

**A Critical Analysis of the Law Governing Admissibility of Confessions in the Law of
Evidence in Zambia and the Nature and Extent of Torture Involved**

By

MUNGALA PETER ANDREW

(27027163)

A dissertation submitted to the University of Zambia in partial fulfillment of the requirements
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THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW

I recommend that the obligatory essay which was prepared under my supervision by

MUNGALA PETER ANDREW

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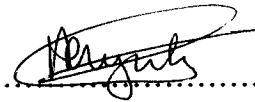
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ABSTRACT

This essay recognises that torture is expressly outlawed and is illegal under Zambian law. Despite it being illegal it is widely practiced by the law enforcement officers on the accused person in a bid to obtain incriminating statements from them. The essay proceeds to advance argument that the law enforcement agents and other scholars have forwarded to justify torture; on the other hand the essay outlines the reasons that have been outlined by the human rights activists as well as other scholars against the use of torture to extract incriminating statements. The essay brings out the fact that the nature of torture inflicted on the victims is diverse and extent of torture inflicted on the accused persons range from the victims sustaining mere physical injuries to death in certain instances.

The essay discusses the admissibility of confessions under Common Law. Under Common Law in order for a confession to be admissible as evidence it is important that the judge satisfies the provisions of the Judges' Rules regarding admissibility of confessions. The essay will examine admissibility of confessions in Zambia and the steps and guidelines that the Supreme Court of Zambia has on several occasions given to the lower Courts. Despite the Supreme Court having offered clear guidance on what approach to be followed before a confession is admissible as evidence, the lower Courts have in certain instances failed to adhere to the guidelines given by the Supreme Court.

The essay will proceed to give recommendations to the legislature and the courts to ensure that such deficiencies in the law are rectified.

ACKNOWLEDGEMENT

My heartfelt thanks go to God for giving me life and good health without which I could not have done this research.

My sincere appreciations go to Ms Chitupila, my supervisor for her unfailing support and encouragement as she guided me through this whole research. I remain personally responsible for all the errors in this research.

Further thanks go to the Commissioners at the Human Rights Commission, the Director of the Legal Aid Board and Ms Nancy Chilufya from the Police Public Complaints Authority for furnishing me with the information that made the research bring out the practical problems of torture.

I would also like to acknowledge my parents who have seen me through and encouraged me not only during this research but throughout my life. Dad and mum thank you so much for I could not have done without you, may God richly bless you.

I wish to express my gratitude to my brothers Valentine, Sydney, Chanda and my sisters Catherine and Marriet for the encouragement, support and love they have given to me.

Many thanks also go to Brian Nkolola for his immeasurable support and being a true brother to me. Special thanks go to Dennis Kamfwa, Alick Gondwe and my classmates for the guidance, encouragement and support in my academic life. Finally I also acknowledge my girlfriend for being there for me.

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DEDICATION

To my parents Mr. and Mrs. Mungala, you are the pillar of my strength as I am able to take on any challenge knowing that you are there to see me through.

STATUTES

The British Acts Extension Act, Chapter 10

The English Law Extent of Application Act, Chapter 11 of the Laws of Zambia

The Human Rights Commission Act number 39 of 1996

The Constitution of Zambia, Chapter 1 of the Laws of Zambia

INTERNATIONAL INSTRUMENTS

United Nations Convention Against Torture 1984

TABLE OF CASES

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ENGLISH CASES

Callis v. Gunn [1964] 1 QB 495

Ibrahim v. R [1914] AC. 599

R v Moore [1952] 2 Den

R v. Baldry [1852] 2 Den 430

R v. Liverpool Juvenile Court ex parte R [1987] 2 All ER 668

R v. Payne [1963] 1 ALL ER 848

The King v. Voisin [1918] CA

Woolmington v. DPP [1935] A.C. 462 (H.L.)

UNITED STATES OF AMERICA

Miranda v. Arizona 384 U.S. 436

ZAMBIAN CASES

Ambrous Mudenda v. The people (1981) ZR 174

Attorney General v. Musonda Samuel Mofya (1995) S.J. (S.C.)

Banda v The People (1986) Z.R at 105.

Charles Lukolongo and others v The people (1986) Z.R. 115 (S.C.)

Chibozu and another v. The people (1981) ZR 23

Chibwe v. The people (1972) ZR 23

Chimba v. The Attorney General (1972) ZR 165

Edward kunda v. The people (1971) ZR 99

Joseph Mutaba Tobo v. The people S.C.Z. Judgment No. 2 of 1991

Liswaniso v. The People S.C.Z. Judgment No. 58 of 1976

Mack Maulla and Asukile Mwapuki v The people (1980) Z.R. 119 (S.C.)

Mambalina v R. (1962) R. & N. 507

Mandavu v. R (1962) R & N. 298 at 304

Mbomena Moola v. The People Supreme Court of Zambia, Judgment no 35 of 2000

Mutambo and five others v. The people (1965) ZR 15

Muwowo v. The People (1965) Z.R. 91 (C.A.)

Mwaba v. The Attorney General (1974) Z.R. 177 (H.C.)

Nalishuwa v. The people (1972) ZR 26

Nyambe Mwiya v The People (1968) ZR 53

Patrick Sakala v. The people (1980) ZR 205

Reben Njobvu and Light Chiphanzi Banda v. The people (1978) ZR 372

Shamwana and Others v. The People (1985) ZR. 41

Sikota v. The People (1968) Z.R. 42

Tapisha v. The People (1973) ZR

The people v Chanda (1986) ZR 105

The People v. Habwacha (1971) Supreme Court of Zambia Judgment no. 17

Zambia Consolidated Copper Mines Limited v. Ennedie Zulu S.C.Z. Judgment No. 9 of 1999

Zeka Chinyama and others v. The people (1977) Z.R. 426

Zoondo & Others v. The Queen (1964) NR& N LR

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CHAPTER ONE

GENERAL INTRODUCTION

1.1 INTRODUCTION

In criminal law, if an accused person has committed a crime it is the duty of the prosecution to prove that the accused committed the *actus reus* with the appropriate *mens rea*¹. The prosecution must adduce evidence which should prove the *actus reus* and the *mens rea* beyond reasonable doubt, the evidence adduced by the prosecution must be admissible in order for a conviction to be successful, and there is no onus on the accused to furnish evidence.² The only exception is where an accused person has committed a strict liability offence. A strict liability offence is an offence which does not require the state of mind in its definition of the offence.³ *Actus reus* is a Latin phrase meaning the prohibited conduct or guilt act⁴ while *mens rea* is the guilty mind or state of mind expressly or impliedly required by the definition of the offence charged⁵.

1.2 STATEMENT OF THE PROBLEM

In most criminal cases the Zambian courts are faced with the problem of determining whether certain evidence which was obtained and relied upon by the prosecution in the pre trial should be admissible as evidence to prove the facts in issue⁶. Despite the Zambian Courts having adopted the English legal system⁷ (Common Law) in which the issue of admissibility of confessions is clearly settled⁸, the Zambian Courts (especially the Magistrate Courts in which most criminal offences commence) have not applied or exercised their discretion consistently despite the Supreme Court of Zambia having provided on several accounts to the lower courts, the procedure to be followed before a confession is admitted and how the courts should adjudicate in instances where the accused's confession was obtained through torture

¹ Woolmington v. DPP [1935] A.C. 462 (H.L.)

² Sikota v. The People (1968) Z.R. 42

³ M. Woodley. 'Osborne's Concise Law Dictionary.' 10th Ed. (London: Sweet & Maxwell, 2005). p385.

⁴ S.E. Kulusika, 'Criminal Law in Zambia' (Lusaka: UNZA Press, 2006) p.33

⁵ M. Woodley. 'Osborne's Concise Law Dictionary.' 10th Ed. (London: Sweet & Maxwell, 2005). p262.

⁶ Sakala v. The People (1980) ZR 205

⁷ British Acts Extension Act, Chapter 10 and English Law Extent of Application Act, Chapter 11 of the Laws of Zambia

⁸ Ibrahim v. R [1914] AC. 599

or involuntary manner⁹. Silungwe CJ. as he then was in **Shamwana and Others v The People**¹⁰ observed quoting the English case of **Ibrahim v R**,¹¹

“...it has been a long established principle of English Criminal law that no statement by the accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement in the sense that it was not obtained from him either by prejudice or hope of advantage exercised or held out by a person in authority.”

Despite the judges rules being very clear as regards the admissibility of confessions, the Zambian courts in practice have failed to strictly adhere to the judges rules as confessions involving torture have been admissible in some cases and the Courts have not exercised their discretion consistently.¹² Despite the fact that the Supreme Court of Zambia held in **Shamwana and Others v The People**¹³ that confession will only be admissible if they were voluntarily obtained, the same Supreme Court on the contrary admitted illegally (involuntarily) obtained evidence in **Liswaniso v The People**.¹⁴ The author is of the view that the courts in Zambia should equally regard illegally obtained evidenced as inadmissible as it is not voluntarily obtained.

Zambia is a signatory to the United Nations Convention Against Torture which prohibits torture¹⁵ and the Zambian Constitution equally prohibits torture.¹⁶ Despite the Convention and the Constitution prohibiting torture, torture is still rampant in Zambia¹⁷ and there is need to find a solution in order to abolish torture in practice. Cases in which evidence was obtained after torturing the accused persons have been admitted by the courts,¹⁸ and the courts have failed to make penal pronouncements on police officers who have been involved in torturing accused persons¹⁹ and hence the problem persisting in practice.

⁹ Chileshe v. The People (1972) ZR 48 and Shamwana and Others v. The People (1985) ZR. 41

¹⁰ (1985) ZR. 41

¹¹ Ibrahim v. R [1914] AC. 599

¹² Zondo and others v. The Queen [1963] Z & NRLR 97

¹³ (1985) ZR. 41

¹⁴ S.C.Z. Judgment No. 58 of 1976

¹⁵ Adopted 10 December 1984, entered into force on 26 June, 1984. Doc: A/39/51/1984. (1984)

¹⁶ Article 15 of the Zambian Constitution, Chapter 1 of the Laws of Zambia

¹⁷ Amnesty International Report 1995. Amnesty International Publications. 1995. P.321

¹⁸ The court observed in Shamwana and Others v. The People (1985) ZR. 41, That non compliance with the judges rules do not render the evidence inadmissible

¹⁹ Chimba v. The Attorney General (1972) ZR 165

1.3 OBJECTIVES OF THE RESEARCH

The ultimate objective of the research will focus on analysing the Legal framework governing the admissibility of confessions in the law of evidence in criminal proceedings in the Zambian Courts; the research will focus on the nature and extent of torture. The following will be the specific objectives of the research;

- i. To establish the nature and extent of torture involved in the obtaining of confessions.
- ii. To outline the history of confessions and their admissibility under common law principles.
- iii. To evaluate the arguments for and against the use of confessions in a bid to establish the basis of these confessions in criminal cases.
- iv. To analyse the approach taken by the Zambian Courts in admitting confessions and the rules governing the admissibility of confessions with emphasis on the exercise of their discretion and how the courts should treat such cases in future.
- v. To review the approach that has been taken by the Zambian Courts in cases involving illegally obtained evidence and discuss how the Courts in Zambia should address these cases in future.

1.4 RATIONALE AND JUSTIFICATION OF THE RESEARCH

Despite the rules governing the admissibility of confessions being clearly outlined by the guidelines that have been offered by the Supreme Court in certain adjudicated cases, the lower courts have failed to consistently exercise their discretion and follow the guidance and rules outlined by the Supreme Court²⁰. In addition, despite torture being abolished under Zambian Law²¹ the Courts have not condemned or made serious penal pronouncements on policemen who have been involved in torturing the accused in a bid to obtain confessions²². The study is justified and timely as there is need to ascertain the rules governing the admissibility of confessions, and to offer recommendations on how the courts in Zambia should adjudicate cases involving illegally obtained evidence. Additionally, the research is justified as it will provide a benchmark on how Courts should treat confessions.

²⁰ Muwowo v. The People (1965) Z.R. 91 (C.A.)

²¹ Article 15 of the Zambian Constitution, Chapter 1 of the Laws of Zambia

²² Chimba v. The Attorney General (1972) ZR 165

1.5 SPECIFIC RESEARCH QUESTIONS

- i. What is the nature and extent of torture involved in the extraction of confessions?
- ii. What are the arguments for and against the use of confessions and the basis of these confessions in criminal cases?
- iii. What is the approach that is taken by the Zambian Courts in admitting confessions and the rules governing admissibility of confessions with regard to the exercise of their discretion?
- iv. What is the approach that has been taken by the Zambian Courts in cases involving illegally obtained evidence and how should this problem be approached in future?

1.6 RESEARCH METHODOLOGY

This study will be based on both primary and secondary data. The primary data will include interviews with police personnel, Drug Enforcement Commission officers, Human Rights Commissioners, Police Public Complaints Authority and other Non Governmental Groups involved in Human rights related work in order to determine the nature and extent of torture. Secondary sources will include statutes, judicial decisions, articles, internet and published reports.

CHAPTER TWO

NATURE AND EXTENT OF TORTURE

2.1 INTRODUCTION

Torture is the intentional infliction of severe physical or mental suffering by one or more persons in an attempt to force another person to yield information or to make a confession or for any other reason.²³ Article 1 of the Convention Against Torture defines torture as any act by which severe pain or suffering, whether physical or mental is intentionally inflicted on a person for such purpose as obtaining from him or third person information or a confession, punishing him for an act he or the third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in official capacity.

