IN THE MALAWI SUPREME COURT OF APPEAL

M.S.C.A. CIVIL APPEAL CASE NO 91 OF 2013

BARTON CHAKUMBA	APPELLANT
(Suing on behalf of T/A Malili)	
And	
THE DISTRICT COMMISSIONER – LILONGWE	1ST RESPONDENT
SENIOR CHIEF MAZENGELAT/A KALUMBU	3RD RESPONDENT
LUCIANO CHASENDA	4TH RESPONDENT

CORAM : **Justice A.K.C. Nyirenda, SC, JA**

Justice Dr. J. Ansah, SC, JA

Justice D.F. Mwaungulu, JA

Kasambara, SC, and Kita, Counsel for the Appellant

Silungwe, Counsel for the respondent

Chimtande C. (Mrs.), Court Interpreter

Gondwe F. (Mrs.), Court Reporter

Chiefs – Appointment – by the President – a pretender must be entitled to be chief at customary law and must have the support of the people over whom the chief rules

Chiefs – Appointment – entitlement at customary law – many pretenders – the selecting authority can choose among many entitled to chieftaincy under customary law

Chiefs – Appointment – the need of the support of the people the chief will rule – proof that the person the president appoints has the support of the people – can be by many ways including a democratic system

Constitutional law – customary law – elevated by the 1994 Constitution

Customary law – needs proof – proved by experts in customary law and persons whom the court considers likely to be well acquainted with such law

Customary law – Chief Malili Chieftaincy – the nchembele are responsible for choosing the pretending chief from many pretenders

Customary law – Chief Malili – succession is rotational among clans – the nchembeles may override rotation

Customary law – Chief Malili – the nchembeles primarily choose from nephews and nieces – but a selection can be made from outside this category

Legislation

Chiefs Act

Sections 4, 4 (2) (a), 4 (2) (b), 4(2) (c), 17 (1)

Constitution 1966

Section 6

Constitution 1994

Section 10 (2)

Courts Act

Section 64

Native Authority Ordinance (Cap. 13 of 1955)

Sections 2, 25

Native Authority Ordinance 1933

Section 2

Cases

Group Village Headman Kakopa and Others v Chilozi and Another (2000) Civil Appeal No. 40 MSCA (Unreported)

Kamphoni v Kamphoni (2012) Matrimonial Cause No. 7 (HC) (PR) (Unreported)

Mwale v Kaliu (1929-61) 1 LR (Mal) 213

Words and phrases

'Entitled to hold office under customary law'

'Majority'

'People'

JUDGMENT

Nyirenda, CJ: The judgment we are to deliver is unanimous and was written and will be read by Mwaungulu, J.A.

Dr Ansah, JA: I agree with the judgment of Justice Mwaungulu.

Mwaungulu, JA

Précis

After reviewing the evidence and reasoning of the court below, which this court must do, because under Order 3, rule (1) of the Supreme Court of Appeal Rules, matters before this court are by way of rehearing, this court must dismiss the appeal with costs here and below to the respondent. However, it is done, for whatever reason it is done and at whatever level it is done, the dominant principles on which whoever and whenever the President is to appoint a Chief, as was in this case, Section 4 of the Chiefs Act is determinant. In this court in *Group Village Headman Kakopa and Others v Chilozi and Another* (2000) Civil Appeal No. 40 MSCA (Unreported) and in the court below Section 4 of the Chiefs Act is invariably and properly invoked and applied. In none of these cases was Section 4 of the Chiefs Act actually interpreted. In this case, much like *Group Village Headman Kakopa and Others v Chilozi and Another* in this court and in many cases in the court below, there is an opportunity to interpret the provisions and apply the interpretation to the facts. There is no doubt, on correcting reading and understanding of section 4 of the Chiefs Act, that the appellant, much like the respondent, is "entitled to hold the office of chief at customary law." That, however, again from reading and understanding section 4 of the Chiefs Act, is insufficient for the President to appoint one as chief where, like here, a pretender to the chieftaincy never established that, in addition to entitlement to hold office, a majority of people in the area of exercise jurisdiction support the pretender. The most the appellant succeeded to show, if anything, was that he, like the respondent, was entitled to hold the office of chief at customary law. Consequently, he could only impugn the decision if he, in accordance with section 4 of the Chiefs Act, proved that he additionally was supported by a majority of people in the area where he was to exercise jurisdiction.

