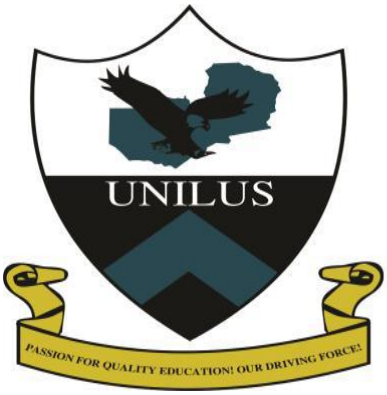

UNIVERSITY OF LUSAKA

JUSTICE DELAYED OR NO JUSTICE AT ALL? AN ANALYSIS OF THE PERFORMANCE OF COURTS IN ZAMBIA.

BY

MWEEMBA MUKWANYA

LLB18213507

An obligatory essay submitted to the University of Lusaka in partial fulfilment of the requirements for the award of the Bachelor of Laws (LLB) Degree.

2022

DECLARATION

I declare that this dissertation entitled, **JUSTICE DELAYED OR NO JUSTICE AT ALL? AN ANALYSIS OF THE PERFORMANCE OF COURTS IN ZAMBIA** which is hereby submitted in partial fulfilment of the requirement for the award of a Bachelor's Degree at the University of Lusaka is my own original work and it has not been previously submitted for the award of a degree at this university or any other tertiary institution.

I understand what plagiarism entails and I'm aware of the University's policy in this regard. Thus, where other peoples work is cited, I have duly acknowledged. The errors or omissions in this work are solely mine.

MWEEMBA MUKWANYA

.....

2022

RECOMMENDATION

I recommend that this dissertation prepared under my supervision by Mweemba Mukwanya, entitled **JUSTICE DELAYED OR NO JUSTICE AT ALL? AN ANALYSIS OF THE PERFORMANCE OF COURTS IN ZAMBIA**, be accepted for examination. I have checked it carefully and I'm satisfied that it fulfils the requirement pertaining to the format laid down in the regulations governing directed research.

Ms Mwaka Chizinga

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2022

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My sincerest gratitude goes to my supervisor Ms Mwaka Chizinga who assisted in the process of completing the dissertation. Her expertise, patience and art of legal writing cannot go without being notice, I cannot thank you enough.

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Lastly, my gratitude is extended to those whose names are not mentioned but still helped me to realize that I can do all things through hard work and God's grace.

DEDICATION

This dissertation is dedicated to my sisters. I love you

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CHAPTER ONE

1.0 INTRODUCTION

The maxim justice delayed is justice denied emphases the importance of a speedy judicial process and thus as a result, every person has the right to have their case heard before a court within a reasonable time period. Delays in the judicial settlements of cases results in society having little faith and confidence in the justice system. However, it is common practice for court cases to delay and take many years for them to be heard and determined by a court of competent jurisdiction. This problem has been as a result of many factors one of them being the lack of a clear definition of what is considered as reasonable time for disposal of cases.

The right that an individual has to have their matter determined without undue delay is one that is recognized by the constitution of Zambia in article 118 (2) (b) which provides:

"In exercising judicial authority, the courts shall be guided by the following principles :,(b) justice shall not be delayed."

This principle is not only recognized in the Zambian constitution but recognized and provided for by many other international conventions such as the African Charter of which Zambia is a party. The African charter in article 7 provides:

"Every individual shall have the right to have his cause hear. This comprises… (d) The right to be tried within a reasonable time by an impartial court or tribunal"

On the other hand, courts are creature of the constitution and under article 118 (1) of the constitution (amendments) Act 2 of 2016, their authority is to be exercised in a manner that promotes accountability and delaying in hearing matters goes against the spirit of accountability.[1] Despite being custodians of justice and having provisions such as Article 118 of the constitution to guide them in their determination and disposal of matters, Zambian courts seems to be persistent and dedicated to delaying matters brought before them and thus denying justice.

[1] O Kaaba, and P.T Sambo *'Mutembo Nchinto v Attorney General 2016/CC/0029 (27 October, 2020)'* vol.3,2020

1.1 BACKGROUND OF STUDY

Globally millions of people involved in legal issues find themselves at the doorstep of the court house[2] with hopes to have their cases heard and resolved by the court. However there has been extensive displeasure with the performance of the Zambian judiciary. One of the main challenges facing the Zambian judiciary has been that of inefficiency and unconscionable delays in the processing of cases. Congestion in the court system and the unreasonable delays in the disposal of court cases are unfortunate realities of the judicial process.[3]

The delays have extended to the delivery of judgment which has been seen in the recent constitutional court case of *Mutembo Nchinto v The Attorney General*[4]. This case involved the challenge by the appellant on his removal from office as director of public prosecution. The case did not only take more than 4 years for the hearing to conclude but at the same time it took more than a year for judgment to be delivered. In addition to this, no apology or proper reason was given for the delay taken to render judgment.

The fact that the court that heard the matter is the constitutional court which is a recently established court with little or no backlog of cases, one may only wonder and imagine the reasons for such delay and inconvenience. Sadly, this is far from being the only case delayed in our courts, specifically the constitutional court. Other cases include appeals from the Lusaka central and munali constituency election disputes[5].

Unlike many African nation i.e. South Africa, the Constitution of Zambia does not limit the amount of time that a suspect can be remanded in custody before being brought before a court of law. This has proven to be fatal as a study conducted at the Lusaka central prison reviewed that accused people are kept for years, without having a day in court before a judge or magistrate.

A 2009 study on the rule of law in Zambia found that:

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[2] Teneneji Banda 'Access to Justice: Court Efficiency in Zambia' institute for African development Cornell University 2019, No.20

[3] http://pdf.usaid.gov/pdf_docs/Pnadt562.pdf accessed on 07/11/21 at 04:00hrs

[4] 2016/CC/0029 (27 October, 2020)

[5] O Kaaba, and P.T Sambo *'Mutembo Nchinto v Attorney General 2016/CC/0029 (27 October, 2020)'* vol.3,2020

> Both civil suits and criminal prosecutions incur unreasonable delays. Reasons for delay include rigid and unduly complex procedures, lax case management practices that tolerate excessive adjournments and continuances, [and] lack of automated management information systems to facilitate performance management.[6]

According to **Muna Ndulo** "While court performance measurement is a relatively new phenomenon, it is a movement that has gained momentum over the last few years. Recognizing the important role of the courts in a well-functioning democracy, many government and non-governmental stakeholders now demand performance indicators that can gauge the efficiency and effectiveness of the judicial system. There is very little, if any, empirical data on the performance of Zambian courts. The data presented in this study can be a critical input to future reform initiatives."[7]

Therefore, if the rights of individuals are to be protected and respected, it is very essential that the performance of the courts is monitored as a way of gauging the efficiency and effectiveness of the judicial system. This is to ensure that the courts dispense justice to all.

1.2 STATEMENT OF THE PROBLEM

Zambia is a state party to both regional and international agreements, which are the African Chatter on Human and people's right and the International Convention on Civil and Political rights that aim at, among other things ensuring that a person is tried without undue delay. The right to a speedy trial has also been recognized and guaranteed by the constitution in article 118 (2) (b)[8] which provides that "justice shall not be delayed". However, what is to be considered as delay has not been explicitly stated by the constitution or any other written law and as a result it has made it hard to determine whether Justice has been delayed or not.

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[6] https://www.themastonline.com/2018/01/08/judge-chitabo-wants-cj-to-head-jcc-jsc/ accessed 08/11/21

[7] Teneneji Banda 'Access to justice: Court Efficiency in Zambia' institute for African development Cornell University 2019, No.20

[8] Act 2 of 2016

1.3 OBJECTIVES

i. To analyze international and regional instruments on the right to a speedy trial and how they have been interpreted.

ii. To examine the laws governing the right to a speedy trial in Zambia.

iii. To explore lessons that can be drawn from England with regards to the protection of the right to a speedy trial.

1.4 RESEARCH QUESTIONS

i. What are the international and regional instruments on the right to a speedy trial and how have they been interpreted?

ii. What are the laws governing the right to a speedy trial in Zambia?

iii. What lessons can be drawn from England with regards to the protection of the right to a speedy trial.

1.5 SIGNIFICANCE OF STUDY

The significance of this research is that it seeks to address the issue regarding delays in hearing and rendering of judgments by the courts with respect to cases before it. This study will help guide the judiciary, in particular judges, on how expedient judgment should be delivered to the parties involved in the legal proceedings. At the same time, the study aims to act as a point of reference for the legislatures when enacting laws for the purpose of upholding the rights that individuals have to have their cases resolved within a reasonable time and help cure the inconvenience that is brought about by the delays in rendering judgment.

1.6 SCOPE OF STUDY

This research study will focus on the laws that provide for expedient delivery of justice in our legal system i.e. the constitution (amendment) Act 2 of 2016 and at the same time properly establish the role played by the courts as custodian of justice in the republic.

1.7 LITERATURE REVIEW

There are many scholars have given their opinion on the expedience of delivery of justice. Some of these scholars include:

Luis Felipe Lopez-calva holds the view that "There are different ways in which the rule of law can deteriorate. One of these is the unequal access to justice, since this is a basic service to which everyone must have access in an expeditious manner. Justice that is delay, becomes, actually, injustice."[9] The author does stipulate the time period considered to be delay for purposes delivery of justice.

