## Julian Mukwesu Nganunu (1941-2014)

***By Key Dingake***

The Nganunu family has lost a loving father, brother and relative. In the former Chief Justice Julian Mukwesu Nganunu, the nation has lost a great jurist and a reformer of note. In what follows below, I attempt to sketch his contribution to our jurisprudence. As some of his judgments would reveal, Nganunu was very strong on the rule of law and legality. He read law in 1966 at the London School of Economics and Political Science and served both government and the corporate sector at the highest levels. He was a product of those times and the environments he worked in.

Jurisprudentially, the conventional theory about judging, espoused by many positivists scholars and their counter-parts in the bench is that judges are simply neutral arbiters who apply the law to the facts in a somewhat detached and mechanical fashion. Legal realists, especially those of the critical legal studies mould contend to the contrary. If judges make new law – even positivists now concede this reality – they couch it in sophisticated language. Lord Reid, one of the luminaries of the British bench thought it inconceivable that judges do not make law.

Reading Nganunu's judgments, you could place him somewhere in between the positivists and legal realists. He believed that judges have a role to play in advancing the values of a democratic society. His tenure as Chief Justice has been used to forge the High Court as the true guardian of the rights of the people. Nganunu has produced judgments which the liberals and conservatives would celebrate in equal measure. In the area of constitutional law, one of his celebrated decisions is the case of *Kamanakao v The Attorney General*. At the heart of this case was the complaint by the applicant that Section 2 of the Chieftainship Act in so far as it defined 'tribe' and 'chief' in a manner that excluded the Wayeyi and other tribes and/or ethnic groups offended against Section 3 (a) of the Constitution which deals with equal treatment and equal protection of the law. The court led by Chief Justice Nganunu agreed with the applicants and directed that Section 2 of the Chieftainship Act (Cap 41:01) be amended to afford equal treatment and equal protection by that law to the applicants. The court refused to declare Sections 77 to 79 of the Constitution unconstitutional –a subject matter that receives some attention from the German constitutional court jurisprudence, yielding contrary conclusions.

In *Kanane*, the Chief Justice was among those of his brethrens who upheld the constitutionality of sodomy laws. This decision has been criticised in some quarters for having subordinated human rights to moral considerations. It is true that the court must keep in touch with the thinking and mores of society, but in aiming for a proper balance, it must not subordinate justice to expediency.

Chief Justice Nganunu insisted on accountability of statutory bodies. He was of the view that creatures of statute must generally comply with the rules of natural justice before taking any adverse decision against any person or entity.

Although, the courts under the leadership of Chief Justice Nganunu, have shown considerable enthusiasm for extending the boundaries of judicial review of administrative action, they have not lost sight of the importance of the balance between the need to control abuses of power and the need to allow public bodies to perform their duties without watching over their shoulders! Chief Justice Nganunu would be remembered for a number of reforms that he brought to the judiciary besides the massive infrastructural developments that are littered all over the country.

Other than his jurisprudential output, Nganunu was a reformer of note. He introduced Judicial Case Management system in the operations of the courts, to ensure that litigation is conducted speedily and cheaply. Prior to the introduction of Judicial Case Management, the pace of litigation was largely in the hands of lawyers. Judicial Case Management shifts the control of cases from lawyers of the parties to a judge. On registration of a case, the case is immediately assigned to a judge, who, together with the attorney involved, will make a schedule for the conduct of the case to date of trial. This innovation has almost eliminated any backlog that was there and speeded up the pace of litigation.

Chief Justice Nganunu also introduced Computer Record Management system (CRMS). In terms of this system, all cases that exist in the courts are recorded in the system according to their age and type so that at the end of the day the judiciary becomes accurately aware of what workload it has. It was also under the stewardship of Chief Justice Nganunu that the hitherto opaque appointment process was made more transparent by requiring that vacancies to the High Court bench be advertised and candidates interviewed. No doubt, opaque appointment processes are now generally frowned upon in most democratic societies.

Chief Justice Nganunu, in countless of his speeches has emphasised the importance of the independence of the judiciary. He understood that an independent judiciary is an indispensable component of a democratic society. He also emphasised this point at countless meeting of judges.

Botswana has been blessed to have a Chief Justice of the quality and presence of Julian Mukwesu Nganunu.

[In his last years, Rre Nganunu also took an active role as a member of The Botswana Society executive. His sagely advice at meetings, not to mention his good humour, helped steer The Botswana Society through some difficult times, and his efforts in raising corporate members and financial support for the Society and *Botswana Notes and Records* came at crucial moments].

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