to the public or to disturb the public peace."

I understand the Section to presuppose knowledge or belief on the part of the maker of the statement, rumour or report as to its falsity and thereby the guilt of the maker, unless the maker can establish the defence provided by Subsection (2). The Section penalizes a person for communicating any falsehood which has a negative impact on the public. It imposes a duty on every person to only communicate the truth and to hold back to oneself any information with a tinge of falsehood. In the event that the information is false, there is a duty to show what efforts the accused made to verify it before publication. In my opinion, that

goes against the enshrined right against compellability of an accused person to give evidence at his trial as guaranteed under Article 18 (7) of the Constitution.

As already stated, there is no doubt as to the genesis of Section 67, that is to say, 1938 and amended in 1958. Counsel for the 2nd and 3rd Applicants have traced its roots to the Statute of Westminster of 1275 in the United Kingdom, Zambia's former colonial masters. That statute prescribed the offence "scandalum magnatum", which was the offence of making defamatory statements regarding persons of high rank, such as peers, judges or distinguished officers of state as defined in Osborne's Concise Law Dictionary (11th Edition). The words used in the statute read in part: **"..... from henceforth none be so hardy to tell or publish any false news or tales whereby discord, or occasion of discord or slander may grow between King and his people, or the great men of the Realm."**

It cannot be denied that the post colonial conditions and political climate are very different from those of the colonial times. Whereas presently there is in place a constitution with an entrenched Bill of Rights, there was none during the colonial era. I believe the intention of the makers of the law on "false news" at the time to have been quite different from those which the present democratic dispensation could have allowed. Can it or ought it to be sustained in the face of the current constitutional developments as well as world view?

The Zambia's Constitution provides for the supremacy of the constitution under Article 1 (3) in the following words:

> **"1. (3) This Constitution is the Supreme law of Zambia and if any other law is inconsistent with this constitution that other law shall, to the extent of the inconsistency, be void."**

In the South African case of THEBUS & ANOTHER v. THE STATE (2003) AHRLR 230 (SACC 2003) when speaking about constitutional supremacy, the Constitutional Court had the following to say on the supremacy of the Constitution which I think must carry equal force in Zambia:

> **"Since the advent of constitutional democracy, all law must conform to the command of the supreme law, the Constitution, from which all law derives its legitimacy, force and validity. Thus, any law which precedes the coming into force of the Constitution remains binding and valid only to the extent of its constitutional consistency.**
>
> **The Bill of rights enshrines fundamental rights which are to be enjoyed by all people in our country. Subject to the limitations envisaged in (the Constitution), the State must respect, protect, promote and fulfil the rights in the Bill of Rights. The protected rights therein apply to all law and bind all organs of the State, including the Judiciary."**

It is the post independence constitutions which have provided for the Bill of Rights in which the freedom of expression is also provided for. There was no freedom of expression in the colonial legislation. So that when Section 67 of the Penal Code was being enacted, I believe there was no consideration of a native's right to free speech.

Various authorities have been cited by Counsel for the Applicants for the need to re-examine colonial legislation *vis-à-vis* the current political and legal environment. Close to home is the case of GOVERNMENT OF NAMIBIA v. CULTURA 2000 (1993) 3 LRC 175 in which the Appeal Court of the Country had this to say:

> **"Clearly many of the laws enacted by the South African government during its administration (of Namibia) and many of the acts performed by that administration during that time were plainly inconsistent with both the ethos and the express provisions of the new constitution and therefore unacceptable to the new Namibia. But there were clearly other acts with no ideological contents such as the registration of births, deaths and marriages which did not fall into this category. On the other hand, acts of the previous administration which might appear on the face of it to be purely administrative and ideologically colourless and unobjectionable, might on a proper investigation be discovered to be hopelessly unacceptable and entirely motivated by policies plainly inconsistent with the express and clear intention of the constitution."**

Looked at from the era of its enactment, therefore, I am of the view that the intention in Section 67 was to suppress native dissenting views which could have the effect of formenting insurrection against the colonial rulers. In the absence of a constitutionally guaranteed right it may have been good law at the time, at least to the ruling elite though not to the freedom agitations. It may, therefore, have served a purpose at the time.