O'Brien Kaaba and Pamela Towela Sambo posit that "where a Court offers no apology or explanation for its own delay, is manifest violation of Article 118(2) (b) of the Constitution which requires that justice shall not be delayed."[10]

Heise Michael opines that "prolonged case disposal time frequently correlates with an increase in litigation cost and threatens evidentiary quality as memories fades and evidence spoils. Delays in the resolution erode public confidence in the justice system, disappoints and frustrates those seeking solutions through the justice system."[11] Equally, the time period considered to be delay has not be laid down by the author.

Tania Sourdin and Naomi Burstyner hold the view that "Historical acknowledgements of delays in the justice system often recognize the perspective of the accused or the disputant, and suggest that for a person seeking justice, the time taken for resolution of their issue is critical to the justice experience. In essence, these acknowledgements are consistent with more recent research which has shown that the time taken to deal with a dispute is a, and in many cases the, critical factor in determining whether or not people consider that the justice system is just and fair."[12] This denotes the relevance of the right to a speedy trial, however just like the previous authors, the time period to be considered as delay has not been mentioned.

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[9] tps://www.latinamerica.undp.org/content/rblac/en/home/presscenter/director-s-graph-for-thought/justice-delayed---four-out-of-ten-people-are-imprisoned-without-.html accessed on 05/11/21 at 00:23

[10] Kaaba, O'Brien and Sambo, Pamela Towela (2020) '*Mutembo Nchito v Attorney General 2016/CC/0029 (27 October 2020)'* SAIPAR Case Review: Vol. 3: Iss. 2, Article 4.

[11] Heise Michael '*Justice Delayed: an Empirical Analysis of the Civil Case Disposal Time' Cornell law faculty publications.* Paper 692

[12] T Sourdin, N Burstyner *'justice delayed is justice denied'*

Mohammad Mizanur Rahman Chowdhury posits that "Delay in our judiciary has reached a point where it has become a factor of injustice, a violator of human rights. Praying for justice, the parties become part of a long, protracted and torturing process, not knowing when it will end."[13] The author acknowledges that delay by the judiciary has become rampant however, the period considered as delay has not been identified and discussed.

Tinenenji Banda opines "Zambia's legal framework entrenches the right to the dispensation of justice in a reasonable time. Article 118 of the Zambian constitution stipulates that the judiciary shall discharge their duties according to the guiding principle of 'justice without delay.' Furthermore, the Bill of Rights in Article 18 provides that cases "shall be given a fair hearing within a reasonable time". It follows then that an effective judiciary can be described as one that is predictable, resolves cases in a reasonable time frame, and is accessible to the public".[14] The author acknowledges the existence of the right however does not provide possible measures for the realization of this right.

Elsie N. Thompson in **Wilfred Onyango Nganyi & 9 Others v United Republic of Tanzania** hold the view that "On account of prolonged and undue delay, the Court would like to emphasize the importance of a speedy judicial process, especially in criminal matters. Justice delayed is justice denied, is a maxim that is often used in this regard. If society sees that judicial settlement of disputes is too slow, it may lose confidence in the judicial institutions and in the peaceful settlement of disputes. In criminal matters, the deterrence of criminal law will only be effective if society sees that perpetrators are tried, and if found guilty, sentenced within a reasonable time, while innocent suspects, undeniably have a huge interest in a speedy determination of their innocence."[15] Just like the previous authors, what is considered as unreasonable delay has not been given any thought.

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[13] M. Mizanur R. Chowdhury *'a study on delay in the disposal of civil litigation: Bangladesh perspective'* The International Journal Of Social Science, Vol.14 No.1 August 2013

[14] Teneneji Banda 'access to justice: Court Efficiency in Zambia' institute for African development Cornell University 2019, No.20

[15] (006/2013) [2018] AFCHPR 36; (1 January 2013)

Pim Albers opines “The reasonable time requirement concerns the guarantee of anybody going to court that a final decision in a case will be given within a reasonable time without undue delay.” Similarly, the measures to ensure the realization of the right to a speedy trial have not been identified.

1.8 METHODOLOGY

This research shall primarily be a qualitative analysis. Reference shall be made to textbooks, internet sources, journals, and articles, statutes, reports, as well as relevant case law and various other materials that shall aid the research. This research will also include interview information, which is field research.

1.9 ETHICAL CONSIDERATIONS

This research shall be in line with all the essential ethical standards that shall be encountered during the period of carrying it out. The researcher will make certain that all the information and knowledge obtained in confidence in the pursuit of this research shall continue to be confidential and therefore, there shall be no forms of misinformation and misuse of the said information to the disadvantage of the source from which such information is acquired.

2.0 REASERCH OUTLINE

CHAPTER ONE stands as an introduction to this thesis. It introduces the statement of the problem and provided the background of the study.

CHAPTER TWO analyzes international and regional instruments that Zambia is a state party with respect to the right to a speedy trial. Additionally, this chapter analyzes the court’s interpretation of the right.

CHAPTER THREE is focused on identifying and examining the different Acts of Parliament that encompass and protects the right to a speedy trial and at the same time, analyses the efficiency of the Zambian courts in the dispensation of justice.

CHAPTER FOUR reviews the measures within the context of administration of justice in England and analyze their effectiveness within the legal system that is with respect to the realization of the right to a speedy trial. It also considers the observations that led to

the strategies that were advocated and implemented. This is with the aim of drawing lessons from the English jurisdiction.

CHAPTER FIVE summaries the contents provided in the preceding chapters of this thesis. At the same time, it makes recommendations that will aid in resolving the problem identified in this thesis which is the non-existence of the realization of the right to a speedy in the Zambian jurisdiction.

2.1 TIMETABLE WITH INTENDED TIMELINE

ACTIVITY	DATE	DURATION
Submission of chapter 2 to supervisor	31st January, 2022	1 month
Submission of chapter 3 to supervisor	25th February, 2022	1 month
Submission of chapter 4 to supervisor	25th March, 2022	1 month
Submission of chapter 5 to supervisor	29th April, 2022	1 month
Submission of dissertation to course coordinator	20th May, 2022	1 day

CHAPTER 2

INTERNATIONAL AND REGIONAL INSTRUMENTS ON THE RIGHT TO A SPEEDY TRIAL AND THEIR INTERPRETTION.

2.0 INTRODUCTION

This chapter will analyze both international and regional instruments that Zambia is a state party with respect to the right to a speedy trial. Furthermore, this chapter will analyze the court's interpretation of the right. Even though Zambia is not a member of the European Convention on Human Rights, reference to the European court decisions will be made. This is due to its rich jurisprudence on the subject matter.

2.1 THE UNITED NATIONS ON FUNDAMENTAL HUMAN RIGHTS

The charter of the United Nations was adopted on 29th June 1945 and it made reference to human rights and fundamental freedoms and being one of its aims.[16] During this period, people had lost their rights and freedom due to the Second World War and it was thus very crucial that the charter on the United Nations reaffirmed and protected them. However, the United Nations Charter despite making reference to human rights does not contain any explicit provisions that define and protect specific human rights.

Therefore, In order to realize its aim and objectives, article 68 of the UN charter mandated the Economic and Social council (Ecosoc), a UN organ tasked to promote international co-operation in the area of social and economic development, to create commissions on thematic issues, including human rights and as a result, it established

[16] Oliver .D.S. *'international human rights law'* (Cambridge press)

the Human Rights Commission which was later replaced by the human rights council which was a sub commission.[17]

On 24th may, 1948, the commission on human rights adopted the draft declaration of rights which was later adopted by the UN general assembly on 18th December, 1948[18]. This was consequently the establishment of the Universal Declaration on Human Rights (UDHR). According to article 38 (1) (c) of the Statute of the International Court of justice, the rights contained in the UDHR have acquired status of customary international law and are therefore considered as part of the 'general

Principles of law recognized by civilized nations'.[19] The Universal Declaration of Human Rights consists of a Preamble and 30 articles, setting out the human rights and fundamental freedoms to which all men and women are entitled, without distinction of any kind[20]. Some of the rights set up include the right to life and protection from torture.

After the UDHR was adopted, the General Assembly passed a resolution asserting that the enjoyment of civil and political freedoms and of economic, social and cultural rights are interconnected and interdependent and thus requested the human rights commission to draft two covenants[21]. Between the two covenants, one was to outline the civil and political rights while the other outlined the economic, social and cultural rights. And therefore, in 1960, the two covenants being the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) where adopted. The two documents including the UDHR constitute the international bill of rights.

2.2 INTERNATIONAL AND REGIONAL INSTRUMENTS

The human rights regimes can be categorized as 'universal'(international) or 'regional', closely associated with existing international or regional organizations from which they derive their legality. These organizations have provided specific ideological and institutional frameworks as well as the material support to assure the survival and

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[17] *ibid*
[18] Oliver .D.S *'international Human Rights Law'* (Cambridge press)
[19] *ibid*
[20] United Nations *' Human Rights: a basic hand book for UN staff'*
[21] *ibid*

autonomy of the different human rights regimes.[22] In particular, the universal regime that promotes and protects human rights has been conceived and grown under the auspices of the United Nations.