Two customary law practices

This court in *Group Village Headman Kakopa and Others v Chilozi and Another* and decisions in the court below proceed on that section 4 of the Chiefs Act requires the President or whoever is responsible for selecting a chief at customary law to determine who will be chief. Based on that, a practice emerges where those responsible for designating a chief go through a process, according to customary law applicable, to determine who the chief will be. There might be germane reasons and justification for such practice one of which might very well be that the practice is permissible under section 4 of the Chiefs Act or, rather, that the Chiefs Act does not prohibit such a practice. There is, however, another practice emerging whereby it is not only those responsible for electing a chief who ultimately determine the chief but that they, together with the people in the jurisdiction where the chief will exercise the jurisdiction, are involved in

determining who the chief will be. The latter practice is more concomitant with section 4 of the Chiefs Act:

> (1) the President may by writing under his hand appoint to the office of Paramount Chief, Senior Chief or Chief such person as he shall recognize as being entitled to such office.
>
> (2) no person shall be recognized under this section unless the President is satisfied that such person –
>
> (a) is entitled to hold office under customary law;
>
> (b) has the support of the majority of the people in the area of jurisdiction of the office in question; and
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> (c) in the case of the office of Senior Chief under subsection (1) shall not affect the status of the substantive office of Chief or in any way confer on that person additional jurisdiction to the jurisdiction which he had before being appointed Senior Chief.

Before interpreting section 4 of the Chiefs Act, a few preliminary matters need consideration the first one of which is that sections 4 (2)(a), 4 (2)(b) and 4 (2)(c) should be read conjunctively and not disjunctively, as the case may be, with the result that if a matter, like the one under consideration, involves appointment of a chief the conjunction 'and' is brought between sections 4 (2)(a) and 4 (2)(b). Section 4 (2) (c) of the Chiefs Act only applies for appointment of chieftaincy beyond office of chief. The other preliminary observation is chronological, trying to understand the current legislation *vis-à-vis* its history.

Legislation's History

The legislature passed the Chiefs Act, Cap. 22:03, on 29th December 1967, after 6th July 1966, under the 1966 republican constitution. This is important for many reasons, the first one of which is that, unlike the Malawi Constitution of 1994, section 6 of the Malawi Constitution of 1966, prescribing fundamental principles of that Constitution, specifically provided for sanctity of chieftaincy. Secondly, the 1994 Constitution relegates the chieftaincy to statutory force. Thirdly the ordinances before the 1967 Act, in a constitutional system which was written or partly written, were, so to speak, part of the Constitution.

Section 17 (1) of the Chiefs Act repeals the Native Authority Ordinance (Cap. 13 of 1955). That ordinance never had an equivalent of the more elaborate section 4 of the Chiefs Act. Most of what is in section 4 of the Chiefs Act was subsumed in section 2 of the Native Authority Ordinance:

> In this ordinance, unless the context otherwise requires – "chief" means any African who is not precluded by native law and custom from being a chief and who is recognized as a chief by the Governor, and includes any person who, with the approval of a Provincial Commissioner and on the direction of a chief, acts for or assists such chief in his duties as a native authority.

The qualifier is expressed negatively. The governor could appoint as long as, under native law and custom, the person was not precluded. The wording of the section comports two renditions which are mutually exclusive. The first is that a pretender can be precluded if at native law or custom the pretender would not be entitled to be chief at customary. The native law or custom, in such a case, would be precluding.

On the other hand, the section rends itself to suggesting that governor could appoint anybody irrespective of customary law or custom of succession as long as there were no, which for lack of a better word, I would call general prohibitions, restrictions at customary law or custom. The best illustration would be where customary law or custom prohibits anybody's appointment if one is guilty of defined ignoble conduct. Under the latter rendition, the Governor had just to look at subjects of good behavior at customary law and custom. This was a broad power. That this was the intent is seen by what was in the predecessor statute.

