

**TRIAL BY JURY: THE WAY FORWARD IN ZAMBIA'S JUSTICE  
DELIVERY SYSTEM.**

**BY**

**KAFULA MWICHE**

**BEING A PAPER SUBMITTED IN PARTIAL FULFILMENT OF  
THE EXAMINATION REQUIREMENTS FOR THE DEGREE OF  
BACHELOR OF LAWS OF THE UNIVERSITY OF ZAMBIA.**

**MAY, 2000**

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## **PREFACE**

The jury system as it is understood appears to me to be as direct as extreme a consequence of sovereignty of the people as universal suffrage. These are two instruments of equal power, which contribute to the supremacy of the majority. Thus the jury which is the most energetic means of making the people rule is also the most efficacious of teaching them how to rule well.

Alex de Tocqueville.

## **DEDICATION**

To my wife Veronica Makwakwa Mwiche and my son Kafula Jabulani  
Mwiche.

## **ACKNOWLEDGEMENTS**

I wish to thank most sincerely my supervisor in this paper Judge K.C. Chanda (RTD), for the warm advise and direction without which the paper would not have seen the light of day. I further wish to thank my dear wife for editing and the words of encouragement even at times when I felt like I was banging my head against a brick wall. I would also like to thank Vincent Chakulya without whom this paper would not have been printed. Lastly but not the least I would like to thank my family for believing in me and tolerating my extended stay in school. But most of all to God be the glory.

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## **INTRODUCTION**

The role of Law in the rule of Law cannot be static. As Society develops from one stage to another, law cannot be expected to lag behind society. While the executive and the legislature are busy enacting laws to meet the new challenges posed by a changing society the courts and judges should also be seen to be playing their part in challenging old orthodoxy's and helping to usher in new values and expectations. <sup>1</sup> The justice delivery system in Zambia has been the same since Independence from the British in 1964. The system has out lived two Republics and is now in the third one with very little change. This therefore paper serves to advocate a change in the current justice delivery system in Zambia. The change advocated for is in line with the political and socio-economic change that has taken place in all other areas of human endeavour in Zambia with the advent of the third Republic. There has been a lot of dissatisfaction and misgivings in the current justice delivery system expressed from a number of quarters. An eminent Zambian legal scholar recently lamented that,

" The Zambian Judiciary has never been subjected to fundamental reforms ever since independence. People have not had the opportunity to engage in serious debate on the kind of justice they want and how it should operate. Rather, we have been using it almost as it was inherited from Britain with all the undesired"<sup>2</sup>

Almost every facet of Zambian life has changed with time whereas the justice system has remained stagnant. It is the general feeling in the citizenry that since Zambia is now a democracy the people should have a say in all areas that effect their lives and the justice delivery system is one such area.<sup>3</sup> The change in the justice delivery system, in which the ordinary Zambian will have a role to play, envisaged by way of this paper is the introduction of trial by Jury.

The current justice delivery system appears to have has outlived its usefulness with the people seemingly losing confidence in it. This is very dangerous to the society. The justice system is the custodian of the peace and once the people lose faith in it, it becomes a recipe for anarchy. The aforesaid apparent loss of confidence in the justice system can be deduced by utterances by a number of interest groups in some judgements of the Courts. In the ***Presidential petition (1997)***,<sup>4</sup> a case in which the opposition parties by way of petition challenged the 1996 presidential elections alledging *interalia* that the Republican president Mr. F.T.J.Chiluba was not a Zambian citizen and therefore not entitled to have stood for election, the Supreme Court threw out the petition and declared the president a Zambian and the duly elected president. The judgment of the Supreme Court in this case was met with a lot of disapproval such that youths of the United National Independence Party (UNIP) rioted just after the judgment was delivered.<sup>5</sup>

In the case cited above a number a number of political parties that were parties to the petition expressed their dissatisfaction of the out come of the case stating that it was impossible for justice to be received in the Courts.<sup>6</sup> The Vice President of the Zambia Democratic Congress (ZDC) did not mince his word when he said that; "it was time for Zambians to fight for their destiny and not depend on institutions to do so for them."<sup>7</sup>

Moreover the lose of confidence in the justice system can be seen in the recent activities where people have started taking the law into their own hands instead of letting the law take its course against offenders. Vigilante justice has been instituted time and again as the people feel that if the accused person is arrested and taken to court justice will not be done. A recent illustration of this was the setting ablaze of a suspected burglar in the Chelstone area of Lusaka. The suspect was set ablaze by a mob of residents when he and four others tried to break into a house whose occupants raised the alarm.<sup>8</sup> Therefore from the foregoing the need to reform the justice delivery system and to make it more responsive to the peoples needs is a matter of great urgency.