The republic of Zambia is a state party to a number of human rights instruments that aim, among other things, to protect an individual's right to a speedy trial. International human rights instruments lay down obligations which States that are state party are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights.[23] On the other hand, Regional human rights instruments (e.g. treaties, conventions, declarations) help to localize international human rights norms and standards, reflecting the particular human rights concerns of the region.[24] Regional human rights instruments in other words help to bring human rights protection and promotion closer to home.

2.2.1 INTERNATIONAL AND REGIONAL CONVENTION ON THE RIGHT TO BE TRIED WITHIN REASONABLE TIME

Article 14 (3) (c) of the ICCPR (international convention on civil and political rights) provides for an accused person to be tried within a reasonable time. This right has been explained adequately by general comment No.32 as not only intended to avoid keeping persons too long in a position of uncertainty about their fate and, if held in detention during the period of the trial, to ensure that such denial of liberty does not last longer than necessary in the circumstances of the specific case, but also to serve the interests of justice.

What is reasonable has to be gauged in the circumstances of each case, taking into account mainly the complexity of the case, the conduct of the accused, and the manner in which the matter was dealt with by the administrative and judicial authorities. In cases where an accused person is denied bail, they must be tried as expeditiously as reasonably possible. This guarantee relates not only to the time between the formal

[22] Azizur .R.C and Jahid .H.B ' an introduction to international human rights law' (1st ed, hotei and IDC publishers, 2010) P.119

[23] https://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx accessed 10/02/2022 at 05: 40hrs

[24] https://libguides.anu.edu.au/c.php?g=465002&p=3178731 accessed 10/02/2022 at 06:16hrs

charging of the accused and the time by which a trial should commence, but also the time until the final judgment on appeal. All stages, whether in first instance or on appeal must take place "without undue delay."[25] It is very important that all the proceedings relating to a particular trial are conducted expediently.

Article 14 (3) (c) of the ICCPR only makes reference to an accused person and thus does not necessary apply in civil cases. However, the European Convention of Human rights (which is basically a reflection of the ICCPR) make reference to civil hearings.

Article 7 (1) (d) of the African Charter provides that:

"Every individual has the right to have his cause heard. This comprises (d) the right to be tried within reasonable time by an impartial court or tribunal"

Unlike article 14 (3) (c) of the ICCPR, this provisions encompasses both an accused person as well as civil litigants just like the ECHR.

Article 14 (1) of the ICCPR, 6 (1) of the ECHR as well as article 7 (1) of the African charter guarantees a party or an accused person in terms of criminal proceedings a right to a fair trial. Fair trial entails that a person is tried in a timely, effective and impeachable manner under such procedural safeguards that enable the objective examination of the truth and the issuance of a proper judgment thereafter.[26]

Particular characteristics of the right to a fair trial are the right to have access to a court and the right to be heard, which is the right that the party has to present his arguments before the court and in criminal proceedings the right to make any objection to the charge against him. These are rights that are directly linked to the right to be tried within a reasonable time period. The courts failure to make a decision within reasonable time renders an individual's right to a fair trial ineffective and inoperative because in such an instance, justice is not administered by the courts.

Undeniably, the lapse of an excessive period of time from the execution of a crime or from a civil rights dispute, weakens the defensive position of the accused/defendant,

[25] General Comment No.35 on Article 12

[26] E Salamoura ' *The right to be tried within a reasonable time and the restoration of the party's "presumptive" prejudice'*

since the quality of evidence deteriorates with time as proceedings progress. This is usually due to, among other things: a) loss of memory on the part of the witnesses and the involved parties, b) loss of witnesses due to death, disappearance or change of address c) loss of relevant evidence (e.g. documents) and hence d) difficulty in locating relevant evidence, which have an impact on the issuance of a decision as there is a wrong perception over the truth of the facts. Such weaknesses are avoidable by hearing a case and passing a decision within reasonable time.[27]

The administration of justice without undue delay affects the credibility and effectiveness of the justice system in any society and it is therefore important that the court hears and renders judgments within reasonable time. This boost the public's confidence in justice.

2.2.3 COURT INTERPETATION OF THE RIGHT TO BE TRIED WITHIN REASONABLE TIME (SPEEDY TRIAL)

Both the international and regional instruments have recognized the right that an individual has to be tried within a reasonable time and the courts (i.e. the African court on Human and People's Rights and the European Court on Human Rights) have interpreted this rights in many cases.

2.2.3.1 INTERPRETATION BY THE EUROPEAN COURT OF HUMAN RIGHTS

The notion of reasonable time actually referees to the period within which a courts judgment (civil, criminal, and administrative) must be delivered in order for the administration of justice to be effective and efficient. For criminal cases, the concept "reasonable period" commences *(dies a quo*) from the moment that a formal charge is brought against the person. *Eckle v Germany*[28] defined the term 'charge' as "the official notification given to an individual by a competent authority of an allegation that he has committed a criminal offence or some other act which carries the implication of such an allegation and which likewise substantially affects the situation of the suspect".

[27] ibid
[28] Judgement of 15 july 1982

In *Grigoryan v Armenia*[29], The Court notes that a person is usually 'charged' on the date of arrest, or the date when the person concerned was officially notified that he would be prosecuted or otherwise the date when the preliminary investigations were opened. According to *Grigoryev v Russia*[30], reasonable time also includes the appeal proceeding and when they come to an end. Case law thus indicates that from the time an accused person is charged to when judgment is delivered on appeal is what constitutes the notion of reasonable time period which is essential for the public to have trust on the administration of justice.

For non-complex cases, a total duration of up to two years for each stage (i.e. in the court of first instance and court of appeals) is generally regarded as reasonable. However, when proceedings last longer than two years per instance, or more than six years for the whole process (i.e. from the institution of the case until the publication of the final decision of the Court of Cassation or the Council of State), it then becomes relevant to examine the case closely and considers whether the national authorities and the parties have shown due diligence.[31]

For civil and administrative cases, the period within which reasonable period commences differs substantially from criminal cases. The starting point in civil and administrative cases is on the day the concerned proceedings are addressed,[32] that is, according to *Ichtigiaroglou v. Greece*[33], the day when the proceedings are initiated because it is a prerequisite for every case. Therefore, for civil proceeding, the concept of reasonable period indicates the time period from the date that proceedings commence to the day that a final decision is published.

[29] No. 3627/06
[30] No. 22663/06, 23 October 2012
[31] E Salamoura *' The right to be tried within a reasonable time and the restoration of the party's "presumptive" prejudice'*
[32] *ibid*
[33] judgment of 19.06.2008

2.2.3.2 INTERPRETATION BY THE AFRICAN COURT ON HUMAN AND PEOPLES RIGHT

In the case of *Ngayi and 9 others v The Republic of Tanzania*[34], the African court on human and people's rights (herein after the Court) considered what is meant by reasonable time in article 7 (1) (d) of the African charter. The court noted from the onset that there is no standard period considered as 'reasonable time' for a court to dispose of a matter before it and further stated that in determining whether time is reasonable nor not, each case needs to be treated on its own merits.

In order to determine whether time is reasonable or not, the court following *Cuscani v United Kingdom*,[35] provided several criteria's to be used in doing so. These criteria's include, among others: (i) the complexity of the case, (ii) the behavior of the applicant and (iii) the behavior of the national judicial authority.

(i) Complexity of the case

Where a case is complex, the court has acknowledged the fact that it is possible for the matter to be prolonged and such delay is justified. Thus in order to determine whether a case is complex for not, all aspects of the case must be taken into consideration. Having regard to the European court of human rights case law, the court has stated that complexity inter alia can be due to (i) the nature of the facts to be established, (ii) the number of accused persons and witnesses to the case, (iii) the joinder to a case to another case and (iv) the intervention of other persons to the case (v) the volume of the body of evidence.

(ii) Applicants behavior/conduct

The applicant cannot be blamed for using Procedural Avenue that are provided in the law and available to them such as making an application to stay proceedings etc. According to *Kryuk v Russia,*[36] only delays attributable to the respondent State may justify a finding of failure to comply with the reasonable time requirement. The conduct

[34] Application 006/2013
[35] Application 32771/1996
[36] No. 11769/04, 13 December 2011

of the applicant that would possibly justify delay is behavior that is unlawful such as escape from detention[37].

(iii) Conduct of the National judicial Authority

The national judicial authority has a duty to ensure that proceedings comply with the reasonable time requirement. *Cuscani v United Kingdom*[38] held that the trial judge is the ultimate guardian of fairness and therefore is expected to be more proactive. Therefore delays attributable to the state such as transfer of cases from one court to another and hearing of cases against two or more accused persons are not justifiable. Where such is the case, delays in the proceeding will be considered unreasonable.

(iv) What is at stake for the applicant?

The impact of the proceedings on the suspect or the accused's life could be considered as the main factor of relevance for the Court. In *Grigoryan v Armenia*,[39] the court made emphasis on the fact that an accused in criminal proceedings should be entitled to have his case conducted with special diligence. With this respect, the court has thus underlined that an accused should not be kept in a state of uncertainly longer that he should have.