Section 25 of the Native Authority Ordinance 1955 repealed the Native Authority Ordinance 1933 in which, much like in the successor Act, there was no elaboration as in section 4 of the Chiefs Act. In the Native Authority Ordinance 1933 all that is in section 4 of the Chiefs Act was subsumed in section 2, "In this ordinance unless the context otherwise requires: - "chief" means any native recognized as a chief by the Governor." This provision never suggested the basis of that recognition. One rendition was that there are many chiefs there in existence based on any consideration. It is only those recognized by the Governor who would be appointed as chiefs under the ordinance. The other rendition was that, despite customary law or custom, the governor had power to recognize any person as chief.

Recognition principle

Among the many principles emerging from these statutory provisions, in their historical context, is that the authority appoints chiefs on the principle of recognition. The second is that the principles of recognition are incremental. Section 2 of the Native Authority Ordinance 1933 does not lay the principles of recognition. It must be by hindsight that this is when, on the evidence in the court below, the Catholic Church, if at all it did, influenced the Governor to appoint an educated and Christian chief. It must therefore be that, because of the broadness of the provision which, as we have seen, gave the Governor the power, almost single handedly and without principles on which to operate and that the Governor was enabled to recognize whoever, wherever and whenever, that section 2 of the Native Authority Ordinance 1955 was passed. For the first time the Governor was constrained in that the Governor could not recognize a chief 'precluded' by native law and custom' from being a chief.

This increment, however, could not assuage another potential conundrum. If, as was the case under section 2 of the Native Authority Ordinance 1955, all depended on whether the person was precluded by native law and custom from being a chief the provision actually gave power to the governor to appoint anybody among those not precluded to be chief with the consequence that, even if at customary law an individual person was actually eligible, the governor could appoint anybody among many eligible because customary law did not preclude them. Even then, the power was very large. It was, however, concomitant with good

government that a chief was pliant and compliant to central government. On this construction therefore, it was unnecessary that someone was eligible at customary law or that the chief should be supported by the subjects over whom the chief was to control. It is from this vista that Section 4 of the Chiefs Act was a paradigm shift and watershed.

Section 4 of the Chiefs Act 1967 refines the requirement of recognition based on customary law and requires the approval or support, not of central government, but the people in the area where the chief will exercise jurisdiction. The current section 4 of the Chiefs Act, therefore, requires, concerning a chief, appointment based on dual recognition. The pretender to chief must foremost be one who is entitled to hold office of chief at customary law and must, without fail, have the support of the majority of the people where the pretender will exercise jurisdiction. It is not enough, therefore, that the pretender is one who is entitled to hold the office of chief if, as it must be, the pretender lacks the support of a majority of the people in the pretender's jurisdiction. Conversely, the President cannot and should not recognize any pretender, however large the support of the people in the jurisdiction, if the pretender is not entitled at customary law to be appointed chief. The President can only recognize a pretender fulfilling, in relation to a chief, both requirements.

Section 4 (2) (a) and 4 (2) (b) therefore, imposes a duty on a president, and by extension, those who under customary, are responsible for identifying a succeeding chief, to ensure that actions and processes enable a President recognizing a pretender entitled to hold office of chief at customary law and has support of a majority of the people in the area where the pretender will, if appointed, exercise jurisdiction. It must be, therefore, that those responsible who identify a person lacking support of a majority of people in the area of jurisdiction breach the duty under the Act. Similarly, there will be breach of duty by a majority of people in the area of jurisdiction press a candidate not entitled to hold office of chief at custom. These two restraints are a (proper) check on a President and people on who the chief, if appointed, will exercise authority.

"Entitles to hold office at customary law"

What, therefore, do the words 'entitled to hold office under customary law' mean? There is one understanding of this provision which, without actually interpreting the section, is vogue in this court's and the lower court's decisions and which dominates counsel's arguments. This understanding is that the deceased chief's successor at customary law should be appointed chief by the President almost as a matter of course because the words connote determining the successor according to custom. This understanding results in heavy litigation challenging a clan's identification of a pretender. The question then is just the narrow one whether, according to the custom and customary law of the particular chieftaincy one person is or is not entitled to be chief.