Historically, in much of Europe, Courts freely inflicted torture depending on the accused's crime and the social status.²⁴ Torture was seen as a legitimate means for justice to extract confessions, or obtain the names of accomplices or other information about the crime. Often, defendants sentenced to death would be tortured prior to execution, so as to have a last chance that they disclose the names of their accomplices.²⁵

Torture is widely used in Zambia by the law enforcement agents to yield information from suspects and the nature of torture inflicted on victims is diverse and its extent ranges from victims sustaining mere physical injuries to death²⁶. This chapter focuses on analysing the nature and extent of torture in Zambia. The chapter is aimed at exposing the torturous activities perpetrated by the law enforcement officers in their pursuit of obtaining self incriminating statements from the accused persons. In order to achieve this objective the paper will analyse cases reported to the Human Rights groups and cases reported by the courts in a bid to establish the nature and extent of torture. The paper will also discuss the justification for the use of torture and the relationship between torture and confessions. Finally a conclusion will be drawn from the arguments.

²³ D. M. Walker, 'The Oxford Companion to Law' (New York: Oxford University Press, 1980) p. 400

²⁴ <http://en.wikipedia.org/wiki/Witch-hunt> http://witches.monstrous.com/witch_hunt.htm (12th December, 2010)

²⁵ <http://www.salemwitchtrials.com/faqs.html> (12th December, 2010)

²⁶ Amnesty International Report: "Zambia: Applying the law fairly or fatally? Police violations of human rights" (April 1999).

2.2 CASES REPORTED TO THE HUMAN RIGHTS RELATED GROUPS

In Zambia there are various human rights related groups that have been established by the government and other Non Governmental Organisations that have been founded to encourage and ensure compliance with human rights. This paper will focus on human rights groups which were formed or established to deal with aspects relating to torture. The paper will look at cases reported by the Human Rights Commission, the Amnesty International, the Police Public Complaints Authority, the Legal Resource Foundation, The Post Newspaper and the Jesuit Centre for Theological Reflection.

The Human Rights Commission which was established to promote and protect human rights in Zambia²⁷ has been receiving complaints from the public regarding human rights violations involving torture. The most recent complaint received by the commission is the Mpika incident,²⁸

“This complaint involved three Drug Enforcement Commission officers in Mpika who suspected the victim to have been in possession of cannabis. The unarmed officers severely beat up the victim using their hands in a bid to make him confess that he was in possession of cannabis. The victim died after three days and the three Drug Enforcement officers are currently in custody facing murder charges.”²⁹

This complaint which was received by the Human Rights Commission clearly confirms that torture is widely used by the law enforcement agents to obtain confessions from the accused persons and that the officers in some instances as this one use their unarmed hands to inflict physical pain on the accused persons in a bid to obtain evidence that would incriminate the accused person. Mr Kanunka went further to illustrate the Chipata Compound incident,

“The deceased was accused of burglary and theft. He was apprehended by the police officers and taken to Ng’ombe Police Post where he was severely beaten by the police officers and died in a police cell. Later in the night his body was dumped by police officers in Kamwala South in a manner that could lead to a conclusion that the body was hit by a car. Traffic police officers picked up the body which residents of Kamwala South suspected to have been hit by a car. The police officers are currently facing murder charges.”³⁰

In the Chipata Compound incident the police officer used their famous short buttons and boots to kick and tramp over the accused person in order to inflict physical pain which eventually led to the death of the accused person. This incident clearly explains that the nature of torture is diverse as the law enforcement agents usually use various means to inflict physical pain on the accused persons. The extent of torture in this case is that the victim died from the torture.

²⁷ Human Rights Commission Act number 39 of 1996

²⁸ The Commission could not give names of the victims to safeguard their confidentiality during the interview

²⁹ P. Kanunka, Senior Investigation Officer, Human Rights Commission (20th October, 2010), Lusaka.

³⁰ P. Kanunka, Senior Investigation Officer, Human Rights Commission (20th October, 2010), Lusaka.

The Post reports,

‘Furious residents in Lusaka’s Garden Compound demolished a police post and burnt vehicles in protest against a suspected case of police brutality in which a man died. They went on rampage after the police officers allegedly beat a man to death for allegedly “Loitering”. According to sources the deceased’s family member went to Garden Police Post to check on their relative who had been picked up the previous night, but could not find him. The source said the police attempted to bribe relatives who demanded to know the whereabouts of the man with K100, 000. The relatives later discovered the body of the deceased with a deep cut on the head’³¹.

In this incident it was alleged that the police officers used a sharp object to inflict severe pain on the deceased.

The Police Public Complaints Authority was established by the government to receive complaints of Police brutality and misconduct from victims;³² it has received complaints from victims who have been tortured at the hands of Police Officers. One complaint that was reported to the Authority was by Samson Chirwa,

‘...upon arriving at Woodlands Police Post three officers came to the car and dragged me out using utmost force. I was pushed behind the reception where I was badly beaten. Later I was pushed in a police cell where I was detained. At about 22:00 hours a roll call was conducted but to my surprise my name was not called out. Between 22:00 and 23:00 hours officers came back and switched off the cell lights and ordered cellmates to beat me up. After passing out, I was taken out of the cell and poured water on. They then lit candles and started burning my hands with further beatings.’³³

In the above complaint unarmed police officers beat up the victim and burnt his hands using lit candles. This complaint confirms that the extent of torture inflicted by the police officers in Zambia is diverse.

The other complaint that was reported to the Police Public Complaints Authority was by Lenty Mooya. Lenty wrote,

“...the following day my husband and I were taken back home. Upon reaching home the named officer asked my husband where his aborture was. My husband was told to lay right there where he slaughters animals from and the named police officer started beating him up using an iron bar...the officer turned to me and beat me as he could. My legs, thighs, feet were swollen and my ankle dislocated.”³⁴

The Police Public Complaints Authority has confirmed receiving various complaints of torture from the victims and the extent of torture in certain cases has resulted into death³⁵. In Wesley Muonga’s complaint the father alleged as follows,

³¹ The Post Newspaper, 13th November, 2010.

³² Nancy Chilufya, Assistant Registry Officer, Police Public Complaints Authority (26th January, 2011) Lusaka

³³ See the appendix on page v

³⁴ See the appendix for the complaint page i-ii and the photo of Lenty’s dislocated ankle on page iv.

³⁵ Nancy Chilufya, Assistant Registry Officer, Police Public Complaints Authority (26th January, 2011) Lusaka

"I Wesley Muonga hereby lodge a complaint over the death of my son who passed away on the 12th October, 2001 through heavy torture by Criminal Investigation Officer..."³⁶

The post mortem confirmed that the deceased died as a result of the heavy torture that he underwent at the hands of the Criminal Investigation Officer. This case proved that the extent of torture in certain instances was the victims dying from the torture.

There are reports of torture and ill treatments of prisoners in police custody. There continued to be reports of torture and beatings in police custody. In February, two police officers were charged with murder of a taxi driver, Oscar Chimbainga. They were reported to have beaten him with planks and fists at Chawama Police Post³⁷. In this case the police officers used planks and their fists to inflict severe pain on the accused person. The police officers use various objects to inflict pain on suspects as illustrated by the Amnesty International Report.

It is apparent that members of the police regularly use excessive force when apprehending, interrogating and holding criminal suspects. Both international organisations such as the Amnesty International and the Zambian Human Rights groups such as Jesuit Centre for Theological Reflections and the Zambian Human Rights Commission confirm that the police use torture. Furthermore the Police Public Complaints Authority has equally confirmed receiving various complaints involving torture.

"Allegations include police pouring a highly corrosive substance to the genitals of a detainee, stripping a woman naked and lashing a woman's private part with a hosepipe..."³⁸

Charles Searson, who has been a keen writer on cases of torture at the Jesuit Centre for Theological Reflections emotionally observes,

"Whenever I visit a Police Station in Lusaka, even on routine matters, a cold shiver runs down my spine. It's the knowledge that some of the people kept in the police cells have been routinely tortured during interrogation by the police. Most of this is hidden away from the public eye, but if one listens to the reports coming out before the current 'Commission of Inquiry into the Allegations of Torture, Abuse or Violation of human rights on the persons suspected of involvement in the attempted coup of 28th October 1997', they would make your hair stand on end..."³⁹

Charles's article affirms that torture is routinely practiced by police officers on the accused persons in police custody and police officers usually use different means to inflict pain on the accused person.

³⁶ See the appendix for the post mortem on page vii-viii

³⁷ Amnesty International, *Amnesty International Report* (Amnesty International Publications. 1995. P.321)

³⁸ Amnesty International: *Zambia: Policing in Zambia: Sometimes Fatal*, Seldon Fair. 25th May, 1999.

³⁹ Charles Searson, S.J. 'Torture in Zambia's Police Cells' (JCTR Bulletin Article 43.2000)

Charles further illustrate the case of a grade 12 student Bertha Mugamanzila of Matero Girls' Secondary School who during the Grade 12 exams in November 1998, was accused of having brought a piece of paper into the examination hall, which was said to have contained answers to the examination questions. After questioning in the headmistress' office she was brought to Matero Police Station for questioning and was locked up in the police cells. The case is still being heard as an inquest at the Lusaka Boma Courts, but the facts before the court show that Bertha died in custody in the cells.⁴⁰ It is alleged that the girl died as a result of the torture that she underwent while she was in custody at Matero Police Post. The police officers in Zambia have used several methods to torture the accused persons and most accused persons have died as result of the torture inflicted on them.

Two Mongu police officers are facing legal action for assaulting Mate Mombotwa and causing him grievous bodily harm. He sustained a cut on his left ear after the officers beat him up before detaining him at Mongu Town Central Police Post. The incident occurred on the 25th of November 2008 after the two unarmed officers went to the victim's house to question him over a burglary. According to Mombotwa, they were met by his wife as he was asleep at the time. He said they slapped her before they took turns beating and kicking him in his bedroom. Mombotwa spent four hours in a police cell before he was released. He was later admitted at Lewanika General Hospital after he began to vomit blood.⁴¹ It is clear that the vomiting of blood was caused by the severe torture that was inflicted on him by the unarmed police officers.

2.3 CASES REPORTED BY COURTS IN ZAMBIA

There are cases which have been adjudicated upon by the courts in which victims have alleged that they were tortured in the course of their investigation in order to extract incriminating statements from them by law enforcement agents. The paper will outline and discuss cases that have been adjudicated upon by the courts in which torture was alleged in a bid to determine the nature and extent of torture inflicted on the accused person.

Ndulo and Hatchard⁴² observe that the Zambian High Court had a taste of what police brutality can amount to. In **Chimba v Attorney General**⁴³ where evidence was proved which

⁴⁰ Charles Searson, S.J. 'Torture in Zambia's Police Cells' (JCTR Bulletin Article 43.2000)

⁴¹ The Legal Resource Foundation News. December 2007/ January 2008. p10

⁴² M. Ndulo and J. Hatchard, 'The Law of Evidence in Zambia' (Lusaka: UNZA Press. 1991) p 272

⁴³ (1972) ZR 165

showed that each of the plaintiffs was removed from a lawful place of detention and taken in a closed van to an unknown place where for periods varying between seven and ten days they were each held in very small, empty, completely dark and dirty cells with an earth latrine on the floor. Their clothing was completely removed; they had no clothes and no blankets. They were half-starved, and given little or no water to drink and none to wash. They were each interrogated in a dark office on a number of occasions, under three bright lights, threatened with death, or mutilation, and slapped, punched and kicked. Other than the first plaintiff, they were photographed naked. The first plaintiff reached the stage of mental breakdown. The second and fifth plaintiffs were threatened with electric shock. The fourth plaintiff was subjected to electric shock. Throughout their investigations they were under armed guard. Some of the interrogators were recognised to be members of the Criminal Investigation Department and the guards were Constables. The plaintiffs at one time held Ministerial or other high office in the Government but later broke away from the ruling party to join an opposition party, and the interrogation was designed principally to ascertain the source of its funds. Scott J. held the government liable for the torture inflicted on each of the plaintiffs.

The case of **Chimba v The Attorney General** illustrates further that the nature of torture being inflicted on the accused persons in Zambia is diverse as the police use various means to inflict pain on the accused person. In this case the police used electric shocks on the accused person to inflict severe pain, the police officers further starved the accused persons by not giving them food and water to drink in a bid to force them to confess. Starving the accused person is one of the means that the law enforcement agents use to inflict pain on the accused person. The accused persons were confined in cells which were not fit for human habitation and interrogated under three bright lights, threatened with death, or mutilation, and slapped, punched and kicked. All these various means that were implored by the police confirm the diverse nature of torture practiced in Zambia.

In **Attorney General v Musonda Samuel Mofya**⁴⁴ the facts of the case are that the respondent was arrested and detained by the police on 2nd October, 1991. The learned trial judge found that he had been subjected to assault as a result of which he suffered from injuries consisting of swollen and numb arms, body abrasions, swelling on the head, and the wrists slightly swollen with a small ulcer on the radial aspect compatible with being suspended by his wrists. The learned trial judge also found that the respondent had been

⁴⁴ (1995) S.J. (S.C.)

suspended on a 'makeshift swing'(commonly referred to as '*akampelwa*' among the police officers). Ngulube C.J. awarded the respondent costs for torture.