Further, the fact that an accused maybe kept in remand during the proceedings requires the local authorities to administer justice expediently.

2.2.4 SOME FIGURES CONSIDERED AS REASONABLE AND UNREASABLE TIME PERIOD

The courts has made a number of decisions on unreasonable delays and therefore considered certain durations as being reasonable and others unreasonable. With reference to case law, the following conclusion can be drawn:

– Period less than 3 years:

[37] ibid
[38] Application 322771/1996
[39] No. 3627/06, 10 July 2012

Particularly in *Tryumbach v Ukraine*[40] the court established that Proceedings lasting 2 years and 1 month are reasonable. Therefore, it is recognized that proceedings of a duration of 3 years or less are generally considered to be reasonable and any complaint regarding such durations is usually overruled by the Court and considered as '*manifestly ill-founded*' and therefore not admissible.

– Between 3 and 5 years:

In the case of *Jusuf v Greece,*[41] a period of 4 years 9 months for two levels of jurisdiction in which delay was attributable to the authorities was considered to be unreasonable. *Ustyantsev v Ukraine*[42] considered a period of 3 years 6 months for 2 levels of jurisdiction as being reasonable. Therefore, except in situations where delays are attributable to the authorities and/or the accused is in custody, lengths of a period less than 5 years for more than one level of jurisdiction are usually considered to be reasonable.

– More than 5 years:

Dimitar Vasilev v Bulgaria[43] the court considered a duration of 5 years 6 months for 2 levels of jurisdiction where delays was attributable to both the accused and the authorities as being unreasonable. In *Borodin v Russia*,[44] a length of 5years 3 months for 2 levels of jurisdiction in which delay was attributable to the applicant was considered to be reasonable. It is therefore safe to conclude that lengths of more than 5 years are considered as reasonable, except in situation where delay has been caused by the authorities as a result of a lack of sufficient diligence in handling the proceedings.

It can be seen that a length of 3 years is considered to be reasonable as well and a period of 5 years whilst on the other hand, a period of 7 years has usually been considered as being unreasonable.

[40] No. 44385/02, 12 January 2012
[41] No. 4767/09, 10 January 2012
[42] No. 3299/05, 12 January 2012
[43] No. 10302/05, April 2012
[44] *No. 41867/046* November 2012

2.2.4 CONCLUSION

It is impossible to have a fixed period within which a case must be heard and decision rendered. Case law especially by the European court on human rights has tried to give a specific definition of a period which could be considered as reasonable, which is having regard to the particulars of each case.

CHAPTER 3

LAWS IN PRACTICE ON THE RIGHT TO A SPEEDY TRIAL IN ZAMBIA

3.0 INTRODUCTION

This chapter is focused on examining the different Acts of Parliament that encompass and protects the right to a speedy trial and at the same time, analyses the efficiency of the Zambian courts in the dispensation of justice.

3.1 THE BILL OF RIGHTS

The bill of right is a list of fundamental rights guaranteed by the constitution.[45] Before the enactment of the constitution (amendment) Act 2 of 2016, the right to a speedy trial was only enshrined in the bill of rights. With the amendment of the constitution in 2016, article 118(2) (b) was included in the constitution as a guiding principle to the judiciary.

Article 18 of the constitution[46] (the bill of rights) protects an individual's right to be tried within reasonable time. The article provides:

(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

Further, article 13(3) of the constitution[47] provides;

(3) Any person who is arrested or detained

(a) For the purpose of bringing him before a court in execution of an order of a court; or

(b) Upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Zambia;

[45] Chapter 1 of the laws of Zambia
[46] *ibid*
[47] *ibid*

And who is not released, shall be brought without undue delay before a court; and if any person arrested or detained under paragraph (b) is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that the appears at a later date for trial or for proceedings preliminary to trial.

Any person so detained and not brought before a judge to have his cause heard, shall be brought before the court to hear the case against him without undue delay. The right to be heard is one of the important aspect of a fair trial, which right to be heard must be without unreasonable delay for the trial to be regarded as fair.

According to *Chetankumar Shantkal Parekh v The People*,[48] the supreme court stated that Article 13(3) of the constitution entitles any arrested person to a trial within a reasonable time and where any trial is unreasonably delayed, such person must be released - shall be released - on bail as clearly stipulated by Article 13(3). It is clear that article 13 (3) is there to ensure that persons are tried with an acceptable period of it that is without any delay, and fair to do so entitles the accused to be acquitted.

3.2 THE AMENDED CONSTITUTION

The constitution (amendment) Act 2 of 2016 enshrines guidelines in article 118(2) (b) of the constitution[49] for the exercise of judicial authority. It provides as follows;

(2) In exercising judicial authority, the courts shall be guided by the following principles: (b) justice shall not be delayed;

This provision of the constitution ensure that the courts exercise their authority within a reasonable time period. The concept “justice shall not be delayed”, being one of the courts guiding principles, signifies the importance of administering justice without undue delay. The question that follows then is “what is justice?” and lord denning defined justice as "It is what the right-minded members of the community-those who have the

[48] (1995) S.J (S.C)
[49] (Amendment) Act 2 of 2016

right spirit within them-believe to be fair."[50] This amplifies the fact that the court is therefore, the place of justice as well as the law.

In *Savenda Management Services Limited v Stanbic Bank Zambia Limited Gregory Chifire*[51] the supreme courts defined the phrase 'administration of justice' as ''[The] maintenance of right within a political community by means of the physical force of the state; the state's application of the sanction of force to the rule of the right"**.** Apart from the fact that this definition does not set time limits within which the "sanction of force" will be applied, it reveals that administration of justice is always in a state of flux and therefore, those who are its protectors, the Judges, cannot afford to go to sleep.

It is settled and clear that the Zambian legislature has strived and ensured that an individual's right to have his cause heard without undue regard is provided for and respected. However are these laws sufficient in protecting the right to a speedy trial? All the provisions above do not expand on the right that is they do not expressly provide for what should be considered as delay in administering of justice. Therefore, it is without a doubt that the Zambian laws of speedy administration of justice are not broad enough.

What then remains to be analyses is whether the judiciary is doing its part in ensuring that tis right is fully realized in the Zambian jurisdiction. This is because it is one thing to have a law enacted and it's another for its existence to be respected in actuality.

3.3 THE EFFICIENCY AND EFFICACY OF THE ZAMBIAN COURTS

Of the many challenges facing the Zambian court system, one of the most persistent is that of inefficiency. Unfortunately Court inefficiency is a global problem.[52] In Zambia, congestion, backlog and the unreasonable delay in the disposal of court cases are the unfortunate realities of the judicial process.[53] This was acknowledged by the former republican chief justice Irene Mambilima.

A 2009 study on the rule of law in Zambia established that:

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[50] Road to Justice
[51] Judgment No. 47 of 2018
[52] Dakolias, M. *' Court Performance Around the World: A Comparative Perspective*, (1999)
[53] Tinenenji .B. *'Access to Justice: court efficiency in Zambia'*

> Both civil suits and criminal prosecutions incur unreasonable delays. Reasons for delay include rigid and unduly complex procedures, lax case management practices that tolerate excessive adjournments and continuances, [and] lack of automated management information systems to facilitate performance management.[54]

As a result of the delays in the trial proceedings and delivery of judgment, a plaintiff in *Miyanda v The High Court of Zambia*[55] commenced an action by way of a writ of mandamus in the Supreme Court in which he requested the court to render judgment in his case on behalf of the high court. The judgment had been pending for 8 months. However, the supreme courts could not deliver judgment on behalf of the high court because it is an appellant court and since no judgment had been given, it had no authority to decide on the matter.

The Supreme Court held that mandamus is not an appropriate remedy against judges of the superior courts. The applicant further went on, after the judgment was given, and initiated proceedings against the high court judge in the case of *Miyanda v Chaila*.[56] The court in the case held that a "judge could not be sued for adjudicatory delay and that the insulation of judicial officers from lawsuits was indispensable to judicial independence." Therefore, the effect of these judgments (position of the law) is that complainants have no recourse against delay in the delivery of judgments.

In the recent case of *Mutembo Nchinto v The Attorney General*[57], the plaintiff was relieved from his position as Director of Public Prosecution (DPP) and hence initiated an action before the constitutional court. It took four years for the Court to dispose of the case. The court largely blames the delay on the parties for being "locked in interlocutories." The Court however does not explain how and why resolving interlocutory matters took so long. An inspection of the case record shows that the case

[54] Michel, J., O'Donnell, M. & Munalula, M. ' *Zambia Rule of Law Assessment' (2009)*
[55] (S.C.Z. Judgment No.5 of 1984)
[56] [1985] ZMHC 5
[57] 2016/CC/0029 (27 October 2020)

was concluded in September 2019. This therefore means that the Court more than a year to render a mere 50-page judgment.[58]

The Court in the case presented no apology or reason for its own delay, which is manifestly a violation of Article 118(2) (b). Delivering a judgment more than a year after the case closed, without any explanation or apology, is inconsistent with the spirit of accountability dictated by the Constitution.[59] In *Dominic Liswaniso Lungowe & Others v Vedanta Resources Plc. and Konkola Copper Mines*[60], a UK High court judgment involving Zambian litigants, the judge apologized profusely when he delayed by only weeks in delivering judgment and in addition gave proper reasons that lead to the delay.