I do not think that this is the rendition of the words 'entitled to hold office under customary law', let alone the only one. The words go to eligibility or right to hold the office of chief at customary law. Consequently, those responsible for identifying who should succeed a deceased chief have to identify the pretender from many who may or can succeed in the

chieftaincy. The words refer to all such who are entitled, including the one whom ultimately or eventually is identified by those responsible as such successor.

This rendition is peremptory because of section 4 (2) (b) of the Chiefs Act. For, if, the words 'entitled to hold office under customary law' mean the one who should be successor according to customary law, the identification under section 4 (2)(a) suffices by itself and therefore, makes section 4 (2)(b) unnecessary. Section 4 (2) (b) suggests that a person duly identified under section 4 (2) (a) could fail the recognition requirement if he does not have the support of a majority of the people in the area where the pretender will exercise jurisdiction. There is no concyclic argument here where that if the person identified under section 4 (2) (a) fails because of section 4 (2) (b) of the Chiefs Act, it must be that he was not, in the first place, entitled under section 4 (2) (a). The consequence of section 4 (2) (b) is that it defeats recognition of anyone identified under section 4 (2) (a) of the Chiefs Act. Section 4 (2) (b), as we have seen, is incremental on the principles on which the President recognizes a chief for purposes of appointment. In a sense it is introducing a democratic process.

"Support of the People"

Section 4 (2) (b), however, introduces uncertainties. The word 'majority' itself can be understood in ordinary meaning which, irrespective of number of candidates, means the candidate with more than 50% of the vote. The word 'people,' however, is broad; it includes all, irrespective of age or status. As we see shortly, this court in *Group Village Headman Kakopa and Others v Chilozi and another* (2009) Civil Appeal Cause No. 40 (MSCA) (Unreported), without determining the issue, assumed, rather obliquely, that the Village Headmen present at that particular meeting was the majority. This conclusion is not supported by section 4 (2) (b) itself. If the legislature intended only village headmen or people identifying a successor constitute the people under section 4 (2) (b) it would have so provided and with better clarity in the words used. It must be, therefore, that the legislature intended that the successor has the support of the people, namely, the populace in the area of jurisdiction.

Consequently, where, which is usually the case, there is a process of identifying the chief or where a president specifically or tacitly allows for such a process, section 4 (2) (b) of the Chiefs Act entails a dual process. The first process is one where those entrusted with the responsibility of identifying a chief at customary law from those entitled to succeed the deceased or deposed chief, must comply with section 4 (2)(a) of the Chiefs Act. Once, therefore, that process is accomplished, there must be a process of ascertaining the support of the people. Should a majority of the populace not support the choice, the President cannot and should not recognize a candidate under section 4 (1) of the Chiefs Act. It must be, therefore, the people responsible have to have a second or more caucuses until they identify the successor supported by a majority. It follows, *a fortiori* that there would be nothing improper if the people responsible for identifying the successor, to expedite or simplify the process, work together or simultaneously with all the people in the area where the chief will exercise jurisdiction. Looking at the history of the Chiefs Act and the wording of section 4 (2) of the Chiefs Act, it is inevitable that the at can only recognize and therefore appoint, only that person who is entitled at

customary law to hold the office of chief and has the support of the majority of people in the area where the chief exercises jurisdiction.

Judicial Decisions

Courts have not considered the matter any differently from the statute. This court dealt with section 4 (2) of the Chiefs Act in *Group Village Headman Kakopa and Others v Chilozi and Another* (2009) Civil Appeal Cause No. 40 (MSCA)(Unreported) and confirmed the duality. In *Group Village Headman Kakopa and Others v Chilozi and Another,* there was a challenge to the chieftaincy of a man who the president duly appointed based, it would appear, solely on whether the chief was entitled at customary law to be the successor to a chief who had died. This court, finding that there was compliance with customary law, underlined the importance of the two elements:

> This, therefore, demonstrates that the first respondent was appointed in accordance with customary law as required by section 4 (2)(a) of the Chiefs Act. Furthermore, the provisions of section 4 (2)(b), which state that the appointed chief must have the support of the majority of the people in the area of jurisdiction of the office in question, were also satisfied, in that, as the court below observed, the Kabudula area has seventeen Group Village Headmen. Fourteen of these Group Village Headmen endorsed the name of the second appellant. It is clear, therefore, that the statutory requirements of section 4 (2)(b) of the Chiefs Act were compiled with in the appointment of the first respondent as Traditional Authority Kabudula.

