

THE TRAIL OF TWO BISHOPS

March 8, 2006

BISHOP KUNONGA'S TRIAL

Six months of official ecclesiastical silence have elapsed since the abrupt adjournment of the trial against the Right Rev. Nolbert Kunonga, Bishop of Harare, accused on 38 different counts by 90 people in his congregation.

The Honourable Justice James Kalaile SC of Malawi, announced in open court on the second day of the trial that he had decided to stand down as trial judge and would contact The Most Reverend Bernard Malango, who is both bishop of a diocese in Malawi, and archbishop of the Anglican Church of the Province of Central Africa, to appoint another judge. Six months of perceived prevarication have dragged by with no official answer to letters asking the archbishop when the trial would continue.

One count against Bishop Kunonga is that, without lawful authority from the diocesan trustees, he issued an urgent interdict in the Civil Division of the Magistrates Court personally to restrain the duly elected churchwardens and members of the church council of the Cathedral of St Mary's and All Saints from carrying out their normal duties and to restrain a commercial bank from giving access to and acting on the legitimate instructions of the council in respect of the cathedral account.

The bishop had refused to recognise the lawful election of the church council at a properly constituted AGM and was determined to prevent the members from carrying out their lawful duties in terms of the Acts (laws) of the diocese. He lost the case and was ordered to pay the legal costs of the respondents (council and bank).

ARCHBISHOP MALANGO BREAKS SILENCE

That silence has now been broken; not by direct communication to the court officials, but obliquely through the Press. A report in *The Herald*, Zimbabwe, and "*Pravda*", Russia, both published on December 23, 2005, stated the archbishop had reached a decision. Surprisingly, contrary to normal procedure, neither the archbishop nor the provincial secretary have officially notified the "decision" to the registrar of the province who acts as registrar of the court, or the prosecutor of the trial, who was appointed by the archbishop.

It is only through the public media that over 90 indigenous complainants and others, like the provincial registrar and the prosecutor, have read that Archbishop Malango apparently said he will not after all appoint another judge to try Bishop Kunonga but will rule on the matter himself, based on a copy of a report from his own officials. (Who these are is not disclosed).

Pravda quoted officials at the Harare diocese office as saying Archbishop Malango of Zambia (*sic*) informed church leaders (who these are is not stated) throughout the province that the case against Bishop Kunonga has been dropped. "The matter is closed and cannot be revived," claimed Archbishop Malango in a letter dispatched to the region's 12 bishops on December, 19, 2005, according to the media.

Reports say this letter warned ... "all persons interested in bringing charges of this nature against any bishop of the province (are) ... to ensure that they do not raise purely administrative issues masked as canonical offences." This veiled threat against the persons whose very complaints the archbishop once recognised as triable,

is ill founded and misleading. Canon 24 of the provincial laws does not make any distinction whatsoever between “canonical offences” and “purely administrative offences” in describing the various offences a bishop may be accused of.

TIME TO SPEAK OUT

In view of the time lapse and the stance adopted by the archbishop the time has come to speak out against what is turning out to be a travesty of justice. Appropriate facts and comments must be spelt out to eradicate misconceptions and to indicate where the laws of the church are being ignored. Being a servant of the church as chancellor of the Anglican diocese of Harare and deputy chancellor of the Anglican Church of the Province of Central Africa, covering Botswana, Malawi, Zambia and Zimbabwe, I believe that, at the very least, I have a moral obligation to draw attention to where these laws have been cast aside.

ARCHBISHOP EXCEEDS HIS AUTHORITY

First and foremost what the archbishop has said and done, if correctly reported, is a violation of the canons (laws) of the province and he has exceeded his authority.

For the archbishop to make the reported unilateral decision that, “as far as the case against Bishop Nolbert Kunonga is concerned, the matter is closed and cannot be revived”, is in direct contravention of the laws of evidence, the laws of the church and natural justice. It is submitted that his ruling is null and void and that the archbishop has not fulfilled his lawful obligation as holder of that office.

He has no right to abolish an ecclesiastical court which he himself has convened and which has already commenced proceedings. Neither the archbishop nor the duly constituted court has yet actually heard evidence and cross-examination of the witnesses.