The case of **Attorney General v Mofya** above brings out the diverse nature of torture being practiced in Zambia. Accused persons who are usually victims of the *makeshift swing* are usually tortured using whatever instruments or objects the police officers can use in a bid to inflict body pain. The accused person is put on a makeshift swing with his arms, legs and body chained to the makeshift swing chair and the chair swings while the police officers use whatever object or instrument to inflict pain on the accused person who is usually in a helpless and defenseless position. As a result of the suspension of the accused to makeshift swing the law enforcement agents officers use any object or instrument to inflict pain on the accused person, the accused person usually suffers severe injuries on his body as evidenced in the Mofya case where the victim suffered injuries consisting of swollen and numb arms, body abrasions, swelling on the head, and the wrists slightly swollen with a small ulcer on the radial aspect compatible with being suspended by his wrists.

The nature of torture inflicted on the accused person is diverse, in **Mwaba v The Attorney General**⁴⁵ the plaintiff claimed damages for assault, intimidation, trespass to person and false imprisonment by servants of the Government of the Republic of Zambia. He claimed that on or about the 3rd November, 1972, he was unlawfully removed from his place of detention by servants of the Government and taken to and wrongfully imprisoned in an unknown place until the 8th November, 1972. In the course of his imprisonment the plaintiff alleged that he was imprisoned in a filthy cell of minute proportions with little or no light or ventilation, forced to enter and remain in the nude, threatened with violence, subjected to torture and particularly to electric shock, interrogated in a dark room with bright lights directed into his eyes, punched and slapped, threatened with his life, given little and insufficient food and water, and forced to remain awake for long periods of time. It was held that the plaintiff had been subjected to torture, inhuman and degrading treatment contrary to the protection which he enjoyed under the Constitution thus he was entitled to exemplary damages.

In **Mwaba v The Attorney General**⁴⁶, the police officers in the course of their investigation subjected the accused to threats with his life while being interrogated in dark cells with three bright lights directed at his eyes and left in a nude state in filthy cells, starved, forced to

⁴⁵ (1974) Z.R. 177 (H.C.)

⁴⁶ Charles Searson, S.J. 'Torture in Zambia's Police Cells' (JCTR Bulletin Article 43.2000)

remain awake for long hours, punched, slapped and subjected to torture through electric shocks. All these methods illustrate the diverse nature of torture being practiced in Zambia.

In **Zambia Consolidated Copper Mines Limited v Ennedie Zulu**⁴⁷ this case concerns the dismissal of a mine policeman from ZCCM following the theft by other persons of steel plates from an area he was guarding. The respondent was manning two gates on the material day, one of which was used by Messrs Capital Holdings' staff. It was not in dispute that the supervisor of the Capital Holdings Stores authorised the removal of thirteen mild steel plates to Reedbuck Engineering and that the respondent merely did his duty by opening the gate at the request of the supervisor. As the learned trial Commissioner found, there was no suggestion of aiding and abetting or anything else on the part of the respondent. The steel plates were in fact thereby stolen by the supervisor and others. For not discovering and preventing the felonious removal of the goods from the yard, the respondent was together with the others handed over to the Zambia Police who prosecuted him for theft. He was found with no case to answer and acquitted after one of the appellant's managers withdrew the complaint in court. There was evidence that during the interrogations by the Zambia Police, the respondent was tortured and beaten up. It was held that beatings and torture of suspects cannot be regarded as a natural and inevitable consequence of reporting cases to the police. The police are not allowed to beat suspects and it is illegal to do so. The appeal has to succeed on the question of liability for the assault and battery committed by the Zambia Police.

Despite this case not being clear on the nature of torture and beating that the police used to inflict pain on the plaintiff, the Supreme Court of Zambia should be commended for affirming in their judgment that torture was illegal in Zambia⁴⁸ and that the argument by the state suggesting that the beatings and torture that the plaintiff incurred at the hands of the police officers could not be regarded as a natural and inevitable consequences of reporting the case to the police.

Edward Shamwana and other coup plotters were tortured when he and several others were detained for treason in 1980. While sentenced to death in custody on death row, the accused was tortured; at one time Shamwana was made to stand in a mixture of human excreta and urine ankle deep for 48hrs, he alleged degradation, harassment, torture and solitary

⁴⁷ S.C.Z. Judgment No. 9 of 1999

⁴⁸ Article 15 of the Zambian Constitution, Chapter 1 of the Laws of Zambia

confinement.⁴⁹ The police use various means to inflict physical pain in a bid to obtain confessions from the accused persons; this may involve solitary confinement in degrading conditions such as that which was implored in the case of 1980 coup plotters.

2.4 REASONS OR JUSTIFICATION FOR THE USE OF TORTURE

The cases which have been discussed above indicate that torture is widely used in Zambia by the law enforcement agents in a bid to obtain incriminating statements from the accused person. The paper under this heading will focus on the reasons and justifications for the use of torture by the law enforcement agents. The paper will bring out the arguments that have been advanced by perpetrators and scholars who argue in favour of the use of torture.

Researchers and those involved in judicial torture⁵⁰ have justified torture using the following arguments; firstly, they argue that torture is used to get information when there was reason to believe that such information would save innocent lives⁵¹. Chapman a respectable writer on this topic observes that;

“The major justification for the use of torture to obtain confessions arises from the belief that such information would save innocent lives and that the infliction of torture on the accused person is outweighed by such information that would serve innocent lives.”⁵²

Torture is tragically necessary in some instances to save innocent lives, but it is a terrible thing for a government to engage in; it must be subject to strict safeguards, and it must be used only when the information needed is vital to avert disaster, time is of the essence or other methods have been exhausted.⁵³

Secondly, Ndulo and Hartchad observe that;

“The major justification for the use of torture to obtain confessions arises from the inability to know a man’s heart and mind and in modern days law enforcement arises from a genuine desire to solve crime. The use of torture necessarily implies that other evidence equal or better is not available and that torture could be relied to extract such evidence.”⁵⁴

Professionals from the FBI and intelligence agencies have stated repeatedly that torture works as a tool for extracting information.⁵⁵ Richard Posner, a highly influential judge on the United States Court of Appeals for the Seventh Circuit, further argue that;

⁴⁹Times of Zambia, July 31, 1990 at 1, col. 2-4

⁵⁰ Judicial torture is the official torture sanctioned and indeed performed for or by the state. Jeremy Crampton, Torture and confession in Wolfe’s Book of the New Sun October to December 2000(12th December, 2010)

⁵¹ <http://newsblogs.chicagotribune.com/steve.chapman/2009/04/the-real-reason-for-torture>(12th December, 2010)

⁵² <http://newsblogs.chicagotribune.com/steve.chapman/2009/04/the-real-reason-for-torture>(12th December, 2010)

⁵³ Rafi Amer, ‘Tortured Justification of Torture’ February 9, 2006(12th December, 2010)

⁵⁴ M. Ndulo and J. Hatchard, ‘The Law of Evidence in Zambia’ (Lusaka: UNZA Press. 1991) p. 272

⁵⁵ Rafi Amer, ‘Tortured Justification of Torture’ February 9, 2006

"If torture is the only means of obtaining the information necessary to prevent the detonation of a nuclear bomb in Times Square, torture should be used and will be used to obtain the information... no one who doubts that this is the case should be in a position of responsibility."⁵⁶

The third justification for torture is punishment, a person who has committed an offense must be punished for the offence committed and torture is viewed as a way of punishing that person by the infliction of pain. In the American Justice Department's view contained in a 50-page document signed by Assistant Attorney General Jay S. Bybee and obtained by The Washington Post; inflicting moderate or fleeting pain does not necessarily constitute torture. Torture, the memo says,

"must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death."⁵⁷

Inflicting torture on the guilt person acts as retribution on the accused person for the crime committed by the accused.

The fourth justification for torture is prevention of crimes or further attacks. Rafi one of the respected writer on torture in his article argues that;

"Prevalent idea is that use of pain (torture) is a good measure to get even in cases of crimes. It has also been argued that inflicting pain also helps prevent crimes; hence moral justification for use of pain or in other words torture."⁵⁸

In August 2002, the American Justice Department advised the White House that torturing Al Qaeda terrorists in captivity abroad "may be justified," and that International Laws against torture may be unconstitutional if applied to interrogations conducted in President Bush's war on terrorism, according to a newly obtained memo. If a government employee were to torture a suspect in captivity, he would be doing so in order to prevent further attacks on the United States by the Al Qaeda terrorist network,⁵⁹

The fifth reason why law enforcement officers use torture on their victims is to exert power and control over them.⁶⁰ The police officers torture the suspects in order to show them their authority. One police officer argued that torture usually helps the police officer to be in

⁵⁶ <http://www.nytimes.com/2004/05/16/weekinreview/16slac.html>. (12th December, 2010)

⁵⁷ Dana Priest and R. Jeffrey Smith. Washington Post Staff Writers (Tuesday, June 8, 2004) Page A01

⁵⁸ Rafi Aamer, 'Tortured Justification of Torture' February 9, 2006 (12th December, 2010)

⁵⁹ <http://newsblogs.chicagotribune.com/steve.chapman/2009/04/the-real-reason-for-torture> (12th December, 2010)

⁶⁰ 'The Legal Resource Foundation News.' December 2007/ January 2008. p14

charge of the interrogation and enables that the suspect or victim obeys and answers the question posed to him during interrogations.⁶¹

The other reason for the use of torture is lack of knowledge or awareness about human rights among the law enforcement officers despite torture being abolished under *Zambian law*.⁶² Most law enforcement officers are not aware that torture is prohibited and that it is illegal to use torture⁶³. This lack of awareness has been furthered by government's attitude towards law enforcement officers who have been involved in torturing suspects. One of the police officers that the October, 28th 1997 coup detainees have consistently alleged to have been involved in torture is former Acting Assistant Commissioner of Police Teddy Nondo. Despite these allegations, Nondo was promoted on 3rd April, 1998 to become Deputy Commissioner of The Drug Enforcement Commission (DEC). This move by the Chiluba government was seen by many as a way of rewarding Nondo for torturing the coup suspects.⁶⁴

The final reason for torture is the social environment in which the law enforcement officers operate. Their conditions of service are so poor in terms of salary, accommodation and sanitation and they tend to be frustrated most of the time. The law enforcement officers usually tend to take out their anger and frustrations on the defenceless inmates or suspects accused of having committed crimes.⁶⁵

2.5 RELATIONSHIP BETWEEN TORTURE AND CONFESSIONS

A confession is an admission of guilty made to another by a person charged with a crime⁶⁶. Article 1 of the Convention Against Torture defines torture as any act by which severe pain or suffering, whether physical or mental is intentionally inflicted on a person for such purpose as obtaining from him or third person information or a confession, punishing him for an act he or the third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in official capacity.

⁶¹ Austine Zilimwa, Constable, Zambia Police, (17th December, 2010), Choma

⁶² Article 15 of the Constitution of Zambia, Chapter 1 of the Laws of Zambia

⁶³ Zambia Consolidated Copper Mines Limited v. Ennedie Zulu S.C.Z. Judgment No. 9 of 1999

⁶⁴ Afronet, 'Zambia Human Rights Report' 1998(Lusaka: Afronet, 1999) p9

⁶⁵ Rafi Aamer, 'Tortured Justification of Torture' February 9, 2006(12th December, 2010)

⁶⁶ M. Woodley. 'Osborne's Concise Law Dictionary'.10th Ed. (London: Sweet & Maxwell, 2005). p103

The major similarity which arises from the definition of torture and confessions is that torture is usually inflicted on the accused person in a bid to make the accused admit guilt or in a bid to obtain a confession. According to the definition of torture given by article 1 of The Convention against Torture, torture is inflicted to obtain confessions from the accused person.⁶⁷ One well documented effect of torture is that with rare exceptions people will say or do anything to escape the situation, including untrue "confessions" and implication of others without genuine knowledge, who may well then be tortured in turn.⁶⁸

The other relationship between torture and confession is that confessions are heavily dependent on torture to extract them. Abrahamian in his central thesis outlines the relationship between torture and confessions as dependant, Abrahamian argues that torture is usually resorted to obtain confessions, thus confessions are heavily dependent on torture. Abrahamian observed as follows in Iran;

“Because Iranian police wanted to stage public confessions and recantations, they tortured even more brutally. Forced public confessions move from a peripheral position within the Iranian police system under Reza Shah to the pivot around which the entire torture system turned.”⁶⁹

He concedes that the original motivation for torture, both under the Imperial and the Islamic state, was to extract confessions.

Furthermore, confessions are voluntary admissions of guilty made to another person by a person charged with a crime;⁷⁰ the relationship between torture and confessions is evidenced in forced confessions by which those in authority usually inflict pain in order to obtain admissions. As Ndulo and Hartchad observe that the major justification for the use of torture to obtain confessions arises from the inability to know a man's heart and mind. In modern times law enforcement agents usually use torture and this use of torture arises from a genuine desire to solve crime. The use of torture necessarily implies that other evidence equal or better is not available and that torture could be relied to extract such information.⁷¹ The police and other law enforcement officers usually torture victims in order to obtain confessions (forced confessions) and all confessions obtained by torturing the victim are not admissible as evidence as they are not given voluntarily as per definition of confessions.