Again various legal procedents from the diaspora were cited by Counsel for the Applicants in attacking Section 67. Near to home again is the Ugandan case of CHARLES ONYANGO OBBO & ANOTHER v. ATTORNEY GENERAL (Constitutional Appeal No. 2 of 2002) in which the Supreme Court of that Country considered, *inter alia,* the constitutionality of Section 50 of the Ugandan Penal Code which criminalised the publication of false news, very similar to the Zambia's Section 67 in most material aspects.

In the OBBO case, the appellants had been charged with publishing false news in a newspaper article titled "Kabila paid Uganda in Gold, says report." The article alleged, *inter alia,* that the new President of the Democratic Republic of Congo had given a large consignment of gold to the Government of Uganda as payment for "services rendered" by Uganda in the removal of the former military dictator, the late Mobutu Sese Seko. The appellants challenged their prosecution contending that the law which the state had invoked to prosecute them violated their several rights guaranteed by the constitution.

Apart from considering the provisions of the Constitution of Uganda, the Supreme Court also took the broader view by considering international legal instruments such as the African Charter on Human and People's Rights which under Article 9 provides:

> **"1. Every individual shall have the right to receive information.**
>
> **2. Every individual shall have the right to express opinions within the law."**

The Court also considered the African Union's Declaration of Principles on Freedom of Expression in Africa of October, 2002 which states:

> **"1. Freedom of expression and information, including the right to seek, receive and impart information and ideas, either orally, in writing or print, in the form of art, or through any other form of communication, including across frontiers, is a fundamental and inalienable human right and an indispensable component of democracy.**
>
> **2. Everyone shall have an equal opportunity to exercise the right to freedom of expression and to access information without discrimination."**

Lastly among the legal instruments considered by the Ugandan Court was Article 10 of the International Covenant on Civil and Political Rights which states:

> **"1. Everyone shall have the right to hold opinions without interference.**
>
> **2. Everyone shall have the right to freedom of expression. This right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers either orally, in writing or in print, in the form of art, or through any other media of his choice."**

In his judgment, MULENGA, J.S.C said:

> **"From the foregoing different definitions, it is evident that the right to freedom of expression extends to holding, receiving and imparting all forms of opinions, ideas and information. It is not confined to categories, such as correct opinions, sound ideas or truthful information. Subject to the (Constitutional) limitation, a person's expression or statement is not precluded from the constitutional protection simply because it is thought by another or others to be false, erroneous, controversial or unpleasant. Everyone is free to express his or her views. Indeed, the protection is most relevant and required when a person's views are opposed or objected to by Society or any**

part thereof as "false" or "wrong"..... (Section 50) criminalises conduct that is otherwise a legitimate exercise of the constitutionally protected right to freedom of expression..... A democratic society respects and promotes the citizens' individual right to freedom of expression, because it derives benefit from the exercise of that freedom by its citizens. In order to maintain that benefit, a democratic society chooses to tolerate the exercise of the freedom even in respect of "demonstrably untrue and alarming statement," rather than suppress it...."

The learned Supreme Court Judge then cited an article in SOCIETY vol. 24 p. 8 No. 1 of Nov/Dec 1986 in which the learned and noble Archibold Cox opined thus:

"Some propositions seem true or false beyond rational debate. Some false and harmful political and religious doctrines gain wide public acceptance. Adolf Hitler's brutal theory of a "master race" is sufficient example. We tolerate such foolish and sometimes dangerous appeals not because they may prove true but because freedom of speech is indivisible. The liberty cannot be denied to some ideas and saved for others. The reason is plain enough, no man, no committee, and surely no government, has the infinite wisdom and disinterestedness accurately and unselfishly to separate what is true from what is debatable, and both from what is false."

The learned Mulenga J.S.C, also cited with approval the words of McLachlin J in the Canadian Supreme Court case of R v. ZUNDEL (1992) 10 C.C.R (2nd) 193 in which that learned Judge had this to say:

"Tests of free expression frequently involve a contest between the (majority) view of what is true or right and an unpopular minority view. As Holmes J. stated over 50 years ago, the fact the particular content of a person's speech might "excite popular prejudice" is no reason to deny it protection for "if there is any principle of the constitution that more imperatively call for attachment than any other it is the principle of free thought – not free thought for those who agree with us but freedom for the thought that we have".... Thus the guarantee of freedom of expression serves..... to preclude the majority's perception of truth or public interest from smothering the minority perception..... Before we deny a person the protection which the most fundamental law of this land on its face accords to the person, we should, in my belief, be entirely certain that there can be no justification for offering protection. The criterion of falsity falls short of this certainty given that false statements can sometimes have value and given the difficulty of conclusively determining total falsity. Applying the broad, purposive interpretation of the freedom of expression guaranteed by (the Constitution) hitherto adhered to by this Court, I cannot accede to the

argument that those who deliberately publish falsehoods are for that reason alone precluded from claiming the benefit of the constitutional guarantee of free speech."