Consequently, neither can argue they are in a position to make a fully considered and objective judgment. The causes between the parties are still to be heard in an open court and judged righteously, impartially, fairly and justly. This will give the complainants the opportunity to give evidence and the bishop the opportunity to defend himself against the charges made.

The church laws protect a person from being judged before he or she has been heard so that the court can first find out what that person has done.

BISHOP’S ALLEGED OFFENCES

It is alleged Bishop Kunonga has deliberately ignored the laws of the province to the detriment of the diocese, the church and its parishioners and priests. It is averred that he wilfully contravened provincial and diocesan laws and conducted himself in such a way as to give just cause for scandal or offence and/or otherwise conducted himself in a manner unbecoming a bishop. The Most Reverend Bernard Malango accepted 38 different instances of these offences with different complainants, in about December, 2003 as warranting a hearing in the provincial court.

At the start of the trial hearing against Bishop Kunonga the charge of incitement by him to have certain persons killed was withdrawn only because of an argument in chambers before the judge between the lawyers about the prime witnesses giving evidence by video and audio-recording material from outside the country.

With the prior approval of the judge arrangements had already been made for the electronic interview to take place live in court. The objection raised by the

defence was that this is not admissible in terms of the Zimbabwean law of evidence. This was not accepted by the prosecutor but in the interests of speeding up the trial he withdrew the charge reserving the right to bring it to court again. In fact the Civil Evidence Act [*Chapter 8:01*] of Zimbabwe stipulates that in civil proceedings in any of the courts in Zimbabwe, recording material is admissible as evidence of things recorded thereon.

Some of the other allegations against the bishop are that he unlawfully brought a civil court case against the cathedral churchwardens and councillors, members of the cathedral and a commercial bank; unlawfully intimidated, threatened, suspended, caused or ordered to be suspended or dismissed or prohibited from attending meetings without good cause or reason a number of priests, churchwardens, councillors and others in the diocese; banned the cathedral Shona choir from performing; dismissed, all heads of diocesan institutions, chairpersons of boards of governors, members of mission boards, members seconded to the Bishop Gaul College board; unduly interfered with the affairs of that college; unlawfully failed to follow proper procedures laid down in the laws of the diocese in several instances; and caused, by unprocedural means, attempts to be made to have laws amended with the apparent intent to gain more power and greater control over the diocese and its members.

Canon 24 states that a bishop may be tried in a church court for various offences. No mention is made of “purely administrative” and “purely canonical” issues. Bishop Kunonga stands accused of committing the following offences listed in the canon:

- Wilfully contravening any provincial or diocesan laws. [COMMENT: This refers to any contravention of administrative, legal, ecclesiastical, financial, canonical or spiritually-related laws and all duties, obligations and procedures laid down in both canon and diocesan law. Failure to obey and follow these laws of the province is a breach not only of the laws but also of the oaths sworn by clergy, bishops and archbishops].
- General neglect of duty. [COMMENT: “**duty**” includes carrying out administrative, as well as any other type of duty and behaviour normally required or expected of any priest or bishop or archbishop].
- Conduct giving just cause for scandal or offence, or otherwise unbecoming a clergyman. [COMMENT: This offence goes far beyond the two artificial, non-existent categories quoted by the archbishop in his letter to the 12 bishops. No differentiation is made in the laws of the province between these two categories in respect of offences. If the archbishop disputes this and infers no administrative act or omission can be regarded as an offence, even if such act or omission is in fact contrary to the canons, acts, rules and regulations of the church, he is openly giving permission in such instances to bishops to ignore the church laws with total impunity. It is an invitation to treat with contempt laws laid down for the efficient and effective, practical, caring, just and faithful running of a church or diocese or the province, notwithstanding the oath to be bound by the church laws.]

OTHER RELEVANT CHURCH LAWS

The constitution, canons and rules of the Church of the Province of Central Africa (“the laws of the province”) support the contention that the archbishop does not have

the power or authority to close off the trial of Bishop Kunonga or the right to hold back from the bishop and the complainants what they are entitled to, namely the right to be heard in open court.