However in light of the foregoing what then is justice? The term justice has been defined differently by a number of scholars depending on the context in which the term is used. Nevertheless the universally accepted definition of justice is defined as,

" A moral value commonly considered to be the end which law ought to try to attain which it should realise for the men whose conduct is governed by law and which the standard or measure or criterion of goodness in law and conduct by which it can be criticized or evaluated."<sup>9</sup>

One legal scholar gave a definition of justice that could be on all fours with the purposes of this paper when he stated that justice is,

" A depiction of the good of society, the ideal state of affairs, the consummation of many hopes and dreams, the heaven on earth that we would seek to achieve. The just society and derivatively the just legal order is that which must afford men a milieu in which they can realize their full potential and have decent satisfying lives. In more homely terms the just society is one that secures to men such familiar but elusive values as freedom, equality, security and opportunity; it gives them public support and protection that they need to make good their inadequacies and it also allows them the room to exercise initiative and direct their private life. Justice identifies the standards to which social apparatus should adhere in the dealings with citizens. The laws should be certain known and impartially administered men are to be regarded as equal before the law and are to be treated with fairness, no man should be a judge in his own case and there should be no reason for arbitrariness, enforcement must be effective and even handed. "<sup>10</sup>

Therefore the ideal of justice requires a system that is efficient and acceptable to the general populace. The due process of law is a guaranteed right in Zambia and provided for under the Constitution.<sup>11</sup> Hence the system that enhances this right must be efficient and reflect the era in which it is operating. Trial by jury would be the system that would reflect the aspiration of the people thus its introduction in Zambia would be the way forward in reforming the current justice delivery system.

This paper has four chapters that discuss the issue in more detail. Chapter one sets the tone for the paper in that it discusses the present justice delivery system in Zambia including a brief historical background. That is it traces the justice system from the pre - colonial days to the present day. This chapter also analyses the shortcomings and the inadequacies of the current justice delivery system.

In chapter two the discussion centres on Jury trial. It defines the jury system and gives the historical background tracing it from earliest time to the present day. The Chapter then examines the salient features of the system by way of examining the system in the United States of America and the United Kingdom.

Chapter three is the crux of the matter as it discusses the justification to introduce trial by jury in Zambia. It examines the socio- economic aspects that support or that would

enable the introduction of the jury system. It also provides a suggested a *modus operandi* for implementing the system in Zambia.

Chapter four is a summary of the findings, an analysis of the improvements that trial by jury would bring to the nation and how it would help in revamping the justice delivery system. The conclusion follows thereafter with the recommendation that should be implemented to ensure that trial by jury is the way forward in Zambia's justice delivery system.

## **NOTES**

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- <sup>1</sup> Williams H. R Judges and Politics in Contemporary Age, Bowerdean Publishing Co, London. 1996.p. 2
  - <sup>2</sup> Hansungule M. Kaunda's Judgment, The Post, No 1201, April 6, 1999
  - <sup>3</sup> Oral interviews Opinions expressed by a cross section of people in Lusaka,
  - <sup>4</sup> Presidential Petition ( 1997) Unreported
  - <sup>5</sup> Zambia Daily Mail, November 11, 1998. p. 1
  - <sup>6</sup> Times Of Zambia November 11, 1998 p.6
  - <sup>7</sup> The Post, November 11, 1998.
  - <sup>8</sup> Zambia Daily Mail, May 20, 1999
  - <sup>9</sup> Walker D.M, The Oxford Companion To Law, Oxford University Press, U.S.A 1980 p.689
  - <sup>10</sup> Jenkins I, Social Order & The Limits Of The Law, Princeton University Press, New Jersey, 1980. p. 232
  - <sup>11</sup> Article 18, Constitution of Zambia, Cap 1 of the Laws of Zambia