⁶⁷ The United Nations Convention Against Torture 1987

⁶⁸ Wikipedia, the free encyclopedia org/wiki/Witch-hunt(12th December, 2010)

⁶⁹ Ervand Abrahamian. 'Forced Confessions: Prisons and Public Recantations in Modern Iran.' (Berkeley, CA: University of California Press, 1999. 285 pages(12th December, 2010)

⁷⁰ M. Woodley. 'Osborne's Concise Law Dictionary.' 10th Ed. (London: Sweet & Maxwell, 2005). p103

⁷¹ M. Ndulo and J. Hatchard, 'The Law of Evidence in Zambia' (Lusaka: UNZA Press. 1991) p. 272

2.6 CONCLUSION

In conclusion, torture is widely used in Zambia by the law enforcement agents to force people to yield information and the nature of torture inflicted on victims is diverse, it ranges from mere use of hands by unarmed law enforcement officers to using sophisticated means such as the electric shock, makeshift swing to starvation among others. The nature of torture inflicted by the law enforcement agents is diverse. The police usually imprison accused person in filthy cells with little or no light or ventilation, force the accused to enter and remain in the nude, they threaten victims with violence, subject the accused to physical torture and to the electric shock, the accused are interrogated in a dark room with bright lights directed into their eyes, punched and slapped, threatened with his life, given little and insufficient food and water, and forced to remain awake for long periods of time. The extent of torture ranges from victims sustaining mere physical injuries, to death. Quoting the words of Phil Greene a very strong advocate of complete abolishment of torture stated,

“Whether it works or not is irrelevant because torture is against the United Nations Convention Against Torture. People alleged to have committed or directed torture must be brought to justice, whoever they happen to be and regardless of why they chose to break the law. Anyone who breaks the law must answer for his or her crime.”⁷²

Torture is against the United Nations Convention Against Torture and is prohibited⁷³ and illegal⁷⁴ under Zambian law. Despite torture being rampant by law enforcement agents the law enforcement officers usually deny committing and indulging in torture.

This chapter has discussed the nature and extent of torture perpetrated by the law enforcement agents in a bid to obtain incriminating statements from the accused persons. The following Chapter will outline admissibility of confessions at Common Law.

⁷² <http://newsblogs.chicagotribune.com/steve.chapman/2009/04/the-real-reason-for-torture> (12th December, 2010)

⁷³ Article 15 of the Constitution of Zambia, Chapter 1 of the Laws of Zambia

⁷⁴ Zambia Consolidated Copper Mines Limited v. Ennedie Zulu S.C.Z. Judgment No. 9 of 1999

CHAPTER THREE

CONFESSIONS AT COMMON LAW

3.1 INTRODUCTION

The issue of confessions is tied up with accused's right against self incrimination. It is desirable that a government seeking to punish an individual produce the evidence against him by its own independent labour, rather than from the accused's mouth.⁷⁵ R. Clark observes, 'The history of confessions is full of torture, treachery and lies. From the biblical times to the present we read of the morally weak, emotionally disturbed, often innocent people cruelly used, made to convict themselves by words forced from their mouth.'⁷⁶ This chapter will discuss confessions at Common Law. The paper will briefly outline the history of confessions. The paper will also analyse the arguments for and against the use of confessions. The paper will further discuss the admissibility of confessions at Common Law. Finally a conclusion will be drawn from the arguments.

3.2 HISTORY OF CONFESSIONS

Mertzer summarises the history of confessions as follows;

"In the 12th century, in England, the Church of England had powers to administer justice. The church did this by the method called trial by ordeal. The ordeal was God's judgment and was therefore administered by priests, sincere in their belief that God would protect the innocent. The innocence of the accused was tested by physical means. In the ordeal of cold water the accused was tied and tossed into cold water. It was believed that God would accept him into the water if he was innocent. The other ordeal was the ordeal of the boiling water; the accused placed his hands in the pot of boiling water to take out a stone. In the ordeal of iron, the accused grabbed a red hot piece of iron and carried it for several feet. In either ordeal, if the wound healed after three days, the man was innocent. If the man was convicted by an ordeal, the court sentenced him to the punishment laid down by law for that offence."⁷⁷

In both the ordeal of boiling water and the ordeal of iron the standard that was used to determine the accused person's innocence or guilty was the healing of the wound. If the wound healed after three days the man was judged innocent; if the wound failed to heal after three days the victim was judged guilty and would be punished or sentenced according to the laid down punishment. This standard was not objective and practical as it is common knowledge that no wound would heal after three days.

⁷⁵ M. Ndulo and J. Hatchard, 'The Law of Evidence in Zambia' (Lusaka: UNZA Press. 1991) p.272

⁷⁶ R. Clark, 'Crime in America' (New York: Simon & Schuster. 1982) p. 316

⁷⁷ M. Metzger, 'The Right to Remain Silent' (New York: Harcourt Brace Jovanovic. 1972) p. 24

While the ordeal of boiling water and the ordeal of iron took place in England torture was also used to extract incriminating statements. Nokes observes that in the early fourteenth century torture was approved to compel a hard prisoner to submit and this practice continued until the eighteenth century.⁷⁸ Common Law Courts continued to ask self incriminating questions and to bully witnesses into answering the incriminating statements.⁷⁹

Leonard contends that,

“The right against self-incrimination originated as an indirect product of the Common Law's accusatory system and of its opposition to rival systems which employed inquisitorial procedures. Towards the close of the sixteenth century, just before the concept first appeared in England on a sustained basis all courts of criminal jurisdiction habitually sought to extract self-incriminatory admissions from persons suspected of or charged with crime.”⁸⁰

Although defendants in crown cases suffered from this and many other harsh procedures, even in Common Law Courts, the accusatory system afforded a degree of fair play not available under the inquisitional system. Moreover, torture was never sanctioned by the Common Law, although it was employed as an instrument of royal prerogative until 1641.⁸¹

Wigmore notes that,

“During this period there was no rule of law that excluded a confessions that had been obtained using improper means such as torture. During the eighteenth century, there grew up a reaction (From the Church common lawyers and the general public) against torture and that an accused person need not answer self incriminating questions. During this period justices changed their views and stated that confessions were inadmissible when it was shown that the accused person was improperly influenced or tortured.”⁸²

Leonard further illustrates that,

‘Under Chief Justice Edward Coke there was well-publicized opposition to self incriminatory questioning which focused England's attention upon the injustice and illegality of such practices. In 1641 the Long Parliament, dominated by the Puritan Party and common lawyers, condemned the use of torture to yield incriminating statements from the accused person. The Long Parliament eventually prohibited ecclesiastical authorities from administering any oath obliging one “To confess or to accuse himself or herself of any crime.”’⁸³

As a result of the well publicized opposition to incriminating statements it was recommended that judges' rules be promulgated to be followed when interrogating suspects. The rules were formulated to offer guidelines to police officers on how they should handle and treat suspects

⁷⁸ G.D. Nokes, 'Introduction to Evidence.' 4th Ed. (London: Sweet & Maxwell. 1972)p. 24

⁷⁹ Leonard W. Levy, 'Right Against Self Incrimination' (USA: Macmillan Press. 1986)

⁸⁰ Leonard W. Levy, 'Right Against Self Incrimination' (USA: Macmillan Press. 1986)

⁸¹ M. Metzger, 'The Right to Remain Silent' (New York: Harcourt Brace Javanovic. 1972)p. 24

⁸² Wigmore on Evidence. Vol. 3. 3rd Ed.p. 300

⁸³ Leonard W. Levy, 'Right Against Self Incrimination' (USA: Macmillan Press. 1986)

in custody.⁸⁴ A confession obtained in breach of the judge's rules is not inadmissible as a matter of law but the judge might exercise his discretion to exclude it, if it is shown that it will act unfairly to the accused person.⁸⁵

3.3 ARGUMENTS IN FAVOUR OF CONFESSIONS

The proponents of confessions argue that confessions should not be abolished as they help reduce crime. Abolishing confessions would lead to an increase in crime.⁸⁶ Chapman observed that the major justification for the use of torture to obtain confessions arises from the belief that such information would save innocent lives.⁸⁷ Ndulo and Hatchard observe that the major justification for the use of torture to obtain confessions arises from the inability to know a man's heart and mind and in modern time usually arises from a genuine desire to solve crime. The use of torture necessarily implies that other evidence equal or better is not available and that torture could be relied to extract such better evidence which is unavailable through a confession.⁸⁸

The scholars in support of the use of confessions argue that confessions are the best evidence when they are well proved⁸⁹. In **R v Baldry** it was held that a confession is best evidence if it is well proved and is generally a useful way of proving facts in issue. When a confession is properly obtained it is very good evidence.⁹⁰

The other argument in favour of confessions is that through questioning a suspected person better evidence is obtained in the process which makes it possible for the pursuit of the right trail for others. In America it was reported that after the case of **Miranda v Arizona**⁹¹ prominent Americans, Richard Nixon among them accused the US Supreme Court of emptying the prisons of criminals, they claimed that the law enforcement would never again be effective.

⁸⁴ *Zoondo & Others v. The Queen* (1964) NR& N LR

⁸⁵ *The People v. Habwacha* (1971) Supreme Court of Zambia judgment no. 17

⁸⁶ <http://newsblogs.chicagotribune.com/steve.chapman/2009/04/the-real-reason-for-torture> (12th December, 2010)

⁸⁷ <http://newsblogs.chicagotribune.com/steve.chapman/2009/04/the-real-reason-for-torture> (12th December, 2010)

⁸⁸ M. Ndulo and J. Hatchard, 'The Law of Evidence in Zambia' (Lusaka: UNZA Press. 1991) p. 272

⁸⁹ *R v. Baldry* [1852] 2 Den 430

⁹⁰ *R v. Baldry* [1852] 2 Den 430

⁹¹ 384 U.S. 436

In **Miranda v Arizona**⁹², it was held by the United States of America Supreme Court that illegally obtained evidence is inadmissible. This holding by the Court affected admissibility of confessions as all confessions that were illegally obtained were inadmissible and as such it became very difficult to convict accused persons as illegally obtained evidence was inadmissible despite being relevant to the facts in issue. This consequently led to the emptying of the prisons.

3.4 ARGUMENTS AGAINST USE OF CONFESSIONS

The scholars against use of confessions argue that involuntary confessions may be false.⁹³ Ramsey Clark cites a case but does not give the name of the case. The facts were as follows,

“Two girls were brutally murdered and dismembered. The accused having made a full confession pleaded guilty to the crime. Less than a year later, the man who had pleaded guilty and sentenced to life imprisonment was set free because he had not murdered the girls. Evidence disclosed that it was physically impossible for him to have been at the scene of the crime. The other man arrested on another charge was shown to be the murderer.”⁹⁴

The other argument against confessions is that, confessions are obtained by torturing the accused person which eventually leads the accused person to make self incrimination statements. Article 18 of the Constitution of Zambia guarantees a fair trial to an accused person charged with an offence and torturing the accused person in a bid to obtain a confession contravenes article 18 of the Constitution.⁹⁵ Confessions are usually obtained by torturing the accused persons in a bid to force them to admit being guilty and such coercion deprives the accused persons of a fair trial which is guaranteed by article 18 of the Constitution.

Furthermore, it is argued that confessions should not be admitted as they are usually obtained by improper means; in **Chimba v The Attorney General**⁹⁶ where evidence was adduced which showed that,

“Each of the plaintiffs was removed from a lawful place of detention and taken in a closed van to an unknown place where for periods varying between seven and ten days they were each held in very small, empty, completely dark and dirty cells with an earth latrine on the floor. Their clothing was completely removed; they had no clothes and no blankets. They were half-starved, and given little or no water to drink and none to wash. They were each interrogated in a dark office on a number of occasions, under three bright lights, threatened with death, or mutilation, and slapped, punched and kicked. Other than the first plaintiff, they were photographed naked. The first plaintiff reached the stage of mental breakdown. The second

⁹² 384 U.S. 436

⁹³ R. Clark, 'Crime in America' (New York: Simon& Schsterated Publishers. 1982) p. 392

⁹⁴ R. Clark, 'Crime in America' (New York: Simon& Schsterated Publishers. 1982) p. 392

⁹⁵ Chapter 1 of the Laws of Zambia

⁹⁶ (1972) ZR 165

and fifth plaintiffs were threatened with electric shock. The fourth plaintiff was subjected to electric shock. Throughout their interrogations they were under armed guard.”

Confessions obtained in such an improper manner should not be admissible as evidence as they are not voluntarily given by the accused persons.

3.5 ADMISSIBILITY OF CONFESSIONS AT COMMON LAW

Admissibility refers to the question whether particular items of evidence may be properly adduced as evidence. It deals with the connection with the matter under investigation.⁹⁷ In order for a confession to be admissible as evidence it is fundamental that it complies with the Judges’ Rules. ‘Judges’ Rules were first promulgated by Judges of the Queen’s Bench Division in 1912 and subsequently revised from time to time. The rules were advice given by the Judges to the executive arm of government. They were not judicial decisions made by the Judges; they have therefore no binding legal effect. The executive arm of government then issued the rules to Police Officers as administrative instructions which Police Officers, as a matter of discipline, were enjoined to follow. They are administrative directions enforced by the Police authorities as tending to the fair administration of justice.⁹⁸

However the Zambian judiciary still applies the pre 1964 version of the judges’ rules. In the case of **Zoondo & Others v The Queen**⁹⁹ Conroy CJ stated that the new rules, that is, the 1964 version of the Judges’ Rules had not been applied to this country,

‘When I speak of the judges’ rules, I therefore refer to the rules as set out in paragraph 118 of the 35th edition of Archbold...I am now informed by the learned state advocate that the pre 1964 rules are still applicable here’

Ndulo and Hatchard¹⁰⁰ summarise the Judges’ Rules as follows, rule one permits a police officer investigating an offence to question anyone whether suspect or not from whom he thinks useful information can be obtained. This is so whether a person is in custody or not, so long as he has not been charged with the offence or informed that he may be prosecuted for it.