3.3.1 REASONS BEHIND DELAYS IN DISPOSAL OF SUITS IN ZAMBIA

(a) Backlog of Cases

Former Chief Justice Mambilima noted:

> Zambia has a backlog of legal cases dating way back. It was important, not only from the point of view of the Court but also taking into account the obligations and responsibilities of the others involved in administration of justice, to research the principles and techniques for establishing and managing new, effective, just and transparent systems.

In 2019, The High Court recorded a total of 4,234 criminal cases. Of these, 1,690 cases were brought forward from 2018 and 2,544 were new. Cases disposed of were 2,444, leaving 1,790 cases pending at the close of the year.[61] From these records, it is clear that the number of cases carried over to the following year are quite a lot however, the effort of the judiciary in disposing of cases can be seen from the number of cases disposed in 2019. 57.7% of the criminal cases were disposed of and unfortunately, 42.3% were not.

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[58] Kaaba, O and Sambo .P .T (2020*) 'Mutembo Nchito v Attorney General 2016/CC/0029 (27 October 2020)'* SAIPAR Case Review: Vol. 3: Iss. 2, Article 4.

[59] Ibid

[60] *[2016] EWHC 975 (TCC)*

[61] The Judiciary Reform Annual Report

In relation to civil cases, 8,854 were brought forward from 2018 across all divisions of the High Court. A total of 6,901 cases were filed in 2019. Of these, 5,556 were filed in the General List, 641 in the Commercial Division and 704 in the Industrial Relations Division. The Court disposed of a total of 9,176 cases broken down as 7,785 (General List), 852 (Commercial Division) and 539 (Industrial Relations Division). Out of the 7,785 cases disposed of in the General List, 46.5 per cent (3,619) were disposed of by the Task Force on Backlog. Cases carried forward to 2020 were 6,579.[62]

For civil cases in 2019, the courts had a total of 15,755 cases to dispose of and, the courts managed to dispose of 9176 cases which is 58.2% of the cases before them. From the figures, it has been seen that the courts in both civil and criminal are really making effort in ensuring that cases are disposed of.

The effort to reduce the backlog of cases , especially in the high court, has been seen through the vision of Her former Ladyship the Hon. Chief Justice Hon. Mrs. Justice Irene C. Mambilima which was effective March 2015 to ensure that backlog at the Judiciary is dismantled. The Task Force on Backlog was formed in June 2018, comprising six (6) Judges, who have been assigned to a countrywide exercise to handle matters in backlog at the High Court.[63]

Justice Gertrude Cahawatama, Judge-in-Charge of the Lusaka High Court, informed the meeting held in Livingstone that the Task Force brought up 10 000 case records and reviewed them to establish how many were in backlog, and discovered that approximately 5000 case records were active and needed urgent attention. Thus far, most of these have been dealt with, and that she expects the exercise to be concluded by July 2019.[64]

Therefore, the creation of the task force on backlog of cases has helped relieve the high court of the backlog of cases it has, this is seen as one step forward in the administration of justice in Zambia.

(b) Court Procedural Law

[62] ibid
[63] https://judiciaryzambia.com/2019/02/27/the-task-force-on-backlog-livingstone/ accessed 29/04/22 at 06: 29hrs
[64] ibid

In the Zambian courts, both civil and criminal cases experience unreasonable delays due to complex procedures.[65] The laid down procedures in legislation is either non flexible or not followed at all.

In civil suits, much of the delay occurs because the provisions of the Civil Procedure rules are not properly observed and leaves room to escape speedy disposal.[66] In relation to the production of documentary evidence, little use is made of the rules for discovery and inspection of documents and for serving interrogatories. Parties, in most instances, skip this stage and as a result end up making objects at trial which would have been made the advocates offices.

This leads to unnecessary elongation of the trial process. If this procedural rule could be strictly adhered to, the controversy between the parties can often be narrowed before the cases go for trial.

During trial, both civil and criminal, numerous numbers of adjournments are given by the court sometimes to suit the convenience of the lawyers or the judges themselves which, without doubt, contributes to delays.[67] Adjournments are mainly due to the infamous 'trial by ambush', i.e., lack of disclosure of evidence prior to trial (usually in the subordinate Court).[68]

A lawyer who is ambushed during trial with complex documentary evidence has an option of either seeking an adjournment to study the evidence, or to proceed and suffer the possible consequences of appearing unprepared for cross-examination of a prosecution witness.

(c) Conduct of Lawyers

It has been reviewed that in a number of cases, counsel plays a huge role in delays and Judges routinely rebuke lawyers for their tardy conduct. The court in several cases scolded counsel for either delay, failure to follow orders, and/ or all-round discourtesy of

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[65] Michel, J., O'Donnell, M. & Munalula, M. *' Zambia Rule of Law Assessment' (2009)*

[66] Mohammad M. R. C. *' A study on delay in the disposal of civil litigation: Bangladesh perspective'* Vol.14 No.1 (2013)

[67] K.N.C. Pillai **'***Delay In Criminal Justice Administration — A Study Through Case Files'* Vol. 49, No. 4 (2007)

[68] Sunday B. N.SC and William .N. *'Accused's rights and access to prosecution information in subordinate courts in Zambia;*

court proceedings.[69] In *Impala Gems and Trophies v E.N.T Motor limited*[70] the judge in obiter states:

"I found the conduct of Counsel for the Defendant during this episode to be very casual and discourteous to this Court. The discourtesy lay in his failure to file notices or motions to adjourn. It was clearly an attempt at delaying the disposal of the matter by way of procrastination. I therefore found no compelling reason to adjourn the matter and proceeded to hear the Plaintiff close its case."

In the case of *Moses Sakala v Abacus 360 Corporate Ltd*[71] the presiding judge in the matter commented:

"There has been a total disregard of the order for directions. Put simply there has been a conspicuous disobedience or non-compliance with the order for directions. Advocates and litigants who chose to ignore court orders do so entirely at their own peril"

In addition, the judge in *Nkhuwa v Lusaka Tyre Service Limited*[72] noted the following:

"This court has had occasion in the past to comment adversely on the attitude of legal practitioners to compliance with other rules of procedure, but it is time that all legal practitioners were made to understand that where the rules prescribe times within which steps must be taken these rules must be adhered to strictly and those practitioners who ignore them will do so at their own peril".

In *Mutantika and Another v Chipungu*[73], the court obviously vexed by what it considered an abuse of court process and waste of court's time, held quite cuttingly;

"How can two men of full age and capacity…sit in Court and decide to remain mute, whether by visitation of God or otherwise, despite hearing their names and their Appeal being called for hearing by the Court, more so, in the absence of their legal Counsel? This is not the type of conduct that the Courts of the land expect of prudent and serious litigants"

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[69] Tinenenji .B. *'Access to Justice: court efficiency in Zambia'*
[70] [2014] ZMHC 61 (31 July 2014)
[71] 2017/HP/0430 (20 March 2018)
[72] [1977] (SC) Z.R. 43.
[73] [2014] ZMSC 127

From the decisions above, it is clear that the behavior of a lawyer during the trial process definitely has an impact on whether a case is disposed of in due time or not. Counsel as well as litigates have a role to play when it comes to justice being administered without delay. Therefore, in order to eliminate delay in disposal of suits, lawyers must play their role diligently.

(d) Physical Infrastructure

Physical infrastructure refers not only to the court buildings but also covers equipment and instruments within the infrastructural judicial system and contributes to the process of justice in the judicial system, either directly or indirectly. The Accessibility of infrastructural facilities plays a key part in the accomplishment of the judiciary's objectives and overall performance.

In Zambia, courts incur unreasonable delay due to absence of recording equipment to create court records.[74] Not all areas in Zambia have courts located in the area and as a result, people move from one area to another to access the courts. Failure to have appropriate number of courts and tribunals brings about court congestion of cases and as a result leads to delay in disposal of cases. The consequence is that trials are prepared at a very long time, resulting in cases being stacked up in courts.

3.4 CONCLUSION

The Zambia legislature has enacted a number of provisions protecting an individual's right to have his cause heard without undue delay. In as much as the onus is on the judiciary to convey this right into actual reality because it is one thing having a law enacted and it's another for its existence to be respected in actuality, the laws are not sufficiently protecting the right to a speedy trial. It has therefore been determined that the Zambian judiciary, in many cases, has failed to ensuring that matters are disposed in due time.

[74] Michel, J., O'Donnell, M. & Munalula, M. *'Zambia Rule of Law Assessment' (2009)*

CHAPTER 4

LESSONS TO BE DRAWN FROM ENGLAND RELATING TO THE PROTECTION OF THE RIGHT TO A SPEEEDY TRIAL.

1.0 INTRODUCTION

England is a country that is well known for protecting and respecting the rights of individuals, that is, including the right to a speedy trial. This chapter seeks to review the measures within the context of administration of justice in England and analyze their effectiveness within the legal system for the realization of the right to a speedy trial. It also considers the observations that led to the strategies that were advocated and implemented.