All clergymen, including bishops and archbishops, have to sign an oath agreeing to abide and be bound by the laws of the province and the diocese and to seek to further the proclaiming of the Gospel and the care of God's people in love and faith.

These laws cover the spiritual, moral, financial, legal and administrative aspects as well as the duties, obligations and behaviour of the clergy. There is no segregation of the "purely administrative" and "canonical issues" to which the archbishop alludes in his letter.

They state that bishops and archbishops promise to submit to any sentence passed upon them, after due examination by a tribunal established for this purpose. Thus the provincial court (or tribunal) is obliged to carry out a proper examination of the evidence and hand down judgment in the case of a bishop. The archbishop does not have this power and cannot by himself reach a verdict, let alone close a case.

Proceedings instituted in a church court against a bishop may deal with matters involving his moral conduct and performance of duty. If at least three priests and three communicants of the diocese file complaints alleging any offences have been committed a trial must be held.

In the case against Bishop Kunonga, over 90 indigenous persons - priests, churchwardens, church councillors and ordinary communicants - signed a document containing 38 different instances of offences allegedly committed by the bishop. The archbishop himself acknowledged this document and ordered that a trial be opened in the provincial court.

Yet he now takes it upon himself to abort the trial, thereby exonerating Bishop Kunonga and condoning any offences for which he may, or may not have been found guilty had evidence been led through the complainants and the bishop's witnesses.

The laws also state that the archbishop may sit as the judge with two assessors in the provincial court for the trial of a bishop. If he decides not to sit, the provincial chancellor is to sit as judge, also with two assessors.

The archbishop elected not to sit and the chancellor of the province also declined. Instead, the archbishop, as he was entitled to, appointed as judge the Honourable Justice Kalaile SC of Malawi and Bishop Albert Chama and Bishop Leonard Mwenda, both from Zambia, as assessors in the trial of Bishop Kunonga.

The tribunal was thus lawfully constituted and the archbishop was not part of that forum. He is precluded by the laws of the province from giving judgment, as he is not a member of this court. His declaration to the 12 bishops that the Kunonga case is to be closed and cannot be revived is of no force and effect because he has no right to say this.

The judge is called upon to swear he will do justice. The two bishops who are assessors promise to give a true verdict according to the evidence given. Matters of fact are decided by the judge and assessors.

Decisions on matters of law, practice and procedure are to be made only by the judge sitting in the provincial court. In this case the judge is required to comply with the Zimbabwean law of evidence in order to give appropriate rulings on practice and procedure.

Justice Kalaile, however, disapproved of the approach towards practice and procedure by one or both lawyers appearing before him in the trial. In such circumstances it is generally the practice for the judge to adjourn the case, call both lawyers into the judge's chambers, admonish them in private and resume the hearing.

In his wisdom the judge in the trial of Bishop Kunonga abruptly made up his mind in open court to recuse himself from the case rather than calling the lawyers into his chambers. His oath will not have been fulfilled until his replacement is sworn in to sit on the case and do justice when the trial resumes.

No verbal evidence has yet been given in the trial of Bishop Kunonga. Neither the assessors nor the judge have heard matters of fact as they are required to under the laws of the province and so have not yet fulfilled their mandate and promises. They are still obliged to sit and hear the evidence because the laws require verbal evidence from both sides to be heard in public so that justice can be seen to be done as part of the proceedings in the court. It is not open to the archbishop to ignore or flout these laws.

Only the provincial court can give judgement and find the defendant guilty or not guilty: the archbishop does not have that right although passing sentence is reserved to him, preferably taking into consideration any recommendations by the trial court. Neither can he decide to close the court: it sits until all the evidence has been heard and judgement given.

TRIAL OF BISHOP KUNONGA TO RESUME

In the case of Bishop Kunonga Archbishop Malango has prejudged the issue, acted outside the scope of the laws of the province without being aware of all the evidence. He declined to sit as a judge, yet now purports to act as one. He has no jurisdiction to interrupt or close the trial, which he himself ordered to take place, nor does he have the right to usurp the authority of the court. He does, however, have the right and duty to make sure the case is resumed.

