



## Opinion: Media persecution in the Chansa Kabwela case

By Muna Ndulo

The Chansa Kabwela case relates to the prosecution of a news editor of the largest independent daily in Zambia, *The Post*. Kabwela faced charges of distributing obscene materials contrary to section 177(a) the Zambian Penal Code in the Lusaka Magistrates court arising out of her having sent to four persons graphic photographs of a woman delivering a breach birth outside a hospital during a strike by doctors. On the 28th of August I published an article in the *Post* in which I suggested that the prosecution of the reporter was unnecessary. I pointed out that the prosecution was damaging the image of the country abroad. I also suggested that the case was a wastage of resources in a country with high poverty levels. The criticism was directed at the prosecution and not the court.

Following the publication of my article, the prosecution applied to the Magistrate Court that is handing the case that the *Post* newspaper that I should be cited for contempt of court on the grounds that the article authored by me and published by the *Post* was attempting to influence the court. On August 30, 2009, the court cited the entire editorial board of the *Post* and I for contempt of court and summoned us to appear in court on September 2, 2009.

Clearly, the executive has taken this strong action against the *Post* because the *Post* and the Government have differed on a variety of issues relating to the governance of Zambia, especially over the handling of corruption cases. Having failed to silence the independent media, the government seems to have

resorted to trying to use the criminal process to silence critics in the media. This case more than anything else demonstrates the hegemonic position occupied by the presidency in African politics and the weakness of state institutions that are supposed to provide checks and balances to the presidency in this case the police and the Director of Public Prosecutions. The president literary initiated the prosecution by calling for the prosecution of Chansa and in so doing failed to exercise self restraint and observe the limitations imposed on the presidency by constitutionalism. Second, the police failed to act as an independent professional force and third, the Director of Public Prosecution for failed use his constitutional powers to stop the prosecution.

Chansa Kabwela explained that the photos were tearfully brought to the newspaper by the husband of the woman in the pictures in hope that their publication might avert more tragedies. The average person in Zambia while no doubt being shocked and disgusted by the picture would not regard the publication of pictures of a woman giving birth in order to expose the plight of ordinary people during a national strike by medical personnel as being prurient and having the effect or as intended to deprave and corrupt morals. Instead, the pictures should have led to outrage and anger at those who were not making maximum efforts to end the strike. The context and manner in which they were distributed leaves no doubt in one's mind that the pictures were intended to make those in authority realise the serious impact of the medical strike and to bring about action to end the strike. No doubt, other situations could have been

used but the choice of a maternity case was probably intended to touch the humanity in all of us and clearly succeeded in that objective. The source of the materials distributed eliminates any concerns relating to privacy issues and that would have been for the woman in the picture to sue for invasion of privacy.

This case, more than anything else, illustrates poor governance and lack of independence on the institutions involved in the case—the police and the prosecution agencies. It also illustrates the dominance of the Presidency over all other institutions. The President erred in getting involved in a matter that is clearly nonpresidential. If he felt that there might have been a criminal violation in the distribution of the pictures, his action should have ended at referring the matter to the police. He was wrong to more or less direct the police to act. In a system that operates on patronage such as the Zambian system for a President to say “I hope those responsible for the law of this country will pursue this matter” amounts to a directive to officials whose survival depends on blind loyalty to do as he wishes. Investigative and police wings of the government must be left to function professionally and independently. Once the President made the mistake of issuing a directive to the police, the Inspector General of the Police compounded the situation by enthusiastically carrying out the directive. The police action shows lack of professionalism and independence.

Once the presidency and the police had erred in their handling of this case, it was then left to the Director of Public Prosecutions to step in and redeem the situation. In Zambia, the powers to conduct and supervise prosecutions of criminal proceedings are vested in the constitutional office of the Director of Public Prosecutions. He or she has power to discontinue, at any stage before judgment is delivered any criminal proceedings instituted or undertaken by himself or any other authority (Article 56).

I can not think of a more compelling case than the Chansa Kabwela case for the excise of the Director of Public Prosecution's power to discontinue a prosecution. The case is not supported by the definition of obscenity,

the distribution of the pictures was limited to a small section of leaders; and its objective was not to corrupt morals but to draw attention to the appalling conditions in the hospitals. Many of us disagree on the approach Chansa Kabwela adopted which might very well have been influenced by her frustration in dealing with the situation, but no one can doubt that any effort to end a strike which had caused so much suffering was a noble cause. Besides Chansa Kabwela in a letter to the NGO Organisations acknowledge that in future she might do things differently. In these circumstances, entry of a “*nolle prosequere*” would have been in the best interests of the country.

#### Writers Bio

Dr Muna Ndulo is the current Chairperson of Gender Links. He is a Professor of Law at Cornell University Law School and Director of Cornell University's Institute for African Development. He is also Honorary Professor of Law, Cape Town University. Former dean of Law at the University of Zambia. He has also served in a variety of posts with the United Nations, including as political advisor to the head of the United Nations Observer Mission to South Africa (UNOMSA) in the period leading up to and during the 1994 elections in South Africa. A regular contributor to newspapers and academic journals in the region, Muna is a highly regarded scholar, notably in the field of regional integration. He has also written and lectured on gender justice. Muna has served on a number of state and academic boards in Zambia.