There is a decision from the same court as the one appealed to the same effect: *Re the State and the District Commissioner for Machinga ex p Adini* (2009) Miscellaneous Civil Cause No. 9 (HC) (PR)(Unreported). The court below relied on the understanding and interpretation of section 4 (2) of the Chiefs Act. With this conclusion on which, really the appellant's case stands or falls, it might be important to discuss the manner in which this court must approach the requirement in section 4 (2)(b) which *ipso facto* hinges on application of customary law.

Proof of Customary Law

There is the more reason because the appellant in the grounds of appeal, skeletal arguments and oral submissions questions the lower court's understanding and interpretation of the customary law experts that the lower court, in agreement with counsel, allowed to prove customary law on succession of a chief in the area under consideration. Section 64 of the Courts Act now raises the principles on which this court and all courts must treat customary law. To begin with, as observed in *Kamphoni v Kamphoni* (2012) Matrimonial Cause No. 7 (HC) (PR)(Unreported), in the court below, our constitution in section 10 (2) elevates in a more unique way the status of customary law in this country. In 1966, however, with the Republican Constitution, customary law, under section 64 of the Courts Act never diminished customary law's new status. Proof, just like proof of foreign law, is because it customary law is a special area of law not obvious to the conventional legal system except in the circumstances where there is a judicial precedent or where a court takes judicial notice of decisions of its own or of a

superior court, determining the customary law applicable in a like case. Section 64 of the Courts Act provides:

> If in any proceeding a matter of customary law is material, such law shall be treated as a question of fact for purposes of proof. In determining such law the court may admit the evidence of the experts and persons whom the court considers likely to be well acquainted with such law. Provided that a court may judicially note any decisions of its own or of any superior court, determining the customary law applicable in a like case.

Section 64 of the Courts Act, therefore, is shorn of the common law vestiges regarding such law. Section 64 of the Courts Act, passed on 1 August 1958, is more comprehensive and completely improves on earlier approaches in *Mwale v Kaliu* (1929-61) 1 LR (Mal) 213, cited by the judge in the court below. Three principles emerge. First, the word 'may' does not mean 'shall'. Consequently, the court does not have to call evidence on customary law each time. The court is empowered to take judicial notice of the custom including customary law of an area, without the necessity of proof. Secondly, section 64 of the Courts Act when the court is to call evidence the court can have evidence of experts and persons whom the court considers to be well acquainted with such law.

The use of the word 'and' is a bit problematic if the suggestion is that, in any event, the court must have evidence of experts on the one hand and evidence of persons (not experts) whom a court considers likely to be well acquainted with such law. The use of the word 'and' suggests that absence of experts or persons whom the court considers more likely to be well may be fatal to the finding of customary law. The section could also suggest that we have one class of persons; a person must be an expert and one who a court considers likely to be well acquainted with such law.

Application of the Law to the Facts

The relief the appellant sought from the court was as brief as it was succinct. The appellant sought two declarations: "(a) a declaration that the lawful heir to the throne of Traditional Authority Malili is the Thana clan as opposed to the Kadze clan; (b) a declaration that out of the Thana clan, it is the plaintiff, Mr. Barton Chakumba who by Chichewa custom deserves to be installed as Traditional Authority Malili."

When the predecessor chief died, we know that there were two separate or simultaneous meetings to determine a successor. We also know that the two groups were not meeting eye to eye. Both meetings tendered their successors to the District Commissioner for Lilongwe leaving the District Commissioner, who was to require the president to appoint a chief for the area, saddled with two pretenders to the throne.