## **CHAPTER ONE.**

### **ZAMBIAS JUSTICE DELIVERY SYSTEM.**

#### **1.1 INTRODUCTION**

An understanding of the Zambian justice delivery system as it exists today is dependent in a large measure upon an understanding of its history. The current justice delivery system in Zambia is a legacy of the colonial period. Almost every feature of the system today can either be traced back to an historical origin a generation or more ago or can be accounted for as a latter- day attempt to be rid of some offensive aspect of the colonial period.<sup>1</sup> Zambia was a British colony and the justice system that was inherited at independence is almost a replica of the British system and is the same to this day. There has been very little reform or change in the system and in the laws applicable. Moreover some British statutes have been provided for and have direct application in Zambia,<sup>2</sup> and in certain instances where a procedural lapse appears in Courts the procedure as it is in the United Kingdom will be applicable.<sup>3</sup> Moreover most of the statutory laws in Zambia today have their roots in the colonial period.



## **1.2 THE PRE- COLONIAL PERIOD**

The societies that existed in Zambia before were Kingdoms under Chiefs or Kings. Notable among these were the Bemba Kingdom in the north of the Country under Chief Chitimukulu, the Lozi's in the west under King Lewanika and the Ngonis in the east under Mpezeni. These societies had their own traditions and customs that governed the way in which they resolved disputes within their community. However disputes that arose between different tribes or kingdoms were resolved by wars. Each traditional society had its own mechanisms of dealing with offenders such as banishment from the tribe or village or even the payment of compensation. These tribal kingdoms had a very simple justice delivery system that was suited to their time. However paramount to these tribal societies was the sense of community standards of justice. It was the community or the tribe that formulated the punishment such that when an offender was punished he received community justice that was satisfactory to everyone. Hence this was a period in which the justice delivery system was community driven.

## **1.3 THE EARLY COLONIAL PERIOD: COMPANY RULE (1889- 1924)**

The explorers that came to the territory, which is present day Zambia, in the early times such as David Livingstone, took back tales of the richness of the land in terms of resources. This resulted in the influx of more explorers and entities with commercial interests. One such commercial enterprise was the British South Africa Company under

the Chairmanship of John Cecil Rhodes whose dream was to build a railway line from the Cape in South Africa to Cairo in order to exploit the abundant resources of the interior.<sup>4</sup> Thus colonisation arose out of the pursuit of commerce rather than as an end in itself. The British South Africa Company (hereinafter referred to as the Company) was granted a Royal Charter on 29th October 1889 to rule the territory that is present day Zambia. The charter empowered the company to open such offices to perform such duties and open Courts with personnel to serve in them.<sup>5</sup> The Company with the approval of the British government divided the territory into North-Western Rhodesia with its headquarters at Livingstone and North-Eastern Rhodesia with its headquarters at Fort Jameson, which is present day Chipata.<sup>6</sup> The charter also entrusted the administration of justice in the territory in the company.

However, two systems of justice delivery came into existence at the time, one for the locals and the other for the Company people that is to say the whites who worked for the Company. Article 14 of the charter provided that,

" In the administration of justice to the said peoples or inhabitants, careful regard shall always be had to the customs and the laws of the class or the tribe or nation to which the parties respectively belong, especially with regard to the holding, possession transfer and disposition of lands and goods, and testate and intestate succession thereto and marriages, divorces, legitimacy and other rights of property and personal rights, but subject to many British laws which may be in

force in any of the territories aforesaid and applicable to the peoples or inhabitants thereof.”<sup>7</sup>

The first courts to be established in the territory by the Company were consular courts that were provided for in the African Order in Council 1889. Although these courts were an important part of the legal system, in practice their impact on the general public was not wide spread.<sup>8</sup> In the early days of company rule the indigenous people continued to administer their own justice. However the provisions in the North- Western Rhodesia Order in Council of 1899 and North -Eastern Rhodesia Order in Council 1900 established a more elaborate judicial system, in the territories that made profound changes to the justice delivery system. In North - Eastern Rhodesia a High Court was created with original criminal and civil jurisdiction coupled with appellate jurisdiction. Magistrate courts were also created and so were Native Commissioner Courts. In North Western Rhodesia the judicial system was not as elaborate, with only the establishment of an administrators court in 1905, which was manned by laymen, but it enjoyed powers comparable to the High Court in North Eastern Rhodesia.