Rule two requires a police officer to caution a person he suspects, reasonably, before putting any question to him on the suspected offence.

⁹⁷ David M. Walker, ‘The Oxford Companion to Law’ (New York: Oxford University Press. 1980)p.32

⁹⁸ Zoondo & Others v. The Queen (1963-64) Z & NRLR 97 (CA)

⁹⁹ (1963-64) Z & NRLR 97 (CA)

¹⁰⁰ M. Ndulo and J. Hatchard, ‘The Law of Evidence in Zambia’ (Lusaka: UNZA Press. 1991) p.273-274

Rule three requires a further caution when such a person has been formally charged and is in custody or informed that he may be prosecuted.

Rule four provides for the taking down of a voluntary statement and the cautions and the authentication of such a statement thereafter.

Rule five refers to a case where a person is charged or informed of the likelihood of his prosecution and is made aware by a police officer of a written statement of a co accused. The police officer shall hand to such a person a copy of such written statement but he shall not be invited or induced to reply. If he chooses to reply he shall be cautioned according to rule three.

Rule six says a person other than a police officer charged with the duty of investigating offences or charging offenders shall, so far as is practicable comply with these rules. Rule six confers an obligation on the police officers and other law enforcement agents such as the Drug Enforcement Commission who empowered by the law to investigate crimes to comply with the Judges' Rules.

Under Common Law in order for a confession to be admissible as evidence the judge must carry out a '*voire dire*' which means a trial within a trial or a preliminary examination of a witness or witnesses by a judge in the absence of the jury in order to determine collateral matters such as admissibility of a confession.¹⁰¹

In **R v Liverpool Juvenile Court ex parte R**¹⁰² it was held that if in summary proceedings the defendant makes a representation to the Court before the close of the prosecution's case that a confession made by him was or may have been obtained from him by oppression or in circumstances likely to render it unreliable, the justices will be required to hold a trial within a trial in order to determine the admissibility of the confession. In that trial within a trial the defendant will be entitled to give evidence which is confined to the issue of admissibility.

It is a requirement that the statement alleged to be made by the accused person should be relevant to the facts in issue and that the alleged statement was obtained voluntarily and not in an improper manner in order for that statement to be admissible¹⁰³. In **Njuguna, son of**

¹⁰¹ David M. Walker, 'The Oxford Companion to Law' (New York: Oxford University Press. 1980)p.422

¹⁰² [1987] 2 All ER 668

¹⁰³ R v. Liverpool Juvenile Court ex parte R. [1987] 2 All ER 668

Kiman and others v R.¹⁰⁴ it was held that it is incumbent upon the prosecution to prove affirmatively that confessions were voluntarily made and were not obtained by improper or unlawful questioning and that it was a duty of the judge to examine with the closest care all the circumstances in which the confession had been obtained by a police officer especially where a person had been in a police cell for a long time.

Secondly in order for a confession to be admissible as evidence it is important that the police officer cautions a person he suspects before putting any questions before him. The police officer must record a warn and caution statement to the accused person¹⁰⁵. In **The King v Voisin**¹⁰⁶, where the body of a woman was found in a parcel, a piece of paper with the words '*Bladie Belgian*' written upon it being also in the parcel. The police, in the course of their investigation, requested the appellant to go to the police station and account for his movements. After making a statement he volunteered at the request of the police, to write the words '*Bloody Belgian*' and wrote the words '*Bladie Belgian*'. He had not been cautioned before making the statements or writing the words. At that time the police had not decided to charge the appellant with having murdered the woman, although they were detaining him in custody for inquiries. The appellant was subsequently tried for murder of the woman and was convicted. He appealed on the ground that the evidence was extracted in breach of the Judges' Rules. Lawrence J. held that the evidence was inadmissible on the ground that it was obtained by the police officers while he was in custody and without having first cautioned the prisoner.

In **R v Moore**¹⁰⁷ it was held that in order for a confession to be admissible at Common Law the confession must have been made to a person in authority. This is evidenced in rule six which recognises that a confession may only be made to a person in authority and a person in authority may be a police officer or any member of the law enforcement agency. Rule six provides thus'

"A person other than a police officer charged with the duty of investigating offences or charging offenders shall, so far as is practicable comply with these rules."

Even in instances where the confession is obtained in compliance with the Judges' Rules the Judge will still exercise discretion to exclude such evidence obtained from such confessions.

¹⁰⁴ [1954] 21 ER LR 316

¹⁰⁵ The King v. Voisin [1918] CA

¹⁰⁶ [1918] CA

¹⁰⁷ [1952] 2 Den

In **Callis v Gunn**,¹⁰⁸ where the respondent had been arrested and taken to a police station, where he declined to make any statement. A detective constable, who had not cautioned him and if he had cautioned him that they might be given in evidence could have refused to the fingerprints being taken, said to the respondent. The respondent gave his fingerprints, and the issue in the case was whether having given them in circumstances in which, had he been informed that he need not do so, he might have declined, the court should not in its discretion exclude the evidence notwithstanding that strictly speaking it was admissible. It was stated as follows,

‘... in every criminal case a judge has the discretion to disallow evidence, even if in law such evidence is relevant to the facts in issue and therefore, admissible, if admissibility would operate unfairly against an accused person. I would add that in considering whether admissibility would operate unfairly against an accused one would certainly consider whether it had been obtained in an oppressive manner by force against the wishes of an accused. That is the general principle.’¹⁰⁹

In **Kuruma, son of Kaniu v R**¹¹⁰ where the accused was searched and articles found were seized ; the search and seizure were illegal, it was held that,

“No doubt in a criminal case the Judge always has discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused person. The test to be applied in considering whether the evidence is admissible is not concerned with how the evidence was obtained. Having thus enunciated the basic test of admissibility Lord Goddard pointed out that the court always has discretion to disallow evidence if the strict rules of admissibility would operate unfairly against an accused person.”¹¹¹

In **R v Payne**¹¹² the appellant was asked at the police station whether he was willing to be examined by a doctor specifically for the purpose of ascertaining whether he was suffering from any illness or disability. The appellant was told that it was not part of the doctor’s duty to examine him in order to give an opinion as to his unfitness to drive. The appellant consented to be examined by a doctor, who thereafter gave evidence that the appellant was under the influence of drink to an extent that he was unfit to have proper control of the car. Lord Parker CJ held,

“... while such evidence from the doctor in circumstances such as these was clearly admissible, nevertheless the chairman in the exercise of his discretion ought to have refused to allow that evidence to be given on the basis that if the accused realised that the doctor would give evidence on the matter he might refuse to subject himself to examination.”

¹⁰⁸ [1964] 1 QB 495

¹⁰⁹ [1964] 1 QB 495

¹¹⁰ [1955] AC 197

¹¹¹ [1955] AC 197

¹¹² [1963] 1 ALL ER 848

3.6 CONCLUSION

In conclusion, at Common Law in order for a confession to be admissible as evidence it was fundamental that it complied with the judges rules. The judge must carry out a '*voire dire*' which means a trial within a trial or a preliminary examination of a witness or witnesses by a judge in the absence of the jury in order to determine collateral matters such as admissibility of a confession.¹¹³ It is a requirement that the statement alleged to be made by the accused person should be relevant to the facts in issue and that the alleged statement was obtained voluntarily and not in an improper manner.

In **Njuguna, son of Kiman and others v R**¹¹⁴ it was held that it is incumbent upon the prosecution to prove affirmatively that confessions were voluntarily made and were not obtained by improper or unlawful questioning and that it was a duty of the judge to examine with the closest care all the circumstances in which the confession had been obtained by a police officer especially where a person had been in police cells for a long time. It is important that the police officer cautions a person he suspects before putting any questions before him. The police officer must record a caution statement to the accused person. In **R v Moore**¹¹⁵ it was held that in order for a confession to be admissible at common law the confession must have been made to a person in authority. Lastly, Even in instances where the confession is obtained in compliance with the judges' rules the judge will still exercise discretion to exclude such evidenced obtained from such confessions.

This chapter has discussed admissibility of confessions at Common Law and the approach taken by the Common Law Courts. The next chapter will analyse the approach that has been taken by the Zambian Courts as regards admissibility of confessions and how the lower Courts have in some instances failed to adhere to the guidance given by the Supreme Court.

¹¹³ David M. Walker, 'The Oxford Companion to Law' (New York: Oxford University Press. 1980)p.422

¹¹⁴ [1954] 21 ER LR 316

¹¹⁵ [1952] 2 Den

CHAPTER FOUR

APPROACH TAKEN BY THE ZAMBIAN COURTS AS REGARDS ADMISSIBILITY OF CONFESSIONS

4.1 INTRODUCTION

This chapter will focus on outlining the approach that has been taken by the Zambian Courts as regards admissibility of confessions. The paper will try by all means to use recent cases where they are available in the Zambian Law Reports. This chapter will focus on analysing cases adjudicated upon by the courts in Zambia in an effort to ascertain the laid down procedure that is followed before a confession is admissible as evidence. The paper will further bring out cases in which the lower courts have failed to follow the guidelines given by the Supreme Court regarding admissibility of confessions. In order to achieve this objective the paper will firstly outline the procedure to be followed before a confession is admissible as evidence and cases in which the lower courts especially the Magistrate's Court has failed to consistently follow the guidelines that have been given to them by the Supreme Court in decided cases. The paper will ascertain the approach that has been taken by the Zambian Courts as regards illegally obtained evidence. Finally a conclusion will be drawn from the arguments.

4.2 RELEVANCE TO THE FACTS IN ISSUE OR *fuctum probanda*

In order for a confession to be admissible as evidence it must form part of the *fuctum probanda*¹¹⁶. *Factum probanda* refer "To facts which require to be proved or disapproved in order to win a case¹¹⁷". These are facts which deal with or relate to the matter under investigation (the facts in issue). Therefore, a confession which does not relate to or deal with the facts in issue will be inadmissible as evidence.

In **Nyambe Mwiya v The People** Doyle J.A. stated as follows,

"It is obviously correct that a confession is not evidence against an accused person unless it is proved to have been made or assented to by him. Clearly if this is not proved the statement becomes a mere irrelevance. It is however to me a novel proposition that the laws of evidence require that the making must be proved as a separate and preliminary point before it is admitted. There are numerous matters of evidence which only become relevant when the connection with the accused is proved, for example, documents allegedly made in connection with the crime by the accused person before or during the crime, articles of clothing allegedly belonging to the accused person, fingerprints allegedly taken from the accused person at the

¹¹⁶ **Mbomona Moola v. The People** Supreme Court of Zambia, Judgment no 35 of 2000

¹¹⁷ M. Woodley, 'Osborne's Concise Law Dictionary.' 10th Ed(London: Sweet & Maxwell, 2005) p.173

police station, incriminating conversations (which may be confessions) allegedly overheard taking place between the accused person and another prisoner. In any of these cases it is open to the accused person to deny that he made the document, owned the articles, gave the fingerprints or had the conversation. In none of these cases in my experience has there ever been a trial within a trial to determine admissibility but in each case the matter is left to the general issue."¹¹⁸

In order for an alleged confession to be admissible as evidence, the incriminating statement must be relevant to the *factum probanda*, the incriminating statement must connect the accused person or the person making the statement to the offence. The incriminating statement must relate to the charge or proof of the ingredient of an offence.

4.3 TRIAL WITHIN A TRIAL OR *Voire dire*

The judge or magistrate must establish that the incriminating statement that was extracted from the accused person is *factum probanda*, in **Chibozu and another v The people**¹¹⁹ it was held that the Judge was supposed to have asked the appellants whether they had any objection to the confession being admitted as evidence, and if so, a trial within a trial be instituted to determine the voluntariness of their admission. In **Ambrous Mudenda v The people**¹²⁰, it was held that the appellant by contesting the warn and caution statement in the abortive trial within a trial raised the issue of voluntariness and should have been continued and a ruling made on that issue.