Characteristically, the District Commissioner required those responsible to reconsider the matter before requesting the president and, as usually happens in these matters, sought senior chief's assistance. At the first meeting it was apparent that many clans were vying for candidacy. During the meeting other clans fizzled; only the appellant's and respondent's clans

remained. Obviously, either clan had a different pretender. Consequently, left alone, each preferred its own candidate. Consequently, however, they agreed for the two clans resolve the matter. At the end such proposed meeting, based on principle of rotation, the *nchemberes* identified the respondent as such successor. There is evidence, on an agreed list of succession of chiefs in the area, that only once for as many as eight times has a chief come from the respondent's clan. Based on that meeting the respondents name was submitted to Government and ultimately to the President for appointment by the President under section 4 (1) of the Chiefs Act.

The appellant's primary position is that this chieftaincy always subsisted in his clan and, if there was rotation, it was confined within the clan. The appellant's explanation for the one occasion on which the respondent's clan was ever chief is that that a particular chief was a preference of the church that wanted a Christian and an educated person. According to the appellant, the situation was subsequently remedied when two successive chiefs after that chief belonged to his clan. The appellant contended that the respondent's clan was in no way connected to his clan.

The respondent's position was that his and the appellant's clans were the wider royal family from whom chiefs were identified by those who were responsible in identifying chiefs under their customary law. The respondent was adamant that there was rotation of chieftaincy between the two families. The evidence for it is the one occasion when a member of his clan was chief. His explanation for why his clan never continued to be chiefs as often as the other clan is that there was a gentleman's or gentle lady's understanding. The respondent contends, therefore, that the people responsible for identifying a successor chief were right to choose him and submit his name to the Ministry of Local Government for final appointment by the President.

Consequently, however the situation is explained or described, the issue in the court below and indeed in this court is whether the appellant was the person who the President should have recognized under section 4 (1) of the Chiefs Act because the appellant was, under section 4 (2)(a), entitled to hold the office of the chief at customary law and, under section 4 (2)(b), had the support of the majority of the people in the area in which he was to exercise jurisdiction.

It must be remembered that, according to the declarations sought, the onus, as always, was on the appellant to establish on a balance of probabilities that he was the one compliant with section 4 (2)(a) and section 4 (2)(b) of the Chiefs Act and one to be appointed by the President under section 4 (1) of the Chiefs Act. That burden was on never the respondents'. *Per chance,* if the appellant raised a sufficient case by the evidence, the burden shifted to the respondents to rebut that evidence. The latter is not the burden of proof invariably required of the plaintiff to prove the case. This is an evidential burden requiring the respondent no more no less than to provide some evidence or explanation against the evidence the applicant has so far raised establishing the case. Consequently, where the plaintiff case fails preliminarily it is unnecessary to even consider the case or evidence in the defendant's case. It was never the respondent's duty to show that he was eligible for the president's appointment as chief. The appellant in the court below failed to show that his entitlement to hold the office of chief had the support of a majority of the people in the area in which he was to exercise jurisdiction. It was insufficient for the

appellant just to establish that he was entitled at customary law to hold the position of chief: the appellant was supposed to show majority support of the people in the area of exercise of jurisdiction.

Not only did the appellant not proffer any such evidence, in one of the most serious grounds of appeal to this court, the appellant actually impugns the role of the people in the area in which the appellant will exercise jurisdiction. The appellant contends, and vehemently, that the presence of people at such meetings is nothing more nothing less than just receiving the name from those responsible for identifying the chief. The role and significance of the people in the area in which the chief will exercise jurisdiction is in section 4 (2)(b): the appointment as chief, even for one entitled to hold office of chief at customary law, stands or falls on the support of the people in the area where the chief exercise jurisdiction. On this score alone the appeal should be dismissed. When the appellant's counsel was alerted by this court on the importance of section 4 (2)(b) of the Chiefs Act his tapered response was that it was his client who had such support. There was no such evidence. The next question therefore, is whether the appellant has discharged his duty to prove on a balance of probabilities that he was one who is entitled to hold the office of chief under customary law.