1.1 BACKGROUND

Britain has a long and proud history of developing human rights. It is incorrect, as some suggest, that human rights are a recent European imposition which somehow conflict with British traditions.[75] Introduction of human rights in Zambia stems back to 1200s with the introduction of the magna carter in 1215 which introduced the concept of habeas corpus and the right to jury.

As time went by, human rights were further developed in England through the enactment of the Bill of Rights of 1689 which contained several provisions relating to human rights including a requirement that no 'cruel and unusual punishments' could be imposed.[76] The British common law as developed by the courts also recognized concepts relating to human rights long before the European Convention of Human Rights: for example the right to fair trial.

The end of world war two lead to the creation of the European Convention of Human Rights (ECHR) and England was the first European country to ratify the convention. As a result, a further protection on human rights was created in the English jurisdiction. However despite being the first country to ratify the ECHR, England was that last country to incorporate it.

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[75] Equality and human rights commission *' the case for the human rights act'*
[76] *ibid*

The lack of the domestication of the ECHR in England resulted in a week protection and realization of its right in the English jurisdiction. This lead to the enactment of the Human Rights Act of 1998 that was based on the ECHR which became the primary act on human rights protection in England.

1.2 ENGLAND AND THE RIGHT TO A SPEEDY TRIAL

The Human Rights Act[77] is a law in full force from in the United Kingdom (UK). It gives further effect in the UK to the fundamental rights and freedoms in the European Convention on Human Rights (ECHR).[78] Article 6 of the human rights act[79] protects the right to a fair trial which included a right to a hearing within reasonable time. The article provided as follows:

> *In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice*.

The right to a hearing within reasonable time means that an individual is entitled to have his/her case heard without excessive procedural delays. Whether a delay is excessive will very much depend on the circumstances of your case i.e. the type and complexity of the case (for example, criminal cases and family cases involving children usually have a strict timescale).

Efforts are always being made to retain waiting time at a minimum and to pursue new means of increasing the disposal rate while at the same time reducing late change of

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[77] 1998
[78] J. Straw and L. Irvine *' HUMAN RIGHTS ACT: an introduction'*
[79] *ibid*

plea. England has measure in place to give rise to speedier trials within the jurisdiction that have enabled the delivery of swift and expeditious justice for the people.

1.3 ENGLISH MEASURES ON SWIFT JUSTICE

(I) EITHER-WAY TRIALS

The establishment of a category of intermediate offences which could be tried in the Crown Court or magistrates' court was one method of redistributing cases between the higher and lower criminal courts and dealing with an overloaded Crown Court. Offences that can be tried Either-way have been defined as:

"Those which, although serious enough to be indictable, are never even at worse very grave, i.e. reckless driving or making off without payment contrary to section 3 of the Theft Act 1978, and those which vary in gravity depending on the facts of the particular case, i.e. , criminal damage or theft."[80]

Increasing the categories of offences triable in the magistrates' courts should ensure that cases are disposed of more promptly, as jury trials are longer than non-jury trials. The report on "The Redistribution of Criminal Business Memorandum of Evidence to Lord Justice James Committee" observed:

"It is clear that the two most obvious and effective means of bringing about a re-allocation effective means of bringing about a re-allocation of work in favor of magistrates' courts are to remove the right to trial by jury in certain classes of cases and to widen the range of offences triable summarily with the consent of the accused."[81]

The reason why re-allocation of work was re-allocated to the magistrate court is because according to a study conducted by the Vera Institute established that cases are dealt with more swiftly in the magistrates' courts. This study revealed that most cases which got to the magistrates' courts were concluded at the accused persons' first "schedule court appearance". Sentencing took place on the same day as adjudication in

[80] Christopher J. Emmins *'A Practical Approach to Criminal Procedure',* 1983
[81] Chairman: The Lewis Hanser, Q.C., 1974

over ninety per cent of the summons cases and at least seventy-five per cent of the arrest cases.[82]

Either way trials were a result of the crown court being so overburdened with cases that it became such a crucial concern for the English judicial system. In order to find a solution, the "Interdepartmental Committee on the Distribution of Criminal Business between the Crown Court and Magistrates' Courts" was appointed.[83]

Following the recommendation of a tripartite classification of offences, one of which was the creation of a category of intermediate offences which could be tried either in the Crown Court or magistrates' courts, the committee then considered the procedure which was applicable to that category of offence. The classification of offences was principally based on the provisions of the Magistrates' Court Act.[84]

Some of the recommendations by the committee included a choice of forum, in that, an accused person could elect whether to opt for a jury trial or not. It further made a recommendation that summary trials could only occur with the consent of the court, the accused and the Director of Public Prosecutions and that the crown court that the Crown Court in sentencing on an indictable or intermediate offence, should have power to sentence the accused person for any summary offence to which he pleaded guilty.

As a result of the committee's report, the Criminal Law Act 1977, Chapter 45, was enacted. The Act adopted the recommendations of the committee and repealed the provisions dealing with classification of offences under the Magistrates' Courts Act 1952 and introduced the tripartite classification, either-way trials.

Zambian offences are classified in such a way that they can be tried at first instance in the subordinate court or the high court. There are no such offences that can be tried either in the high court or subordinate court at first instance. This is one of the differences between the English system and the Zambian system of classifying offences.

(ii) COMMITTAL PROCEEDINGS

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[82] Waiting Times in Magistrates' Courts - *an Exploratory Study, Vera Institute of Justice, London*, 1979.

[83] J.A Evans *'Interdepartmental Committee on the Distribution of Criminal Business between the Crown Court and Magistrates' Courts'* 1975, cmnd.6323. **128**

[84] 1952

The introduction of 'paper committal' in England pursuant to section 1 of the Criminal Justice Act, 1967, Chapter 80, was another method of reducing caseloads and waiting times.

Prior to the enactment of the Act, full committal proceedings were required for cases triable on indictment. Full oral inquiry was seen, however, as a cause of excessive waiting times and caseloads.[85]

Empirical studies revealed that 'paper committals' accelerated the trial process. The study stated that analyses of 'paper committal' proceedings revealed that the average time for full committal was 15.3 weeks, compared with 8.4 weeks for 'paper committal.'[86]

However, the justices' clerk society observed and stated that defence lawyers agreed to 'paper committals' procedure because it was expeditious and not because they had read the evidence and come to a considered conclusion that there was a prima facie case.[87] The society felt that this weakness was not a criticism of the system but of the 'local legal culture', be they prosecutors, magistrates or clerks. *R V Brixton Prison Governor Ex Parte Bidwell*[88] emphasized that the court must be satisfied that there is a prima facie case because that is the test required by the jurisprudence.

Similarly, although 'old style' committal was rarely used and 'paper committal' was regularly used, it was discovered that a number of weak cases reached the Crown Court by way of 'paper committals'.

The Royal Commission on Criminal Procedure, in dealing with the effectiveness of "Criminal Proceedings In Preventing Inadequately Prepared And Selected Cases Going To The Crown Court" observed, that the statistics revealed in 1978 that more than 84,000 accused persons were committed to the Crown Court and over 2,000, or just over two per cent, were discharged because of the insufficiency of evidence. The commission further stated that ordered and directed acquittals in the year 1978 was

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[85] D. T. Harrison '*the right to speedy trial: a comparative analysis of the administration of criminal justice in Jamaica, England and the United States of America.'* (1993)

[86] Jones, Peter; Tarlin, Roger; Vennard, Julie, *'The Effectiveness of Committal Proceedings as a Filter in the Criminal Justice System'* in Managing Criminal Justice, 1985

[87] The Law Society: A Review Of Criminal Procedure, 1981

[88] [1956] 3 ALL.

over forty per cent nationally and as high as fifty-four per cent in one area. Whether there was a need to continue with committal proceedings was also canvassed.[89]

The total dispensation with committal proceedings has been advocated in some quarters, as also its modification. The Justices' Clerk Society, for instance, called for the abolishment of committal proceedings, and instead, for a scrutinizing process to be undertaken at the Crown Court during a pre-trial inquiry.

The society was also of the view that justice would not be prejudiced by substituting 'paper committals' for a requirement that a defence solicitor certify that he had read the prosecution statements and was of the view that a full committal procedure was not necessary. The fact of certification would not fix the defence solicitor with ‘responsibility for the state of preparation of the prosecution's case nor imply that the case was "fit for committal".[90]

The Bar Association was of the view that 'old style committal' and 'paper committal' should be administrative and involve no court appearance.[91]

A study suggests that 'paper committal' reduces waiting time as the repetition of the prosecution's case was now curtailed. However, a flaw of this procedure is that a significant amount of weak cases reached the Crown Court. Nevertheless, 'paper committals' culled out some of the weak cases from the system.[92]

With the introduction of the Crown Prosecution Service in England and Wales in October 1986, cases have been more carefully scrutinized; thus, a larger flow of weak cases are screened out of the system. The test used by the Crown Prosecution Service is not a "bare prima facie" case but "a realistic prospect of conviction".[93]

The effectiveness of committal proceedings is questioned, hence, the reason for calls before and after the Criminal Justice Act, 1967 for its discontinuance. However, it has withstood the test of time and during that period its efficiency has increased.