The judge or magistrate must carry out a *voire dire* to establish whether such evidence so adduced should be admissible as evidence to prove the facts in issue. In **Tapisha v The People**¹²¹ where the applicant was convicted of theft and part of the prosecution evidence was based on a confession that was extracted by police officer. The accused objected to the confession being admissible on the ground that the statement was made as a result of beatings, and a trial within the trial was commenced. The court held that,

“Where any question arises as to the the admissibility of a confession or any part of it, as a matter of law, as a condition precedent to the admissibility of the statement the issue must be decided as a preliminary one by means of a trial within a trial. The failure by the magistrate to conduct a trial within a trial when such an inquiry should have been conducted is an irregularity, but curable if there has been no prejudice to the accused. Where prejudice has resulted, or may have resulted, the appellate court must ignore the confession.”¹²²

¹¹⁸(1968) ZR 53

¹¹⁹(1981) ZR 23

¹²⁰(1981) ZR 174

¹²¹(1973) ZR 222

¹²²(1973) Z.R. 222 at 225

4.4 PERSON IN AUTHORITY

In order for a confession to be admissible as evidence the Supreme Court of Zambia has laid down as a requirement that the confession must be made to a person in authority, in **Mbomena Moola v The People**¹²³ where the appellant Mbomena, was convicted on one count of murder, contrary to Section 200 of the Penal Code, Cap 87 of the Laws of Zambia and was sentenced to death. He appealed against both the conviction and sentence. The gist of the appeal was that the learned trial Judge erred in law in admitting and relying on the confession that was taken before the village committee that he had caused the death of his father. The major argument by counsel for the appellant was that the village committee constituted persons in authority and as such Judges' rules must apply, namely among others, that the suspect must be warned against the dangers of incriminating himself. It was held that,

"A village committee is not composed of persons in authority and as such any confession made to the committee need not be subjected to the Judges' rules. Those rules were designed to guide Police Officers in dealing with suspects and prisoners in the course of investigating crime. This Court takes judicial notice that the training of Police Officers includes instructions in administering the warn and caution. There is no suggestion that these rules are intended to apply to persons other than those whose normal duties pertain to investigating crime"¹²⁴

It is important that in order for a confession to be admissible as evidence the confession must be made to a person in authority as illustrated in the recent Supreme Court decision (**Mbomena v The people**) that reversed all earlier decisions by affirming that the confessions can only be made to a person in authority who is empowered to investigate crimes to whom judges rules apply. In Zambia other law enforcements agents such as the Drug Enforcement Commission and the Anti Corruption Commission are person regarded as persons in authority as they are empowered to investigate specific crimes by law and as such the judges' rules apply to them.¹²⁵

In **Nalishuwa v The people**¹²⁶ it was held that although the confession was made to the police officers who are by law mandated to carry out criminal investigations and thus qualify to be persons in authority such confession could not be admissible as it was not obtained voluntarily and was in breach of the judges rules. From the **Nalishuwa's** case and the **Mbomena's** case it is clear that it is settled law in Zambia that in order for a confession to be admissible as evidence, it must be made to a person in authority charged with the

¹²³ SCZ Judgment No. 35 of 2000

¹²⁴ SCZ Judgment No. 35 of 2000

¹²⁵ Though there is no judicial precedent that the author came across to support the proposition

¹²⁶ (1972) ZR 26

investigation of crime by the law. Before the case of **Mbomena v The people**, the Courts in Zambia followed the English (Common Law) position which was laid in **R. v. Moore**¹²⁷ which interpreted 'A person in authority' broadly to include even persons who are not charged with criminal investigation. In **Chibozu and another v The people**¹²⁸ the Supreme Court defined a village headman as a person in authority; therefore a "warn and caution" was supposed to be administered before extracting the statements from the appellants.

4.5 WARN AND CAUTION

In order for a confession to be admissible as evidence it is a requirement that the accused person must be cautioned before making the incriminating statement. In **Mbomena Moola v The people**¹²⁹ the gist of Professor Mvunga's argument was that the 'village committee' constitutes persons in authority and as such Judges' rules must apply, namely among others, that the suspect must be warned against the dangers of incriminating himself.' The Supreme Court observed that although warning the accused before extracting the confession was one of the requirements under the judges' rules in order for a confession to be admissible as evidence, the Supreme Court distinguished Mbomena's case in that the confession was not made to a person in authority (village committee) and as such the judges' rules did not apply. Despite the Supreme Court holding that the village committee did not constitute persons in authority to be covered by the judges rules the Court endorsed the view that warning the accused before making an incriminating statement was one of the essential requirements in order for a confession to be admissible as evidence under the judges' rules.

The supreme court in **Mbomena's** case observed quoting the case of **Banda v The People**

"Those rules were designed to guide Police Officers in dealing with suspects and prisoners in the course of investigating crime. This Court takes judicial notice that the training of Police Officers includes instructions in administering the warn and caution. There is no suggestion that these rules are intended to apply to persons other than those whose normal duties pertain to investigating crime. We are unaware of any law or convention which constitutes a village headman as an officer charged with responsibility of investigating crime. In practice, when a person suspected of committing a crime is reported to a village headman this is essentially for the purpose that the headman should use his good office to cause the suspect to be conveyed to the authority of the Police; he is the intermediary between the inhabitants of his village and the Police, sometimes through his chief, a typical headman therefore is a man who would not know, nor should he be expected to know what creature warn and caution is. On a careful review of the position we are satisfied that the Judges' Rules do not contemplate, as persons

¹²⁷ [1952] 2 Den

¹²⁸ (1981) Z.R. 28

¹²⁹ (1981) Z.R. 28

who should administer the warn and caution to suspects, persons like village headmen because it is not their normal responsibility to investigate criminal cases".¹³⁰

In **Joseph Mutaba Tobo v The people**¹³¹ where the learned trial commissioner, relied on the warn and caution statement and the circumstantial evidence and found that the appellant assaulted the deceased sexually in the course of which he strangled and killed her. The learned trial judge established that the warn and caution statement was recorded by the police officers before the confession was extracted from the accused person. On appeal the Supreme Court observed that the confession was in accordance with the judges' rules as the accused person was warned and cautioned before extracting the confession, but that the confession was not admissible as the judge was supposed to exercise his discretion to exclude the confession as the accused was beaten by the crowd shortly before the accused was warned and cautioned.

In **Zeka Chinyama and others v The people**¹³² The supreme court summarised the effect of failure to warn and caution the accused person or any breach of the judges' rules as follows,

"breach of the Judges' Rules or other unfair conduct surrounding the making of the confession, either on the part of a police officer or of some other person, which might indicate to a judge that there is danger of unfairness. The normal impropriety involved is the questioning of a person in custody without informing him of his right to decline to answer questions; it is frequently alleged also that the accused has been kept in custody for unduly lengthy periods, that he has not been fed, that he has been prevented from sleeping, and so on. It is essential to recognise the distinction between these two types of allegation; the first - the failure to warn the suspect of his rights - is a breach of the Judges' Rules and is the kind of impropriety with which we are here concerned, while the other examples are of conduct which can only be described as inducements designed to weaken the will of the accused. Where allegations of this latter kind are made and the judge is not satisfied that they are untrue, then his ruling ought to be that the confession is inadmissible because it has not been shown, to be voluntary, and the question of the exercise of discretion does not arise; and it is to be observed in passing that complaints by accused persons frequently involve allegations of beatings and also lack of sleep and other less direct forms of inducement and the trial court should deal with all these allegations when considering the question of voluntariness. Where a trial court simply expresses itself to be satisfied that no assaults took place but fails to comment on the other allegations of the type mentioned, this could well found an argument on appeal that the trial court misdirected itself on the facts in failing to consider all the evidence bearing upon the question of voluntariness and hence admissibility."

The supreme court in the Chinyama's case confirmed that failure to administer a warn and caution statement entitles the judge or magistrate to exercise the discretion to exclude the confession. It is therefore important for the police officers to warn and caution the accused before extracting a confession from him in order for a confession to be admissible as evidence

¹³⁰Banda v The People (1986) Z.R at 105.

¹³¹S.C.Z. Judgment No. 2 of 1991

¹³²(1977) Z.R. 426

4.6 VOLUNTARILINESS

A further requirement that should be fulfilled in order for a confession to be admissible as evidence is that the confession must be made freely and voluntarily by the accused person. In **Muwowo v The people**¹³³ Blagden CJ. defined a voluntary confession as follows,

“A ‘voluntary’ confession is one made in the exercise of a free choice to speak or to be silent; it cannot be the product of violence, intimidation, persistent importunity or sustained or undue insistence or pressure or any other method by the authorities that overbears the will of the accused to remain silent.”

In **Zeka Chinyama v The people**¹³⁴, it was held that when dealing with an objection to the admission of an alleged confession the trial Court must first satisfy itself that it was freely and voluntarily made.

In **The people v Chanda**¹³⁵ it was held that the statements were obtained from the first accused after improper inducement as the interrogating officer, Sub- Inspector Kajoba, admitted that he kept all the suspects including the first accused in the inquiries office overnight on a hard bench. That was as good as denying the suspects sleep, there were allegations by the accused of assault on him before the statements were extracted from them. That the first accused, like his co-accused, was subjected to prolonged questioning.

There was further evidence in **The people v Chanda**¹³⁶ that during the time the accused made the statements attributed to the confession, the accused had not been given food, were denied sufficient sleep and there were also allegations that they were beaten. It was held that where it is shown that an accused person has at first denied a crime and then after a considerable period in police custody suddenly comes forward with a confession, these circumstances in themselves raise a prima facie reasonable suspicion of involuntariness which requires cogent evidence to be excluded.

In **Tapisha v The people**¹³⁷, the applicant was convicted of theft. Part of the case for the prosecution was the evidence of a police officer to whom the applicant was alleged to have made a free and voluntary statement. When a trial within the trial was almost concluded it was established that he made no statement but that he was forced to sign his name in a notebook. The magistrate thereupon discontinued a trial within the trial on the ground that a

¹³³ (1965) ZR 91

¹³⁴ (1977) Z.R. 426

¹³⁵ (1986) ZR 105

¹³⁶ (1986) ZR 105

¹³⁷ (1973) ZR 222

denial that a statement was made was a matter for the general issues and not for a trial within a trial. It was held that 'It is as a matter of law that before a confession to a person in authority is admissible it must be proved to have been freely and voluntarily made; voluntariness is a condition precedent to admissibility and questions of fact relating to voluntariness are properly described as affecting admissibility. But it is not the law that before an item of evidence is admissible it must be shown to be true'¹³⁸. Baron J. went on in the same case to cite his own judgment in **Mambalina v R.**¹³⁹ as follows,

"If the statement was not made voluntarily - *a fortiori* if it was not made at all - the accused is entitled to have it entirely excluded from the consideration of the court."

Baron J.'s dicta in **Mambilima v R.** reveals strong sentiments by him stating that if a confession is not freely and voluntarily made, that statement is as good as if it was not made(*a fortiori*) as it will not be admissible as evidence.

In **Kangachepe Mbao Zondo v The people**,¹⁴⁰ the appellants were sentenced to death by the High Court. The main ground of appeal was that there had been a breach of the judges' rules in the obtaining of statements from the accused and the statements should accordingly not have been admitted in evidence. It was held that in deciding whether a statement made by an accused person to the police is admissible, the test which a court must apply is not whether the judges' rules have been infringed, but whether the prosecution has affirmatively established that the statement was made freely and voluntarily.

Edward kunda v The people¹⁴¹, the appellant was found by the police on the roof of a store and in possession of some stolen property. He made a statement to the police admitting the charge of having broken into the store. The trial magistrate did not ask the appellant whether he had any objection to the admission of evidence of the confession being given. It was held that the question of the voluntariness of a confession applies to both written and verbal confession.

Despite the law being settled as regards admissibility of confessions in Zambia the trial magistrate in **Kunda's** case failed to follow the guidance that had been constantly given by the Supreme Court as regards admissibility of confessions. The Supreme Court noted that words made by the accused was in fact a confession and before admitting it as evidence the

¹³⁸ Mambilima v R. (1962) At page 510

¹³⁹ (1962) R. & N. 507

¹⁴⁰ (1963-1964) Z.& N.R.L.R. 97 (C.A.)

¹⁴¹ (1971) ZR 99

magistrate should have satisfied himself on the question of voluntariness or otherwise. The magistrate had failed to carry out a *voire dire* in order for him to establish the voluntariness of the statement.

.In **Nalishuwa v The People**, the facts were¹⁴² that the appellant was convicted of murder. The evidence against the appellant was that he was seen talking to the deceased shortly before her death, confessed and when formally charged made reply by admitting charge. Appellant appealed against conviction on grounds that confession was inadmissible. It was held that where two confessions are made and the first is held not to have been freely and voluntarily made, the second will be equally inadmissible, even though there has been no fresh inducement, unless it is shown that the previous inducement has ceased to operate on accused's mind.

From the cases cited above it is clear that voluntariness is a condition precedent to admissibility of a confession. In order for a confession to be admissible as evidence it must be proved that it was made voluntary without inducement or force, the confession must be freely and voluntarily by the accused person. The judge or magistrate must ensure that the confession was made voluntarily as a condition for the admissibility of a confession.

4.7 DISCRETIONARY POWERS

When an incriminating statement has satisfied all the requirements for admissibility under the judges' rules, the Judge or Magistrate has the discretion not to admit such statement if it will act to the detriment of the accused person. In **The people v Nelson Habwacha**¹⁴³ Baron J. held citing a dictum of Lord Parker, CJ. in **Callus v Gunn**¹⁴⁴ which sets out the proper approach to the question of voluntariness and the exercise of the court's discretion,

“... that the court always has a discretion to exclude any evidence if its admission would operate unfairly against an accused, and in the case of an alleged confession there is the further principle that the confession must be shown to have been voluntary. In considering what circumstances would be unfair Lord Parker used the expression ' ... in an oppressive manner by force or against the wishes of an accused. It must be stressed also that is not only when there has been a breach of the Judges' Rules that the question of discretion arises; the principles of fair conduct are principles in their own right independently of the Judges' Rules.”¹⁴⁵

¹⁴² (1972) ZR 26

¹⁴³ (1971) ZR 154

¹⁴⁴ [1964] 1 Q.B. 495; [1963] 3 All E.R. 677

¹⁴⁵ At page 680

In this regard, the judge or magistrate still has the discretion either to admit the alleged confession despite the judges' rules being satisfied and failure by the magistrate or judge to exercise such discretion will lead to a confession being inadmissible as evidence.