Once again, the burden of proof was not on any of the respondents to prove that the appellant was the one entitled to hold the office of chief under customary law. That burden remained squarely on the appellant. Put simply, for purposes of the appellant's case in this court and in the court below, the appellant had to (a) establish the customary law on succession to the Malili chieftaincy; (b) establish the circle in which the chieftaincy is derived from; (c) that he belonged to that circle; (d) the method of determining the successor; (e) that the method was applied; and (f) that he was chosen as successor.

On the customary law of succession to the Malili chieftaincy, there was evidence from the appellant himself and some witnesses acquainted with custom and independent experts. The trial judge meticulously weighed the evidence and determined, properly to all intents and purposes, the clans from which successors to the throne are identified. On the evidence before her, her conclusion on the customary law on the matter was immaculate and this court would endorse it in terms of section 64 of the Courts Act to be the customary law of the Malili chieftaincy. Her conclusion is that succession to the Malili chieftaincy is from determined clans which include the appellant's and respondent's clans. The trial court, again correctly, determined that, successors in principle in a matrilineal/matrilocal system, which is the appellant's and the respondent's, succession follows the female line and, therefore, it is the maternal nephews and nieces to the chief who are entitled to hold the office of chief. On the evidence on record, this court also recognizes, in practice and on principle brothers of the chief come in the mix. There is, therefore, fluidity in the Malili chieftaincy as to the circumstances in which brothers may succeed to the throne.

One practice is that brothers and sisters, nephews and nieces come in the mix at the same time. This is supported by experts in the court below. The other practice is that brothers and sisters come in the mix only when there are no nephews and nieces. This practice is not supported by evidence in the court below. It is, however, supported by the decision of this court

in *Group Village Headman Kakopa and others v Lotani Chilozi and Another,* also cited by the appellant's counsel in this appeal on this point:

> "It is the respondents' case that when the late Kabudula Dickson died, it became necessary to appoint a successor under Chewa custom; an heir to a chieftaincy can either be a brother or a nephew of the deceased chief. The deceased chief, the court was informed, had no nephew who was old enough to inherit the chieftaincy. The only successors, therefore, could only come from his brothers. The first respondent was such a brother."

This conclusion deals with items (a), (b) and (c). Let us now consider item (d).

There is much discussion about the method of identifying the successor. The first part of the discussion relate to the actual process. The appellant raises a few points for consideration. First, there is agreement that under the Malili chieftaincy customary law, the authority entrusted with identifying a chief is the '*nchembere*', literally a woman who has born or can have a child. The *nchemberes* have the exclusive right primarily because in the matrilineal system the family clusters around the sisters when brothers join wives. It is the uncle who, even though himself away from the family cluster, who is responsible for the mbumba. It is, however, in all cases that the female folk will remain in the area of jurisdiction of the chief. Consequently, the *nchemberes* must determine who, not only based on entitlement to hold office, but also because of good behavior and disposition, would care and protect the women. *A fortiori* the *nchemberes* can overlook or override anyone who on simple analysis is entitled to be successor to the chieftaincy. This must be taken as a dominant principle of customary law to the Malili chieftaincy.

The appellants' contention is that the *nchembeles* initially chose him as a successor. There is evidence to the effect that these *nchembeles* must have predominantly been the ones from the appellant's clan. There's also evidence that the *nchembeles* in the respondent's clan did the same thing. It is clear, however, that when this stalemate was detected, through mediation and introspection, the *nchembeles* chose the respondent. The respondent, therefore, had the support of all the *nchembeles* irrespective of the clans. There is no evidence to suggest that the appellant's *nchembeles* were not there. Even if they were not there, if they boycotted the meeting of the *nchembeles* when the identification was to be done and they were notified of the meeting, their absence does undermines neither the meeting nor the decision.