Indeed in order to restore the wounded reputation of the church and comply with the laws of the province the trial of Bishop Kunonga must continue forthwith. Failure to allow the court to resume and hear evidence amounts to undue and unlawful interference in the independence of the court and the conduct of proceedings, which have been lawfully instituted by a large number of complainants.

It shows complete disregard and contempt for the procedure laid down in the laws to ensure that justice is done. It deprives the bishop and the complainants of their right of access to the court, which amounts to a breach of the laws of the province. Proof of the guilt or innocence of the bishop is what the court was originally called upon to determine.

Surely the bishop wishes once and for all to have the opportunity as soon as possible to establish beyond doubt in an open court that he did not commit any of the offences with which he has been charged, if that is the truth?

BISHOP AWARE OF COMPLAINTS OVER THREE YEARS AGO

Bishop Kunonga was served with a document containing the 38 charges in January 2004, but a year before that, in February 2003, both he and Archbishop Malango and the current registrar of the diocese were informed in outline of some of the allegations.

At that time the bishop and archbishop were requested to rectify matters but chose to ignore that opportunity. They cannot be said to have been taken by surprise

when, inevitably, complainants eventually brought the 38 charges, most of which fitted into two main offence categories set out in Canon 24, – namely, wilfully contravening provincial and diocesan laws; and conduct giving just cause for scandal or offence or otherwise unbecoming a clergyman. Although these were served on the bishop in January, 2004 he ignored them until about July, 2005 when the trial was about to be set down.

THE WAY FORWARD

The archbishop needs to be called upon to comply with the laws of the province, appoint another judge immediately and reconvene the court forthwith. Any pleadings, which may require to be completed, should be attended to now in preparation for the resumption of the case. In this regard the laws of evidence of Zimbabwe shall apply but the prime object is to ensure the case can proceed without hindrance or delay, without frivolous or vexatious obstacles being put forward by either party.

It is therefore necessary to hear all the evidence carefully, impartially and fairly, in open court, to ascertain the truth or otherwise of the allegations and to acquit Bishop Kunonga if he is found not to have committed the offences, or to find him guilty if he has.

To find out whether the allegations are justified or not is the task of the provincial court whose members have promised to do justice and give a true verdict according to the evidence of the witnesses. This is the way the laws of the church require the matter to proceed.

R A STUMBLES **CHANCELLOR** **DIOCESE OF HARARE**

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ABOUT THE AUTHOR

Mr Bob Stumbles is the chancellor of the Anglican diocese of Harare and deputy chancellor of the Anglican Church of the Province of Central Africa covering Botswana, Malawi, Zambia and Zimbabwe.

Both offices entail providing free legal advice in the best interests of the church, sitting as a judge or assessor in the diocesan or provincial court and seeing that justice is done at all levels of the diocese. The Most Reverend Khotso Makhulu, when he was Archbishop of the Province, bestowed on Mr Stumbles the Order of Epiphany, the highest honour in the province, for outstanding services rendered to the church and its people.

A well-known lawyer, he has been adviser to national presidents, government ministers, officials and others especially in Malawi and Zimbabwe.

President Robert Mugabe of Zimbabwe appointed him in 1985 to the country's Judicial Service Commission, (a position he held for 15 years) and in 1987 to the three person "Willowgate" Commission to investigate irregularities in the motor trade.

In 1999 the president appointed him to be a commissioner of the Zimbabwe Constitutional Commission. The Zimbabwe government made him chairman of the

National Association of Societies of and for the Disabled (NASCOH), a position he held for 10 years. He is or has been chairperson of many charitable organisations.

For over 40 years Mr Stumbles has advocated the elimination of racial discrimination, the advance of genuine racial harmony, respect for one another and the protection of human rights. As World President of an international service organisation in 1973/1974 his speeches throughout the 43 countries he visited reflected his concern that practical ways should be implemented to bring about better understanding, goodwill and peace among all men everywhere, regardless of race, colour or creed.

His desire has always been to remove racial and tribal polarity, build trust, goodwill and respect between all ethnic groups, and to promote human rights, ensure justice is done and seen to be done everywhere and encourage all people to act and behave in the best interests of society as a whole.

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Any queries, please contact Jill Day +263-(0)4-480455, +263 (0)91 224 165 or jillday@utande.co.zw