FREEDOM OF THE PRESS, AND THE CONVICTION OF MMEMBE

By

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The conviction of M'membe on a charge of contempt of court by Magistrate David Simusamba is wrong in law and is not supported by judicial precedent from other common law jurisdictions. Even assuming that the *Comedy of Errors* article was an attempt to influence the court, there are several Commonwealth decisions that say that you cannot have contempt on those kinds of facts in a situation where the trial is by a professional judge alone and there is no jury system. The professional Judge, Magistrate knows the law. He or she cannot be influenced by anybody. If he or she can be influence by comments from the public he or she does not deserve the honor of being a judge. In the Nigerian case of *Akinrisola v. Attorney-General of Anambra State* (1980 2 NCR 17) whose facts are similar to the Mmembe case. A newspaper article was involved and it commented directly on the law while the court was hearing an election petition, the Nigerian Supreme Court ruled that it was not contempt on the grounds that the trial court was presided over by a professional judge and as a professional was not capable of being influence. The court observed that there was no jury that could be influenced. To suggest that there should be no comments on trials is ridiculous and is in fact a threat to the constitutionally guaranteed right of free speech. This would criminalize much of what goes on in the academy in the rest of the world. Those who argue that Zambian

contempt law are simply displaying legal ineptitude. Zambian contempt statutes track the colonial penal code model. They are the same provisions as you find in much of Commonwealth Africa.

Only a free and vibrant press can provide citizens with a range of information and opinions including fiercely critical views on the actions of the government and other institutions in a country. As Justice Black of the United States Supreme Court outlining the underlying justification for the protection of free speech in the American constitution, observed in *New York v. Times Company* "*the press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government."(403 U.S. 713 (1971).*

It is recognized world wide that governments that have autocratic tendencies use the criminal justice system to intimidate and harass journalists and media houses. The governments often consider it politically wise to get a court to share the responsibility of harassing and arresting people who those in power believe are embarrassing the government. This is done through threats of prosecution on the pain of imprisonment or threat of financial ruin through legal fees that those targeted are forced to incur defending themselves in courts of law. Of course the most effective way of doing this is the criminalization of criticism of the judicial system through the use of contempt proceedings. Reporters and others that criticize courts or comment on judicial proceedings are either charged with scandalizing the courts or interfering with the work of the courts. With respect to scandalizing the courts as the leading English Judge Lord Atkin observed a long time ago: "*But whether the authority and position of an individual*

judge or the due administration of justice is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticizing in good faith in private or public the public act done in the seat of justice. The path of criticism is a public way.. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men[1]*."*

Courts in dealing with these matters must always remember that there are broader values that deserve protection, as the South African Constitutional Court Judge, Justice Krigler observed in The *State v. Russell Malambo* (Constitutional Court of South Africa) (CCT 44/00): " *free and frank debate about judicial proceedings serves more that one vital purpose. Self-evidently such informed and vocal public scrutiny provides impartiality, accessibility and effectiveness*." It constitutes a democratic check on the judiciary. And as another South African Constitutional Court Judge, Abbie Sachs observed in the same case: "*indeed, bruising criticism could in many circumstances lead to improvement in the administration of justice. Conversely, the chilling effect of fear of prosecution for criticizing the courts might be conducive to its deterioration."*

With respect to sentencing Magistrate Siamusamba introduced new jurisprudence in the common law as we know it which would make the Judge in the English case *Solmon v. Solmon* that established the concept of limited liability turn in his grave. How on earth do you sentence an individual for the alleged sins of a corporation? It is trite law

[1] Ambard v. Attorney-General of Trinidad and Tobago (1936) 1 All ER 704

that a corporation is a separate entity from the individuals that work for it and indeed from the shareholders that own it. Mmembe is not the Post. In law the two are distinct. A fine is the appropriate sentence for a corporation. On the length of the sentence it is simply vindictive and outrageous, how do you sentence a first offender to 4 months without an option of a fine when only two months ago the Supreme Court sentenced Kavindeli to a fine on a contempt charge.