In **Zeka Chinyama and others v The people**¹⁴⁶, it was held that the question of the discretion to exclude a confession made to a police officer would be considered when a confession has been held to have been voluntarily made, but there has been a breach of the judges' rules or other unfair conduct surrounding the making of the confession, either on the part of a police officer or of some other person, which might indicate to a judge that there is danger of unfairness.

In **Nalishuwa v The people**¹⁴⁷, it was held that,

“Principles of a fair conduct are principles in their own right independent of the Judges' Rules. Where there has been any impropriety it is incumbent on the trial judge to consider whether the case is proper one for the exercise of his discretion to exclude evidence the admission of which would operate unfairly against the accused and failure so to consider is serious misdirection.”

In the **Nalishuwa** case the Supreme Court acknowledged that the judge's exercise of discretion is a principle of fairness independent from the judges rules, this ensures that even though the judges rules are satisfied the judge must as a principle of fairness exercise discretion to exclude any confession that would operate to the detriment of the accused person.

In **Patrick Sakala v. The people**¹⁴⁸, it was noted by the Supreme Court on appeal that,

“There was in this case no reference made by the trial court to the exercise of its discretion and so, failure to consider the matter of its discretion in connection with both statements, constituted a serious misdirection. As we cannot say that had the matter of the exercise of the discretion been considered by the trial court it must inevitably have admitted the statements, we are bound to rule that the statements were wrongly admitted' the magistrate during the trial after considering admissibility of confessions did not make mention or refer to his exercise of discretion.”¹⁴⁹

The failure by the magistrate to address his mind on the exercise of discretion after establishing that the confession was voluntarily made was regarded by the Supreme Court as a factor that could render the confession inadmissible. The Supreme Court emphasized the exercise of discretionally powers as a fundamental principle for admissibility of a confession.

¹⁴⁶ (1977) ZR 426

¹⁴⁷ (1972) ZR 26

¹⁴⁸ (1980) ZR 205

¹⁴⁹ At 205

In Reben Njobvu and Light Chiphanzi Banda v. The people¹⁵⁰ it was held that,

“For the avoidance of doubt, we wish to say that there are three important stages to be observed in order for a confession to be admissible as evidence. First, the court must decide whether or not the accused's statement was made freely and voluntarily; if it so finds, then it must next consider the second stage, namely the question of the exercise of its discretion on the ground that strict admissibility of the statement would operate unfairly against the accused, for instance, if there was an unfair or improper conduct on the part of a person or persons in authority surrounding the making of the statement. Once the court's discretion is exercised in favour of the accused, the statement is excluded forthwith notwithstanding that it had been made freely and voluntarily. If it is admitted and some further evidence is later adduced concerning which the court feels its discretion should be exercised with regard to the already admitted statement, the court may then decide to exclude such statement before judgment or in the judgment. The third stage is that the court must decide what weight, if any, is to be placed on the admitted statement.”

The Supreme Court summarised the procedure which should be followed before a confession is admissible as evidence and any failure to satisfy this procedure will render the confession inadmissible. The magistrate or judge should adhere to this procedure outlined by the Supreme Court of Zambia as regards admissibility of confession.

In Chibwe v. The people¹⁵¹ it was held that,

“It is unnecessary for us to consider whether on the record the learned trial judge should have exercised his discretion and excluded the statement notwithstanding his finding that it had been freely and voluntarily made; it is clear that the learned trial judge did not direct his mind to the question of the court's discretion and it could well be that if it were necessary to decide this point we would have to hold that this failure constituted a fatal defect.”

The learned trial judge did not direct his mind to the exercise of discretion after establishing that the confession was freely and voluntarily made. The Supreme Court held that failure by trial judge to address the exercise of discretion was a fatal defect that would render the confession inadmissible.

In Mutambo and five others v. The people¹⁵² the ground of appeal was that the learned trial judge wrongly failed to exercise his discretion by excluding the confession. It was held that,

“While a judge has a discretion to exclude admissible evidence, it is a discretion which should only be exercised when it appears clearly that the evidence in itself or by reason of the circumstances in which it was obtained has an unfair prejudicial tendency against the accused out of all proportion to its probative value.”

It is clear from cases analysed above that the major role or reason for the addition of the exercise of discretionally powers is to enable the judge or magistrate to exclude evidence that

¹⁵⁰ (1978) ZR 372

¹⁵¹ (1972) ZR 239

¹⁵² (1965) ZR 15

despite being freely and voluntarily made would act to the detriment of the accused person. The exercise of discretion enhances a fair trial on the part of the accused as all evidence that tend to act to his detriment will be excluded by the judge or magistrate through the exercise of discretion to exclude that statement.

4.8 ILLEGALLY OBTAINED EVIDENCE

Under this heading the paper will outline the approach taken by the Zambian Courts as regards illegally obtained evidence. The paper will analyse cases in a bid to ascertain the procedure and approach taken by the Zambian Courts as regards illegally obtained evidence.

In **Liswaniso v. The People**¹⁵³ the facts were that the applicant an Inspector of Police, was convicted of official corruption, the allegation being that he corruptly received a sum of K80 in cash as consideration for the release of an impounded motor car belonging to the complainant. The evidence on which the applicant was convicted was obtained by means of a trap; the handing over of the currency notes in question by the complainant was pre-arranged with the police, and they were recovered from the complainant's house during a search conducted pursuant to a search warrant. It was common cause that at the time the police officer in question applied for the search warrant to be issued he (Police officer) swore that the money in question was in the applicant's house when in fact it was in that officer's possession. It was argued on behalf of the applicant that the search warrant was invalid and the resultant search was illegal as well, and that anything found as a result of such a search was inadmissible in evidence. It was held that,

“Apart from the rule of law relating to the admissibility of involuntary confessions, evidence illegally obtained, e.g. as a result of an illegal search and seizure or as a result of an inadmissible confession is, if relevant, admissible on the ground that such evidence is a fact regardless of whether or not it violates a provision of the Constitution (or some other law), although based upon an irregular search warrant, was rightly admitted by the trial court because that evidence was a relevant fact. (Per curiam) Any illegal or irregular invasions by the police or anyone else are not to be condoned and anyone guilty of such an invasion may be visited by criminal or civil sanctions.”

The Supreme Court regarded the evidence that was obtained from an invalid search warrant as admissible despite the evidence being illegally obtained; the Supreme Court admitted the evidence as the evidence was relevant to the *factum probanda*. The position in Zambia as held by the Supreme Court is that apart from involuntary confessions, illegally obtained evidence is admissible provided it is relevant to the facts in issue.

¹⁵³ (1976) ZR 277

In **Charles Lukolongo and others v The people**¹⁵⁴ the decision in *Liswaniso v. The people* was endorsed by the Supreme Court when it held that,

‘Real evidence which is repentant to a fact in issue is admissible notwithstanding that it is unfairly or illegally obtained.’

This decision by the Supreme Court affirmed the position in Zambia that illegally obtained evidence is admissible as evidence.

On the contrary in **Mack Maulla and Asukile Mwapuki v The people**¹⁵⁵ the same Supreme Court held that,

“Evidence discovered in consequence of an involuntary confession is admissible and also evidence discovered as a result of a statement not under warn and caution is admissible.”

The Supreme Court in the **Mwapuki’s** case extended the principle established in *Liswaniso v. The people* that illegally obtained evidence is admissible as long as it is relevant to the facts in issue by holding that evidence discovered in consequence of an involuntary confession is admissible as evidence if it is relevant to the facts in issue. The holding by the Supreme Court contradicts the judges’ rules as regard voluntariness of the confession before a statement is admissible as evidence.

4.9 CONCLUSION

In conclusion it is clear from the case law that was outlined in this chapter that the procedure to be followed before a confession is admissible as evidence is settled. The judge must first satisfy himself that the incriminating statement is ‘*Factum probanda*.’ *Factum probanda* refer to facts which require to be proved or disapproved in order to win a case.¹⁵⁶ These are facts which deal with or relate to the matter under investigation (the facts in issue). Therefore, a confession which does not relate to or deal with the facts in issue will be inadmissible as evidence. Secondly the Judge must then proceed to carry out a *voire dire* in order to determine preliminary issues such as whether the accused was warned and cautioned and whether the statement was freely and voluntarily made. In **Joseph Mutaba Tobo v. The people**,¹⁵⁷ the Supreme Court observed that the confession was in accordance with the judges’ rules as the accused person was warned and cautioned before extracting the confession, but that the confession was not admissible as the judge was supposed to exercise

¹⁵⁴ (1986) Z.R. 115 (S.C.)

¹⁵⁵ (1980) Z.R. 119 (S.C.)

¹⁵⁶ M. Woodley, ‘Osborne’s Concise Law Dictionary.’ 10th Ed(London: Sweet & Maxwel, 2005) p.173

¹⁵⁷ S.C.Z. Judgment No. 2 of 1991

his discretion to exclude the confession as the accused was beaten by the crowd shortly before the accused was warned and cautioned.

Furthermore the alleged confession must be made to a person in authority. After these conditions have been satisfied the judge or Magistrate still has the discretion to exclude such self incriminating statement that act unfairly on the part of an accused person.

The position in Zambia is settled as regards illegally obtained evidence; illegally obtained evidence is admissible provided it is relevant to the facts in issue.

This Chapter having exposed the approach taken by the Zambian Courts as regards admissibility of confessions and illegally obtained evidence the next Chapter will give a general conclusion and recommendations that should be made as regards admissibility of confessions and illegally obtained evidence.

CHAPTER FIVE

CONCLUSION AND RECOMMENDATIONS

5.1 CONCLUSION

The paper has shown that the Constitution of Zambia expressly outlaws torture and inhuman treatment in Article 15 which provides that,

“A person shall not be subjected to torture or to inhuman or degrading punishment or other like treatment.”¹⁵⁸

Despite torture being illegal under Zambian law the law enforcement officers heavily rely on it to extract confessions from accused person and the nature and extent of torture inflicted on the accused persons is diverse.¹⁵⁹ The paper has outlined cases reported to the Human Rights Commission of Zambia by victims who have been tortured by the law enforcement agents. The complaints received by the Human Rights Commission confirm that torture is widely used by the law enforcement agents despite it being abolished under Zambian law.

The paper has also exposed recent complaints that have been reported to the Police Public Complaints Authority by victims who have been tortured at the hands of the police officers. Similarly, the paper has also analysed complaints that have been published by the Amnesty International, Legal resource Foundation, The Jesuit Centre for Theological Reflections which all confirm that torture is widely practiced in Zambia by the law enforcement agents. The extent of torture inflicted on the victims has in some instances led to the death of the victims.¹⁶⁰

The paper has analysed confessions at Common Law and outlined the requirements that must be fulfilled in order for a confession to be admissible at Common Law. At Common law in order for an alleged confession to be admissible as evidence it is a requirement that the judges' rules have to be adhered to despite the fact that failure to strictly adhere to the judges' rules does not render the alleged confession inadmissible.

The paper has given a critical analysis of admissibility of confessions in Zambia and the approach that has been laid down by the Supreme Court of Zambia as regards admissibility of confessions and illegally obtained evidence. Illegally obtained evidence is admissible as

¹⁵⁸ The Constitution of Zambia, Chapter 1 of the Laws of Zambia

¹⁵⁹ Chimba v. Attorney General

¹⁶⁰ See appendix page vii- viii

evidence in Zambia as long as it is relevant to the *factum probanda*. The paper also delved with cases in which the Magistrates have failed to adhere to the guidance given by the Supreme Court of Zambia as regards admissibility of confessions. Failure by the Magistrate or judge to adhere to the judges rules does not render the confession inadmissible as judges rules are not rules of law and as such have no force of law.¹⁶¹

5.2 RECOMMENDATIONS

Confessions are one of the best ways of proving evidence.¹⁶² However confessions in Zambia are oftenly characterized by torture of the accused persons by the law enforcement officers in a bid to obtain incriminating statements. In order for confessions to a better method of proving *factum probanda* the paper makes the following recommendation to the government and the Parliament of Zambia; judges' rules to be made rules of law as opposed to being merely directives given to the law enforcement officers, secondly need for an independent, effective and reliable complaint system, thirdly, prosecution of police officers implicated in torture and finally rendering illegally obtained evidence as illegal.

(1) JUDGES' RULES TO BE MADE RULES OF LAW

In order for confessions to be reliable to prove *factum probanda*, it is important that the judges' rules which provide the procedure that should be followed in order for a confession to be admissible as evidence must be made rules of law. In **Mbomena v The People**,¹⁶³ the Supreme Court of Zambia held quoting the decision in **Banda v. The People**¹⁶⁴ that,

“Those rules were designed to guide Police Officers in dealing with suspects and prisoners in the course of investigating crime.”¹⁶⁵

In **Mandavu v. R.**¹⁶⁶ it was held by Conroy C.J that,

“I considered the question of the Judges' Rules in this country, and I now repeat what I there said: ...As the grounds of appeal specifically allege breaches of the Judges' Rules as a ground for rejecting such statements, I will once again, and as simply as possible, explain the effect, in law, of the Judges' Rules. The rules were advice given by the judges to the executive arm of government. They were not judicial decisions made by the judges; they have therefore no binding legal effect. The executive arm of government then issued the rules to Police Officers as administrative instructions which police officers, as a matter of discipline, were enjoined to follow. They are administrative directions enforced by the police authorities as tending to the fair administration of justice.”