It became apparent that the administration of the territory in two zones was not in the best interest of the Company and resulted in the duplication of certain functions. Thus on the 4th of May 1911, the Northern Rhodesia Order in Council of 1911 was promulgated revoking the North Eastern and North -Western Rhodesia Orders in council and resulting in the merger of the two territories into one jurisdiction. As a result the

judiciary too was merged and a number of proclamations and orders were introduced to fortify the system. A substantial change that occurred was that the High Court became a court of the first instance or of review in all criminal matters and in cases between the Europeans and Africans the Court was empowered to apply customary law whenever it would appear to the court that strict adherence to English law would cause an injustice to either party.<sup>9</sup> The jurisdiction of the Magistrate courts was expanded to include criminal punishments as severe as imprisonment for twelve months or twenty-four lashes and in cases that warranted a harsher punishment the court would convict and refer the matter to the High Court for sentencing.<sup>10</sup> On the other hand the locals still administered their own justice according to their customs in the tribal courts.

#### **1.4 THE LATER COLONIAL PERIOD: CROWN RULE (1924- 1964)**

In later years it became increasingly expensive for the Company to administer the territory. Negotiations were entered into with the British government and the Company agreed to divest itself of the powers of government with considerable relief. <sup>11</sup> In 1924 the British government assumed control of the territory for the Crown through the Northern Rhodesia Order in Council of 1924. A governor for the territory was appointed and was to be assisted by an executive council consisting of officials designated by the Crown. The 1924 Order in Council provided for the establishment of a High Court, Magistrates Court and Native Commissioners Courts.<sup>12</sup> The High Court was given original jurisdiction in all civil and criminal matters over all persons and over all

matters.<sup>13</sup> The significant development was that the jurisdiction of the Court was to be exercised upon the principles and in conformity with the substance of the law for the time being in force in and for England. English Law could be modified or ousted by an order in council or local law. No Acts of Parliament passed in the United Kingdom after the commencement of the Northern Rhodesia Order in Council of 1911 were to apply to the territory unless provided for by another law.<sup>14</sup>

A few years later by way of statutes enacted in Northern Rhodesia, Southern Rhodesia and Nyasaland provided for the establishment of the Rhodesia and Nyasaland Court of Appeal. When determining appeals this court applied the law for the time being in force in the territory from which each appeal originated. Upon the coming into being of the federation of Rhodesia and Nyasaland in 1953 a Federal Supreme Court, which was essentially an appellate court, was established which lasted until the dissolution of the federation. In this period at the apex of the justice delivery system was the Judicial committee of the Privy Council, which upon the exhaustion of the courts in the local jurisdiction an appeal could be made to the Privy Council. This emanated from the prerogative of the King as the fountain of Justice, to receive petitions from his subjects who were dissatisfied with the decisions of the ordinary courts of law.<sup>15</sup> Viscount Cane put the position in its right context in ***Nandan Vs R*** (1926) wherein he stated that,

“ The practice of invoking the royal prerogative by way of appeal from any Court in his Majesty’s dominion has long been obtained throughout the British Empire.

In its origin such an application may have been no more than a petitory appeal to the sovereign as the fountain of justice for protection against unjust administration of law."<sup>16</sup>

Nevertheless during the British Government's colonial rule the tribal Courts were still not to be recognised but customary law was to be applied so far as it was not repugnant to natural justice or morality, or any other order made by the Crown or to any law or ordinance in force at the time.

The colonial government then went ahead and implemented their policy of indirect rule by using the already established institutions. The Native Courts ordinance of 1929 provided that the tribal courts would consist of headmen, elders or council of elders in the area assigned to it or as the governor would direct.<sup>17</sup> Hence there developed a two-way justice delivery system one for the Europeans and the other for the indigenous people. However the rapid urbanisation and development of the mines on the Copperbelt brought certain problems with regards to the delivery of justice in as far as the administering of customary law was concerned. The Copperbelt became a boiling pot of different cultures and it was thus very difficult to settle disputes by way of customs as these differed from tribe to tribe.