I must state that the judgment of Mulenga, J.S.C, went down very well with the other learned justices in the OBBO case, as it did with me also.

It cannot be an overstatement, in my view, that Zambia, like most growing democracies is committed to upholding the right to freedom of expression and of the press. At only 50 years of post independence and constitutional democratic practices, the country may not lay too much claim to long and entrenched constitutional practices. However, that must be the *raison de'tre* to spur us to entrenching, *inter alia*, the rights and freedoms guaranteed under the Bill of Rights, and especially, in this case, the right of freedom to hold opinions and to receive and impart ideas and information without interference.

As the Supreme Court observed in the Canadian case of ZUNDEL, the danger of applying Section 67 in the present form is that the prohibition against publishing false news affects not only those caught and prosecuted, but also those who may refrain from saying what they would like to because of the fear that they will be caught. This is compounded by the perception that falsity is defined by the majority, hence excluding minority groups or individuals from laying out their beliefs by way of speech. Section 67 makes possible conviction for virtually any statement

which does not meet the majority definition of truth and lends force to the argument that the law could be used or abused in circular fashion essentially to permit the prosecution of news which is unpopular in the ears of those in authority.

Part of the argument on behalf of the State was that it is only those false statements, reports or rumours which have a negative impact of causing discord which are intended for prosecution under Section 67, and not harmless though mischievous stories. But as was observed in the OBBO case as well as in the ZUNDEL case, the law is intended for the jokers like some of the tabloids circulating in Zambia, as well as for persons who seriously believe in the ideas they seek to communicate. The short answer to the argument that false news may have the effect of causing fear and alarm in the public is that indeed human beings are made of different temperaments with some who are excitable at the least provocation. I do not therefore accept that the majority or even the Court's perception as to the possible effect of the false news ought to be a criteria in the enforcement of a law.

That then takes me to a consideration of the derogations to the right to freedom of expression under the constitution. Before I do so, let me state here that the 13th Century English Statute that created the offence of "Scandalum Magnatum" was abolished in England in 1887. If it was found to be undesirable by its originators as far back as the 19th century, can there be justification for its retention by Zambia, two centuries later? I do not find any such justification.

It will be recalled that Zimbabwe did also at one time have a law crimininalising "false news", of whose retention in post independence Zimbabwe GUBBAY, C.J frowned upon in the case of MARK GOVA & ANOTHER v. MINISTER OF HOME AFFAIRS & ANOTHER (S.C. 36/2000 Civil Application No. 156/99).

Indeed it is trite that every right and freedom is subject to reasonable legal restrictions. Hence the derogations we observe under Article 20 (3). However, the derogations thereunder stipulate that where a law takes away the guaranteed right and that law is "shown not to be reasonably justifiable in a democratic society" then that law is unconstitutional and therefore not permissible and ought not to remain on the statute books. As was said in the THEBUS case, **"if the impugned legislation indeed limits a guaranteed right, the next question is whether the limitation is reasonable and justifiable, regard being had to the considerations stipulated in (the Constitution). If the impugned legislation does not satisfy the justification standard and a remedial option, through reading in, notional or actual severance is not competent, it must be declared unconstitutional and invalid. In that event, the responsibility and power to address the consequences of the declaration of invalidity resides, not with the Courts, but pre-eminently with the legislative authority.**

Admittedly defining what is "reasonably justifiable" in a democratic society can be problematic. As was observed by the Supreme Court of Zimbambwe in RE MUNHUMESO & OTHERS (1994) I L.R.C. 284:

"What is reasonably justifiable in a democratic society is an illusive concept, one which cannot be precisely defined by the Courts. There is no legal yardstick save that the quality of reasonableness of the provision under challenge is to be judged according to whether it is arbitrary or excessively invades the enjoyment of a constitutionally guaranteed right."