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[89] C. Phillips ‘*Royal Commission on Criminal Procedure, Law and Procedures’* 1981.
[90] The Law Society: *A Review of Criminal Procedure*, 1981.
[91] *ibid*
[92] Jones, Peter, et al., ‘*The Effectiveness Of Committal Proceedings As A Filter In The Criminal Justice System’*, [1985] Criminal L.R. 355, 362.
[93] Code for Crown Prosecutor, p.l.

Committal proceeding in Zambia, which is the process through which it is determined whether a person charged with an offence which can only be tried by the High Court should be committed to the High Court for trial, are in two ways. Which are through;

(a) Summary procedure

Section 254 of the criminal procedure code[94] provides for the procedure as follows;

> *Notwithstanding anything contained in Part VII, in any case where a person is charged with an offence not triable by a subordinate court, the Director of Public Prosecutions may issue a certificate in writing that the case is a proper one for trial by the High Court as a summary procedure case and such case shall, upon production to a subordinate court of such certificate, be dealt with by the subordinate court in accordance with the provisions of this Part.*

What happens in practice is that once the police have completed their investigations, they transmit records of the case to the Director of Public Prosecution (DPP), which then studies and analyses it. If the DPP is satisfied that there is sufficient evidence to commit the matter for trial to the High Court, then a Certificate of Committal is issued to the Court to commit the case to the High Court.[95] Thus once the DPP has issued a Committal Certificate, the Subordinate Court then commits the case.

(b) Preliminary Inquiry

A preliminary inquiry (PI) is conducted whenever a charge is brought against an offence not triable by a subordinate Court, and the DPP has not issued a certificate in terms of Section 254 of the Criminal procedure code.[96] A Subordinate Court may also hold a PI where it considers that a case is not suitable for summary trial.[97]

The PI is a lengthy procedure which includes examining of evidence and witnesses before the Court and then making a finding as to whether there is sufficient evidence to commit for trial.

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[94] Chapter 88 of the laws of Zambia
[95] Open Society Initiative for Southern Africa '*A Survey Report on the Application of Bond and Bail Legislation in Zambia*' (2014)
[96] Chapter 88 of the laws of Zambia
[97] Judicial Circular No. 3 of 1962

Committal in the Zambian jurisdiction requires the subordinate court to review by way of a preliminary inquiry the matter before committing it to the high court. And with the existence of full committal which not only take long as witnesses have to be examined, the magistrate court has on occasion deliberated on matter it is expected to commit and renders judgment which is not within its jurisdiction. This was the situation in *R v Changala*.[98] As a result of all these irregularities and issues in practice, a case undergoes through an unnecessary lengthy procedure.

(iii) **DISCLOSURE**

Another method of speeding up the trial process is by disclosure. Criminal disclosure is the exchange of information between the prosecution and defence. This exchange should assist the parties in effectively answering the opposing counsel.[99]

While disclosure is acceptable and normal practice in civil procedure and plays a significant role therein, in criminal procedure it is permissible only in a limited sense. It is more so in the case of disclosure by the accused. This is because the adversarial system is based upon liberal ideology which places the burden of proof on the prosecution.

There are laws in England which allow for pre-trial disclosure by the prosecution and to a limited extent, by the defence. There are also informal rules governing disclosure in criminal proceedings.

The possible reason for disclosure in criminal proceedings was advanced in the report of the “"Interdepartmental Committee on the Distribution of Criminal Business between the Crown Court and Magistrates' Courts" in the following terms:

While we cannot claim that a greater measure of disclosure would have a dramatic effect on the distribution of business, we believe that it would make a significant contribution towards preventing cases being committed for trial unnecessarily. The extent of that contribution we are unable to forecast. Whatever it may prove to be, it is,

[98] Case No. 50 of 1938

[99] D. T. HARRISON ‘**THE RIGHT TO SPEEDY TRIAL:** A COMPARATIVE ANALYSIS OF THE ADMINISTRATION OF CRIMINAL JUSTICE IN JAMAICA, ENGLAND AND THE UNITED STATES OF AMERICA.’ (1993)

in our view, most desirable in the interest of justice that defendants should be fully acquainted with the case against them as far as it is practicable to achieve."[100]

An accused person committed to the Crown Court for trial under section 1 of the Criminal Justice Act[101] is entitled, prior to committal, to copies of the prosecution witnesses' statement. This is for purposes of ensuring that the accused person knows the evidence against him/her. Also, any such accused person committed under section 7 of the Magistrates' Courts Act[102], is also entitled on committal, to copies of the depositions and statements adduced by virtue of section 2 of the Criminal Justice Act[103]

Section 48 of the Criminal Law Act,[104] and the Magistrates' Courts (Advanced Information) Rules,[105] entitle the defence to disclosure upon request in all either-way cases. The prosecutions extent of disclosure includes: prosecution witnesses' statements; accused persons' statements; medical or forensic evidence. The prosecution is also expected to disclose exhibits, the criminal records of any material witness and any other evidence which exonerates an accused person.

In *Dallison v Caffery,*[106] lord Denning (minority judgment) observed that the prosecution is obliged to furnish the name, address and a copy of the statement of the witness. However, Lord Diplock held that the duty of the prosecution was confined to making the witness available, which is, supplying the names and addresses only of witnesses. The court in *R v Lawson and another*,[107] a latest decision, approved Lord Denning's dictum which provided that a copy of the witness' statement should be provided where that witness can give material evidence that will assist the defence.

The case of *Connelly v DPP*[108] observed that the prosecution had an obligation to disclose convictions which would otherwise affect the credibility of the crown witnesses.

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[100] J.A Evans *'Interdepartmental Committee on the Distribution of Criminal Business between the Crown Court and Magistrates' Courts'* 1975, cmnd.6323. **128**
[101] 1967 Chapter 80
[102] 1953
[103] 1967 Chapter 80 of the laws of England
[104] 1977
[105] 1985
[106] [1965] 1 Q.B. 369
[107] [1990] Crim. App. R.62.
[108] [1964] A.C. 1348.

In fact, where a witness for the prosecution is of such bad character or has convictions which affects his credibility, the prosecution is under obligation to reveal that fact.

According to *R V Levland JJ Ex Parte Hawthorne*,[109] failure to carry out these duties may be regarded as a denial of natural justice or a material irregularity. Notwithstanding case law, there is no procedure to enforce the duty to disclose. Besides, the discretion of the prosecutor is central to the duty to disclose and what is "material" is a subjective determination.

On the part of the defence, section 11 of the criminal justice act[110] provided that where the defence is an alibi, the accused must notify and disclose to the prosecution within seven days where he claims to have been at the material time and the names and addresses of witnesses he plans to rely upon. This is so to enable the prosecution to investigate the alibi. Failure to notify the prosecution, leads to the accused losing his defence.

In accordance with the Interdepartmental Committee on the Distribution of Criminal

Business between the Crown Courts and Magistrates' Courts, it was suggested that if the prosecution evidence is to be revealed, then the defence should also disclose its case, but the committee observed that the suggestion was wrong in principle as the accused is presumed innocent and such a change might go against the defendants presumption of innocence.

The Royal Commission on Criminal Procedure observed that under the then present law the accused was only required to give advance information to the prosecution as regards alibi. However, the commission gave a suggestion that this principle should be extended to other defence's which might take the prosecution by surprise, for example, medical evidence or expert forensic scientific evidence which the defence intends to rely on. This suggestion was later adopted by the Crown Court (Advance Notice of Expert Evidence) Rules, 1987. Therefore, the defence is expected to disclose information

[109] [1979] 2 W.L.R. 28
[110] 1967 Chapter 80

relating to alibi, medical evidence or expected forensic science. This is a way of eliminating the element of surprise on the prosecutions part.

Rules on disclosure are straightforward and non-complex however, *R v Judith Ward*[111] it was demanded that guidelines on disclosure of evidence to be given statutory effect. A study disclosed that prosecutors found it difficult to provide solicitors with adequate summaries and almost impossible to provide full statements in each case without incurring delays. [112]

However despite some of the flaws, Disclosure goes to the root of speedy trial and fairness. Failure to reveal exculpatory or material evidence is considered by the court as a material irregularity; therefore, non-disclosure by the prosecutor may affect speedy trial in view of consequences such as a retrials. Disclosure thus appears to have little, if any, negative effect on the trial process.

In Zambia, pre-trial disclosure in criminal cases is non-existence and thus criminal trial are referred to as trial by ambush. A defence lawyer who is ambushed during trial with complex documentary evidence has a choice to either seek an adjournment to study the evidence, sometimes disguised as 'seeking further instructions from the client', or to proceed and suffer the possible embarrassment of appearing unprepared for cross-examination of a prosecution witness.[113]

The courts justification for pre-trial non-disclosure was given in the *People v Kasonkomona*[114] and provided as follows;

> While we note that under the Constitution in article 18(1) of Chapter 1 of the Laws of Zambia, a person arrested and charged for a criminal offence is entitled to a fair hearing, there is no corresponding provision either in the Constitution itself or the Criminal Procedure Code which obligates the prosecution in the

[111] 1992

[112] Baldwin J and Mulvaney A, *"Advanced Disclosure in the Magistrates' Courts, the Working of Section 48,* **[1987]** 151 J.P. 409.