Neither is the *nchembeles'* meeting and decision undermined by the presence at, in or around their meeting of the presence of the District Commissioner and the superior chiefs. The court below, based on abundant evidence before it, concluded, properly, that the District Commissioner and the senior chiefs were not there to influence or participate in the identification of the successor. If anything, they were there to receive the name the *nchembeles* determined to be the successor following a negotiated outcome that the two clans together must cooperate and proffer a successor. In any case, the appellant has not demonstrated that according to the customary law of the Malili chieftaincy, the *nchembeles* must act impartially and independently. There is no evidence to that effect. If it were for this court to decide, which it is not, the logical conclusion would be that it is concomitant with democratic principles that others should

influence the decision, more especially those who under section 4 (2)(b) must render support to the chief nominated to run their affairs.

Moreover, the meeting or decision of the *nchembeles* is scarcely, if at all, undermined by the presence of people in jurisdiction. As seen earlier, it would be permissible as part of democratic and political process that the people, whose support is necessary under section 4 (2)(b) of the Chiefs Act, lobby the nchembeles and influence the identification. On the other hand, it is material to section 4(2) of the Chiefs Act that the support of the people in the area in which the chief exercise jurisdiction is gauged, assessed and ascertained. Of course, that can be done at any other time after the identification but, without doubt, doing that at exact time when the identification process occurred is the *modus operandi par excellence.* This deals with item (d).

It was also the duty of the appellant as a complainant in the court below to prove the method applied at customary law for identifying the successor. The evidence of appellant and the people the appellant called to establish the customary law was essentially that there was no rotation among the clans rather that rotation was only among the one royal clan, the appellant's clan. Before the court below, however, there was evidence that this was not the case. The two independent people called to assist the court, told the court below that it was probably in yester years that there was no such rotation. The customary law, because of disagreements and conflicts, developed to where, to forestall difficulties, the chieftaincy actually rotates among the clans. The court below, after careful examination and evaluation came to the conclusion, which this court cannot on any principle fault that the Malili chieftaincy bases on rotation. If there is need for any evidence for that, it is in that, as the appellant concedes, the two clans intermittently, though not as often, have been chiefs.

The assertion that chiefs from the other clan only became chief because of the church support for religion and education is plausible but not countervailing. The legal explanation might very well be that the particular chieftaincy occurred before 1967 where, as we have seen, the governor had a wide discretion and there was no requirement as introduced in the 1967 Act requiring that a candidate must be entitled to hold the office of chief at customary law. Apart from everything else, the list that shows that both clans have held the office of chief before points to rotation as being the customary law of the Malili chieftaincy. There are many decision of the court below which, albeit relate to chieftaincy in the Southern Region, are persuasive in this court precisely because, with minor variations here and there, the matrilineal system generally supports rotation. The independent people acquainted with the customary law of the Chichewa people, to which the Malili chieftaincy belongs, agree.

As seen, on succession to the Malili chieftaincy, it is not only one individual who is eligible or entitled to hold the office of chief at customary law for a broad principle emerges that is that all nephews and nieces on the sister's side and brothers and sisters of the deceased chief come into the fray. The power is the *nchembeles* to choose among the pretenders. Of course the *nchembeles*, as the appellant contends in this court, initially and probably opted for the appellant. It is platitudinous that when, after mediation and consultation, it was apparent that the chieftaincy goes by rotation, the *nchembeles* chose the respondent. It is also apparent that this

was in the presence of the people in the jurisdiction where the chief was exercising authority and that these, based on the principle of rotation, supported the respondent's candidacy. With both these elements made, it cannot be said that the appellant was the one, let alone, the only one entitled to be chief under the customary law of the Malili chieftaincy. On the contrary, there is evidence that many, including the appellant and respondent, were entitled to hold the office of Chief Malili. On this occasion the *nchembeles* opted for the respondent and, it appears that the appellant's only argument is that he was equally or more entitled. This was not the view of the *nchemberes*. The *nchemberes* thought that the respondent was their man and this court finds no principle of customary law or indeed of any other law on which they should fault the *nchemberes'* decision.

Disposal

The appeal, therefore, should be dismissed with costs to the respondent.

Made this 21st Day of August 2015

A.K.C. Nyirenda, SC,

CHIEF JUSTICE

Dr. J.M. Ansah, SC, JA

JUSTICE OF APPLEA

D.F. Mwaunguluu, JA

JUSTICE OF APPEAL