The Zimbambwean Supreme Court emphasized the importance of the freedom of expression thus in Re Munhumeso:

"Freedom of expression, one of the most precious of all the guaranteed freedoms, has four broad special purposes to serve:

(i) It helps an individual to obtain self-fulfilment;

(ii) It assists in the discovery of truth;

(iii) It strengthens the capacity of an individual to participate in decision making; and

(iv) It provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.

In dealing with when a constitutionally guaranteed right may be limited under the derogation clause in the Constitution, Mulenga, J.S.C in the OBBO case went on to say:

".....protection of the guaranteed rights is the primary objective of the Constitution. Limiting their enjoyment is an exception to their protection, and is therefore a secondary objective. Although the Constitution provides for both, it is obvious that the primary objective must be dominant. It can be overridden only in the exceptional circumstances that give rise to that secondary objective. In that eventuality, only minimal impairment of enjoyment of the right, strictly warranted by the exceptional circumstance, is permissible."

Again as was said in the THEBUS case:

"In our constitutional setting, any crime, whether common law or legislative in origin, must be constitutionally compliant. It may not unjustifiably limit any of the protected rights or offend constitutional principles. Thus, the criminal norm may not deprive a person of his or her freedom arbitrarily or without just cause. The "just cause" points to substantive protection against being deprived of freedom arbitrarily or without an adequate or acceptable reason and to a procedural right to a fair trial. The meaning of "just cause" must be grounded upon and (be) consonant with the values expressed in section 1 of the Constitution and gathered from the provisions of the Constitution." (In the Zambian context reference to Section 1 must be read as a referent to Article 1 (3) of the Zambia Constitution).

In the case of Zambia, the exceptional circumstances are those laws that are set out in Article 20 (3). Under Article 20 (3) of the Constitution the only laws exempted are those that provide restrictions that are "reasonably required," for example:

(i) In the interest of defence, public security, public order, public morality or public health; or

(ii) For the purpose of protecting the reputations, rights and freedoms of other persons, etc.

It does not appear to me that Section 67 is reasonably required for those purposes. Neither can it be said that it is reasonably required for imposing restrictions on public officers.

As I earlier stated in this judgment, Section 67 offends against the Constitutional guarantee of presumption of innocence as well as that which places the burden of proof of guilt upon the State. It requires an accused person to prove lack of knowledge of the falsity of his statement, report or rumour and to show that he took reasonable measures to verify the truthfulness of his statement, rumour or report. The general rule is that in a criminal trial, the onus of proof remains on the State throughout and does not shift to the defence. The Zambian Supreme Court's decision in MWEWA MURONO v. THE PEOPLE (2004) Z.R 207 is a case in point. The presumption of innocence is an entrenched constitutional right of an accused person. It requires

that the prosecution bear the burden of proving all the elements of a criminal charge. A stipulation, such as is found in Section 67 which relieves the prosecution of part of that burden could result in the conviction of an accused person despite the existence of a reasonable doubt as to his or her guilt. Such a stipulation is in breach of the presumption of innocence and therefore offends the Constitution.

Further, liability for prosecution and conviction under Section 67 appears to me not to be dependent upon any actual occurrence of public fear or alarm or disturbance of public peace. It all depends on the State's perception of the possible impact the expression may have on the public and if the Court can be persuaded positively. The law is intended to forstall a danger, which is both remote and uncertain, arising out of the "false news."

In conclusion, I find and hold that Section 67 does not fit under Article 20 (3) of the Constitution. It goes beyond what is permissible under that clause. I, therefore, find that Section 67 does not pass the test of being "reasonably justifiable in a democratic society." It contravenes Article 20 of the Constitution and is null and void, and therefore invalid for unconstitutionality. It follows also that the invalidity and the constitutional guarantee of freedom of expression preclude the prosecution of persons and the criminalization of alleged false statements under Section 67.

Accordingly, a prosecution based on Section 67 of the Penal Code is itself inconsistent with the Constitutional guarantee and equally invalid.

Leave to appeal is granted.

Delivered in Open Court, at Lusaka, the 4th day of December, 2014.

I.C.T. Chali
JUDGE