[113] S. B. Nkonde SC and W. Ngwira *'accused's rights and access to prosecution information in subordinate courts in Zambia'*

[114] No. 9/04/13 (SubCt).

Subordinate Court to extend, provide or exchange the witness statements or exhibits which the prosecution are likely to avail before court[115]

However this system has brought more harm than good. Non-disclosure in Zambia has led to lengthy proceedings due to adjournment by the parties for purposes of analyzing the evidence and/or analyzing the evidence on the spot in court.

1.3 LESSONS TO BE DRAWN FROM ENGLAND

England has laws and rules that are aimed at realizing an individual's right to fair trial and they have aided England in becoming one of the countries in the world that administers justice within a reasonable time. As a result, Zambian should draw lessons from the English laws and measure in place.

Disclosure in criminal cases in England has had a positive impact on the English jurisdiction and just like England, Zambian should include disclosure in its legislation. This will eliminate the unnecessary adjournments by the advocates as well as lengthy proceedings.

It can't be denied that Zambian is traditional and things are usually done in a traditional old fashioned manner, this is evident through the continual practice of full committal proceedings which take longer than paper committal that was introduced in England. If Zambian is to realize the right to a speedy administration of justice, paper committals is a step that ought to be taken in the Zambian jurisdiction.

Zambian needs to follow suit of the English measures and laws on speedy administration of justice if the right is to become a reality in the Zambian jurisdiction. The Zambian laws need to be modified and more specific like the English laws so as to create no ambiguities as to the extent of the right.

1.4 CONCLUSION

England is one of the countries in the world that delivers justice without delay in most instances. This position has been attained as a result of parliament and judicial effort of developing or enacting measures and rules which are essential to the protection of the

[115] *ibid*

right to a speedy and fair trial and have stood the test of time within its jurisdiction. And despite having laws in Zambia providing for a speedy administration in Zambia, there is a lot that Zambian can learn from the English legal system and it is thus recommended that Zambian laws should include the above English measures.

CHAPTER 5

CONCLUSIONS AND RECOMMENDATIONS

1.0 INTRODUCTION

This chapter summaries the contents provided in the preceding chapters of this thesis. At the same time, it is aimed at making recommendations that will aid in resolving the problem identified in this thesis which is the right to a speedy trial not being respected and properly enforceable in the Zambian jurisdiction.

1.1 GENERAL CONCLUSION

The right to a speedy trial is an essential element of the right to a fair trial. This means that in order for fairness to exist in any proceeding whether civil or criminal, this right ought to be protected and respected by both the legislature and the judiciary in any given jurisdiction.

It has been identified that the right to a speedy trial has been given recognition and statutory protection on the international plan as well as in the African region through the creation of the International Convention on Civil and Political Right and the African Charter on Human and People's Rights respectfully.

However, even with such statutory recognition and protection, in reality this is not the case. Despite Zambia having enacted legislation protecting this right, the judiciary has failed to make it a reality for parties to a proceeding within its jurisdiction. This failure is not just a local problem but has been identified as being a global issue.

Despite this global issue, countries like England have since strived hard to ensure that the people within its jurisdiction have full realization of their right to a speedy trial. Because of this, Zambia should draw lessons from the English laws and rules if full realization of the right is to be attained.

1.2 SUMMARY OF CHAPTERS

This research paper contains 5 chapters which analyze the problem relating to the realization of the constitutional guarantee of the right to a speedy trial with lessons being drawn from the English jurisdiction.

1.2.1 CHAPTER ONE

The first chapter identified the legal problem and thus created a foundation for the research study. This chapter also discussed and laid down the background of the study that is how the right to a speedy trial seems to have no effect in the Zambian jurisdiction that is with specific reference to the case of *Mutembo Nchinto v The Attorney General.*[116] Furthermore, the chapter highlighted three (3) objectives of the study which form the main focus of the preceding chapters.

The chapter also highlighted the significance of the study which is to address the issue regarding delays in hearing and rendering of judgments by the courts with respect to cases before it.

1.2.2 CHAPTER TWO

Chapter two focused on analyzing both international and regional human rights instruments that encompass and protect the right to a speedy trial that Zambia is a state party to. It further examined the court's interpretation of this right.

[116] 2016/CC/0029 (27 October, 2020)

1.2.3 CHAPTER 3

Chapter 3 centered on the identifying Zambian statutes that protect the right to a speedy trial, and the constitution[117] for the main focus. It went on to discuss the efficiency and efficacy of the Zambian courts in ensuring that matters are heard and disposed of within reasonable time.

In discussing the efficiency and efficacy of the Zambian courts, reasons for unreasonable delay where identified and included; (a) physical infrastructure, (b) backlog of cases, (c) court procedural laws and (d) the conduct of lawyers.

1.2.4 CHAPTER FOUR

This chapter focused on identifying English laws and rules that have helped England to ensure that there is total realization of the right to affair trial within its jurisdiction. This was discussed for purposes of drawing lessons for the Zambian jurisdiction.

It was found, in this chapter, that there are quite a number of measure put in place by the legislature as well as the English judiciary which have played a huge role in the realization of the right under discussion. The measure identified and discussed include; (a) the introduction of either-way trials, (b) the introduction of paper committals, and (c) disclosure in criminal proceedings.

The chapter was concluded with an acknowledged of England's position as one of the countries in the world that administers justice without any unreasonable delays.

1.3 RECOMMENDATIONS

Having highlighted the inadequacies of the Zambian laws and rules with respect to the protection of the right to a speedy trial, this research study proceeds to make recommendations. The research recommendation are mainly bordered around the amendments to be made to the existing laws in Zambia. The following are the recommendations for the insurance of the full realization of the right to a speedy trial within the Zambian jurisdiction:

[117] (amendement) Act 2 of 2016

1.3.1 AMENDMENTS TO THE CONSTITUTION

As highlighted in this study, the constitution[118] in article 118 (2) (b) is one of the governing principles of the judiciary and provides;

(2) In exercising judicial authority, the courts shall be guided by the following principles: (b) justice shall not be delayed;

This provision, being the only provision in the amended constitution, does not define what is meant by the term 'delay' and as a result creating a level of uncertainty. Therefore, if the right to a speedy trial is to be fully realized, the constitution must adequately define the term 'delay' to include an accepted duration within which a matter ought to be heard and judgment rendered. By so doing, judges will be aware of the period within which to deliberate matters before them.

Furthermore, the constitution must adequately set perimeters around this right, that is, when ones right begins and when it ends. International and regional case law has adequately provided these perimeters, however it is essential that they are given statutory recognition because case law that is not decided by the Zambian courts is only persuasive and not binding on our courts.

1.3.2 INTRODUCTION OF DISCLOSURE

Disclosure is an acceptable and normal practice in civil procedures, however, this is not the case in criminal proceedings. The exchange of information has proven to be a method helpful in speeding up trial proceedings in English jurisdiction. Therefore, the high court rules[119] and the subordinate court act[120] must include provisions pertaining to pre-trial disclosure of information between parties in criminal proceedings.

1.3.3 INTRODUCTION OF PAPER COMMITTAL

Zambian courts have tremendous amount of backlog of cases and one of the ways of eliminating this problem is through the introduction of paper committals. England introduced this type of committal and since its introduction with the jurisdiction, there

[118] (Amendment) Act 2 of 2016
[119] Rules Made Under The High Court Act-Chapter 3 Of The 1960
[120] Chapter 28 Of The Laws Of Zambia

has been a reduction in caseloads and waiting time. Therefore, having highlighted the significance of paper committal and the positive effect it's had in England, it is very necessary that the high court rules[121] be amended to include paper committals.

1.3.4 INTRODUCTION OF EITHER- WAY TRIALS

Introducing categories of cases that are triable in either the magistrate court or the high court. Introducing such a category of offences would entail that the high and magistrate court would, at the same time, be courts of first instance to such cases. Either-ways trial would entail that more types of offences would be triable in the subordinate court and thus relieving the high court of its burden.

1.3.5 DEVELOPMENT OF COURT INFRASTRUCTURE

In order to reduce backlog of cases, which goes to the roots of delay, it is very essential that our courts have the equipment's that is necessary for the performance of its functions. Furthermore, courts should be created in every area within the jurisdiction, that is, there should a high court located in every part of the country. This will ensure that there is an even proper distribution of cases among the courts and as a result, reduce the case load in courts.

[121] Rules Made Under The High Court Act-Chapter 3 Of The 1960

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STUDENT NAME **:Mweemba Mukwanya**

STUDENT IDENTITY NUMBER **:LLB18213507**

SCHOOL **:LAW**

TITLE (TOPIC) OF PAPER **: JUSTICE DELAYED OR NO JUSTICE AT ALL? AN ANALYSIS OF THE PERFORMANCE OF COURTS IN ZAMBIA.**

1. **Knowledge and understanding of the topic**
   - identifies and addresses issues concisely and coherently
   - demonstrates understanding of key concepts related to the topic

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