The Native courts in these areas were faced with great difficulty such that to overcome the problems the use of assessors was introduced. The Chiefs in the rural areas would

select a few elders well vested in the customs and tradition and send them to the mines to act as arbitrators in the District Officers Courts. Although this system initially required much time and effort of the district officers, the assessors eventually:

" ... Began to function almost independently of the *Boma* and operated as a court *de facto* if not *de jure*. The proper establishment of urban courts was thereafter only a matter of time and for example, the conference of District Commissioners of Western Province agreed in 1938 that immediate steps should be taken to constitute a court at Mufulira. By the end of the following year fully constituted courts were functioning at all other mine centres and at Ndola. In the following few years the system was extended to such other urban centres as Livingstone, Lusaka and Broken Hill... "18

This saw the emergence of the Urban Native Courts, which were provided for by the Native Courts Ordinance, number 10 of 1936. These courts were composed of three or four Justices who were members of the tribes most numerous in the area. Tribal chiefs selected the justices subject to approval by the District Officers. The native Courts became the fulcrum of the justice delivery system and most cases were disposed of at this level with very little appeal to the other courts.

### **1.5 POST INDEPENDENCE PERIOD TO DATE (2000)**

On 24th October 1964 Zambia ceased to be a British protectorate and was granted Independence. This independence brought great many changes to the nation such that even the justice delivery system too was affected. The major change herein was the change of the Court structure. There came to the fold Superior Courts and inferior Courts. The Superior Courts after independence were the High Court and later the Court of Appeal which was established to take care of the needs resulting from the dissolution of the federal Supreme Court. The inferior courts that were established were the subordinate courts and local courts. The process of integrating the Native Court system into the mainstream court system was embarked on with great urgency in 1964. A new Act, the Local Courts Act was enacted which brought sweeping changes to the structure and administration of justice in these lower courts that had replaced the Native Courts.

There has not been much change in the justice delivery system since Independence; the only major change has been the replacement of the Court of Appeal by the Supreme Court. The Supreme Court is a creation of the Constitution<sup>19</sup> and is better provided for by an Act of parliament<sup>20</sup>. The Supreme Court consists of the Chief Justice, the deputy Chief Justice and seven Justices.<sup>21</sup> A contentious matter before the Supreme Court is determined by an odd number of justices of not less than three. The Supreme Court is the final court of appeal in the Country. The Supreme Court has original



jurisdiction conferred on it by the constitution.<sup>22</sup> Thus the Court in ***Akashambatwa Mbikusita Lewanika & four others Vs Fredrick Jacob Titus Chiluba & another*** (1996) exercised such jurisdiction<sup>23</sup> where the petitioners in an election petition moved the court. In its appellate jurisdiction, in civil matters the Supreme Court entertains two types of appeal, an appeal as of right and an appeal with leave from the High Court or the Supreme Court itself.<sup>24</sup> In determining civil appeals the Supreme Court outlined its approach in ***Kennuir Vs Hatting (1974)*** where it said that an appeal should take the form of rehearing of the record. In questions of the credibility of witnesses are involved it will not interfere with the findings of fact made by the trial judge unless it clearly shows that the trial judge erred. The court went on to say it would normally be reluctant to order a new trial where it appears from the record that there was sufficient evidence before the trial court.<sup>25</sup>

In criminal matters an appeal can be as of right or with leave from the High Court or the Supreme Court itself. Any person tried and sentenced or merely sentenced by the High Court after being convicted by a subordinate court can appeal as of right to the Supreme Court against such conviction and sentence. On the other hand persons whose cases are heard by the High Court in the exercise of its appellate or reversionary jurisdiction can appeal only with leave from the High Court given at the time when the judgement is pronounced or with leave from the Supreme Court if leave is refused by the High Court.<sup>26</sup> When considering an appeal against conviction the Supreme Court will allow it if it considers that the conviction is unsafe or unsatisfactory having regard to all

the circumstances of the case like for instance in ***Phiri & Another Vs The People*** where the appeal was allowed on account of insufficient evidence.