¹⁶¹ Banda v. The People (1986) ZR 105

¹⁶² R v. Baldry [1852] 2 Den 430

¹⁶³ SCZ Judgment No. 35 of 2000

¹⁶⁴ (1986) Z.R 105

¹⁶⁵ (1986) Z.R 105

¹⁶⁶ (1962) R & N. 298 at 304

Judges rules should be made rules of law in order to make their compliance mandatory by the law enforcement agents, so that breach of the judges rules will make the confession so extracted inadmissible as a matter of law. The Zambian Legislature should promulgate the judges' rules into law in order to make their compliance by the judges mandatory.

(2) NEED FOR AN INDEPENDENT, EFFECTIVE AND RELIABLE COMPLAINT SYSTEM

There is need for an independent, effective and reliable complaint system in dealing with complaints of torture. The Police Public Complaints Authority which was established to receive complaints from the public involving police brutality and misconduct despite being independent is neither reliable nor effective. Ms Chilufya rightly observed, 'When a complaint is received by the commission there is a committee under the commission that consider the complaint, the committee affords the complainant and the police officer guilty of the misconduct an opportunity to be heard. If a police officer is guilty of the misconduct the committee recommends to the Inspector General of Police for administrative action. The Inspector General may in certain circumstances write to the Director of Public Prosecution for the prosecution of the victim guilt of police brutality or misconduct.'¹⁶⁷

The complaint system under the Police Public Complaints Authority is highly dependent on the good will of the Inspector General who has in most cases been accused of shielding the victim police officers.¹⁶⁸ The Inspector General usually shield his officers in order to ensure that they feel secure as punishing them would affect them in their daily operation.

(3) PROSECUTION OF POLICE OFFICERS IMPLICATED IN TORTURE

Police officers implicated in torture should be prosecuted by the courts. The complaint system under the Police Public Complaints Authority addresses the issues of assault by writing to the Inspector General of Police for administrative action against the officers implicated in torture after an investigation. The Inspector General may recommend to the Director of Public Prosecution for the possible prosecution of the implicated police officers. The extent of torture in some instances has resulted in death of victims¹⁶⁹ and leaving the prosecution of the police officers who torture victims to the discretionary of the Inspector

¹⁶⁷ Nancy Chilufya, Assistant Registry Officer, Police Public Complaints Authority (26th January, 2011) Lusaka

¹⁶⁸ Fredrick Muzeta, Complainant (19th January, 2011) Lusaka

¹⁶⁹ See appendix for the post mortem of the victim who died as result of torture from police officers page vii-viii

General usually leads to an injustice on the victim's family. The Inspector General of Police and the Director of Public Prosecution has under the Police Public Complaints Authority system offered state protection to the officers implicated in torture.

The judgment by Judge Phillip Musonda in **Felisia Phiri Mpinga and Sarujai Berena Mpinga v. Constable Lubinda, Constable Musonda, Constable Simukonda and the Attorney General**¹⁷⁰ is good law and if adopted and followed by the Police Service and the Courts will help in eradicating torture by the police officers. Musonda J. held that;

“One reason the police have continued behaving like a hired militia is because the state continue to foot bill for their lawlessness. I will award Ten milion kwacha for false imprisonment to both and five million kwacha for torture and five million as exemplary damages, total twenty million kwacha for each. The police officers should indemnify the state. They may go to retire without pension so be it. That will be the price for such brutal and uncivilized conduct. The courts should not be perceived to hyper the concern of police excessive use of power and its unlawfulness in this judgment; it is merely reflecting the unlawfulness and excessiveness of police misconduct.”

The holding by Judge Musonda J. should be endorsed by the Supreme Court and be adhered by the lower courts as it would ensure that the police officers act within their authority for fear that they would be liable to indemnify the state as agents of the state in an event that they act outside their authority.

(4) FRUITS OF ILLEGAL SEARCH OR INVOLUNTARY CONFESSIONS

In **Liswaniso v. The people**,¹⁷¹ it was held that illegally obtained evidence is admissible as long as it is relevant to the facts in issue. This position tend to conflict with the rule on admissibility of confessions that a confession will only be admissible if it is voluntarily made by the accused person. The holding by the Supreme Court of Zambia entails that evidence illegally or improperly obtained is admissible as long as it is relevant to the facts in issue. This holding by the Supreme Court has been extended to cover confessions illegally or improperly obtained, in **Mack Maulla and Asukile Mwapuki v The people**¹⁷² the Supreme Court held that,

“Evidence discovered in consequence of an involuntary confession is admissible and also evidence discovered as a result of a statement not under warn and caution is admissible.”

¹⁷⁰ 1999/HP/1583

¹⁷¹ (1976) ZR 277

¹⁷² (1980) Z.R. 119 (S.C.)

Illegally and improperly obtained evidence must be rendered inadmissible as it is obtained in an involuntary manner and consequently in breach of the judges rules. The courts in Zambia must follow the approach taken by the United States of American Court in **Miranda v. Arizona**¹⁷³ that a confession that is illegally obtained is inadmissible despite being relevant to the facts in issue

¹⁷³ 384 U.S. 436

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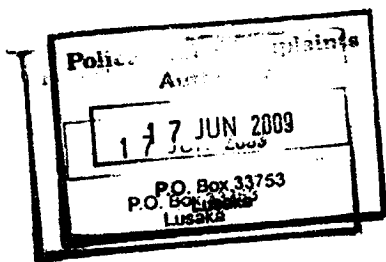
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APPENDIX



MWASONKO VILLAGE HEADMAN,
MWASONKO CHIBOMBO DISTRICT,
CHIEF MUNGULE
10/04/09.

POLICE PUBLIC COMPLAINT AUTHOLITY,
ANEX BUILDING,
GROUND FLOOR,
LUSAKA.

**RE: COMPLAINT AGAINST MR CHILESHE THE OFFICER IN CHARGE FOR
KABANGWE POLICE POST \STATION**

I am hereby lodging this complaint against the named officer above I am Rent Mooya of the named Village above. I am 49 yrs old. The named officer above on Wednesday night 25/03/09, came home at the named Village with some unknown people together with my husband. They had to awake me up; upon reaching the door side I received a slap from Chileshe and dragged me into the car.

Questions came concerning my husbands business him being the cattle buyer. I answered a few that I could manage. I was given time to ask my husband some questions. I asked him what the problem was. He narrated the whole story that he bought an animal from Poacher in between 21 and 24 Dec 2008, so these people are claiming that the animal is theirs. I went on asking, you people, your animal did it have a brand mark? Yes, they replied. My husband, the animal you bought did it have a brand mark? No, he answered. Now, what evidence do they have? I don't know my husband replied. A conversation went on. We reached Kabangwe Police Post my husband was put in cells and I was taken to Matero Police Cells.

The following day we were taken back home I and my husband upon reaching home the named officer asked my husband where his abattoir was. My husband was told to sleep right there where he slaughters animals from Mr Chileshe started beating my husband using an iron bar.

I was so scared such that I never wanted to see how he would finally die. He turned to me; Mr. Chileshe the named Officer beat me as much as they could. My legs, thighs, foot are all swollen. My left ankle dislocated. He brought water, poured my husband after a few minutes he came to life. He drove us back to our various police stations.

On Sunday 29th March, 2009 I was transferred to Ngwerere police post cells. The following day 30th March, 2009 I was bonded without signing any document, after giving him a K1,000,000 (One Million Kwacha) which he requested. The sister-in-law who was giving him the monies demanded for a receipt of which he refused to give her. Two days later my Sons in-law followed up for a receipt only to be told that money was an exhibit.

They came back puzzled and confused because the money was meant for police bond if at all the bond is paid for. Nevertheless, this is what he told me when I was still in the cells.

On 1st April, 2009 I went back to Kabangwe for a medical report and the following day I went to UTH. The Doctor took me for an X-ray and told me to report back on 8th April, 2009 for Radiological report. I reported on the above date and the findings are attached herewith. I am on plusta, I can't even walk as at now.

Would you help me on this matter.

Yours Faithfully,

LENTY MOOYA

Rent Mooya



GP Form 32
Revised by G.M. Suresh

MEDICAL REPORT

THE MEDICAL OFFICER
THE GOVERNMENT/MINE HOSPITAL

The Patient: V.P.H. R. M. MOYO
of (give details of name) Body pains complains
under the following circumstances: Beaten by known persons.

Will you please report on the extent of injuries, and whether they are consistent with the alleged circumstances

Date: 20/09/2019

Place: USUKA

CHAPERD
Police Officer
6637 D. S. P.
Name and Rank in BLOCK LETTERS

I have examined the above named and find: Tenderness and swelling on the left ankle and foot. Tenderness and ecchymosis distal part of Right Thigh and calf. Tenderness, swelling and abrasions on the right ankle. Ecchymosis on the left knee with tenderness

*My findings are consistent with the circumstances alleged/ are not consistent with the circumstances alleged for the following reasons:

As a result of soft tissue injury

[Signature]

[Signature]

DR. KALO KA NANGA

*Delete where not applicable



Samson Chirwa
Basilica Gardens
Farm No. 3852/M
Leopards Hill Road
LUSAKA

0964 350151

0967 415450

The Commissioner
Police Public Complaints Authority
Kent Building
LUSAKA

15th April 2010

REF: POLICE BRUTALITY IN CELLS

On the 18th of January, 2010 around 1230 hours, I left the poultry and met my grandmother in the orchard. She has been suffering from a semi paralys stroke. I told her to be stretching her left hand, as I was demonstrating to her my mother appeared and alleged that I was cheating and trying to break her hand. My mother screamed and instilled fear in my grandmother, later dashed to Woodlands Police Station.

At around 1300 hours on the same day, my mother appeared with 3 police officers, who found me having a shower in my cottage. One officer was armed in Paramilitary uniform, the other in plain clothes, the third (lady officer) in regular uniform, blue shirt, Navy blue skirt.

I asked the officers to be patient so that I finish my shower and accompany then if they so wish. After my shower I dressed and went outside. There I was received like a criminal beaten with no interview. Shoved into mums car and driven to Woodlands Police. Upon arriving at Woodlands three officers came to the car and dragged me out using utmost force. I was pushed behind the reception where I was badly beaten. Later I was pushed to the cells where I was detained. At about 2200 hours a roll call was conducted to my surprise my name was not called. Between 2200 hours and 2300 hours officers came back switched off the cell lights and ordered cellmates to beat me. After passing out, I was taken out of cells, poured water on then tied on legs and hands pushed through the cell bars. The cell mates were ordered to tie hands and the officers used handcuffs to instill immobility. They then light candles and started burning my hands with further beatings, body and hands. I was then transferred to the Ladies cells when I was for 4 days. On the 22nd January I was transferred to

Chainama Hospital where I was observed for 4 days and released on 25th January.

The officer I identified is DANNY MWAANGA of Woodlands Police residing in Chilenje Police Camp.

25th October, 2001

Name: (A/M) EDDIE MWENYA. Apparent age: 18YRS. Date: 17/10/01. Time: 11.20H

Identified by: WESLEY MUONGA. Relation: SON. Address: H/SE NO.85/25 CHAWAN

Referred from: LUSAKA CENTRAL. Attending Police Officer: D/SGT MWALE/18562

External examination was witnessed by Mr. Wesley Muonga father of the deceased, Mr. Richard Kasalwe, uncle of the deceased.

EXTERNAL EXAMINATION:Nourishment and Height
Identification etc

Lean and about 174cm.

1. Multiple bruises of varying dimensions noted on the right chest covering upper, middle and lower part.
2. Bruise noted on the right chest right arm near cubital fossa, right wrist laterally.
3. Bruises noted on both scapula area but more pronounced on right upper back, left middle back and lower back.
4. Abrasions, noted on left wrist medially and left forearm dorsally in the middle 1/3 region, right ankle, left frontal area.

Date of death

.. .. Alleged on 13th October, 2001.

Time of examination

.. .. 11.20 hours.

INTERNAL EXAMINATION:

Skull

.. .. Subgaleal haematoma noted on left fronto-parietal region.

Brain Meninges etc.

.. .. Highly congested, oedematous, left parietal lobe showed some haemorrhagic areas near the central sulcus appears to be concussion. On coronal section wide spread petechial haemorrhages noted.

Mouth, Tongue & Oesophagus

.. .. Mucoid.

Larynx, Trachea & Bronchi

.. .. Froathy inside.

R.Lung, L.Lung and any Pathology

.. .. Bilateral pleural adhesions noted. Right lung red consolidated appearance. Highly congested and oedematous.

Pericardium heart, Blood vessels and Aorta

.. .. Healthy.

/2....

3

Stomach and Contents Filled with yellowish green fluid.
 Peritoneum, Intestines and Mesenteric Glands Congested.
 Liver Fatty liver.
 Spleen Congested.
 Kidneys and Ureters Congested.
 Bladder and Urine Had urine.
 Generative Organs Congested.
 Are all other organs healthy? Congested.

SPECIAL EXAMINATION:

- (a). Biochemical Flood and stomach contents for toxicology.
 (b). Histopathological Specimen taken.

Comments: It appears during confrontation deceased got some superficial injuries on various parts of the body which were not noticed in the internal organs. It is possible. His head was also shaken violently which might have caused oedema and congestion of the brain. Police to find whether his mate in the cell, if any, had some quarrel with him. Please let me know.

CAUSE OF DEATH

.. .. CARDIO RESPIRATORY ARREST.
 due to

(b) CEREBRAL AND PULMONARY OEDEMA.

II: ANALYSING.

SIGNED: DR. R. PATHAK.,
 FORENSIC PATHOLOGIST.