The Constitution of Zambia also provides for the establishment of the High Court with the Chief Justice as an ex officio member and a number of puisne judges that an Act of Parliament may provide for from time to time.<sup>27</sup> The court can be constituted of one puisne judge or by the Chief Justice<sup>28</sup> as in the case of ***Michael Chilufya Sata Vs Post Newspapers Limited*** wherein the Chief Justice was the presiding Judge.<sup>29</sup> The High Court has unlimited original jurisdiction with the exception of proceedings brought under the Industrial and Labour Relations Act,<sup>30</sup> and is the appellate Court to the lower courts. It is the court of first instance in matters of parliamentary election petitions. The sittings of the Court can be held in any buildings within Zambia as the Chief Justice may assign as Court Houses for those Purposes.<sup>31</sup> The High Court on the direction of the Chief Justice by way of a statutory instrument may hold sessions in the provincial towns of Zambia or any other towns where persons have been committed by the Subordinate Court to the High Court for trial.<sup>32</sup>

The Constitution empowers the legislature to establish such lower courts as it thinks fit and thus the subordinate courts have been established in pursuance to this provision. The jurisdiction of the subordinate courts is provided for in the Subordinate Act and the Criminal procedure Code<sup>33</sup>. The Local Courts are also a creation of the Legislature who

have further delegated power to the Minister of Legal Affairs to create more when need arises.

## 1.6 TRIAL IN THE PRESENT JUSTICE DELIVERY SYSTEM

Zambia's judicial system is based on the adversary system, which applies to both criminal and civil matters. The adversary system, which is applied in most common-law countries, simply means that the parties to litigation's before a Court of law have to conduct their own cases to the best of their ability. The principle underlying this system is that the judge plays the role of an umpire.<sup>34</sup> He must be impartial and in Zambia he is both the finder of the fact, makes pronouncements as to the law applicable in the particular case and renders a verdict. This role of the judge in an adversary system was ably put forth by Lord Denning MR in *Jonnes Vs National Coal Board (1957)* where he stated that,

" The judges part when evidence is being given is hearken to it asking questions only when it is necessary to clear a point; to see to it that the advocates behave themselves seemingly and keep to the rules laid down by law, to exclude irrelevancies and discourage repetitions; to make sure by wise intervention that he follows the points made by the advocates and can asses their worth and at the end make up his mind where the truth lies"<sup>35</sup>

In Zambia's adversary system the trial magistrate or judge will sit alone to determine any contentious matter before the Court. At the trial the procedure in civil matters is that he who alleges must prove. The plaintiff will first make out his case by calling his witnesses to adduce evidence to support his claim and the witness will then be cross-examined by the defendant. The defendant will then also open his case by presenting his statement in defence and adduce evidence to support his position. At the Close of trial the court will then determine the matter for the party that has proved its case on a preponderous of probability. In criminal trials the prosecution has to prove its case beyond a reasonable doubt. The prosecution opens the proceedings by adducing evidence to prove that the accused committed the offence alleged. The accused then has the opportunity to prove that he did not commit the offence he is accused of by adducing evidence to prove the same. The court will then pronounce on the guilt or innocence of the accused. Therefore in Zambia's justice delivery system the judge is both the finder of fact and the law. The court is duly constituted where one judge is sitting for the purposes of determining a matter.<sup>36</sup>

### **1.7 TRIAL WITH ASSESSORS**

There is no provision in the Zambian law of including lay persons to determine the matter before the court. However, the law has provision for lay persons to sit with the court as assessors in certain matters. The history of trial with assessors is as long as the history of the judicial system in Zambia itself. In the Consular Courts, which were the first courts to be established, these courts were required to sit with assessors

whenever a cause of action brought before the court involved a claim of over £300.00 (read: three hundred Pounds Sterling). In criminal matters the court was required to sit with assessors where a person was charged with an offence punishable by death or a term of imprisonment exceeding twelve months. These assessors were to be British subjects of good repute resident in the district of the court or belonging to a British ship.<sup>37</sup> The decision of the Consular Court was that pronounced by the official authorised to hold the court and the assessors had neither a voice nor vote on the decision.<sup>38</sup>

In the High Court of North Eastern Rhodesia the Court was required to sit with at least two assessors whenever a person charged with murder appeared before the court and in any other matters the court would sit with assessors if it so wished. Any person between the ages of twenty and sixty could be summoned to serve as an assessor. When the Court was sitting with assessors each assessor was required to give an opinion orally in open court on the guilt or innocence of the accused. However the final decision was to be given by the presiding judge who was to record any dissenting opinion by any assessor in the minutes.

In the same vein the High Court in the period under direct British colonial rule was with an option of sitting with two or more assessors, in this instance trial with assessors unlike in the previous instances was discretionary. Thus to this day trial may be held with the help of assessors in the Magistrates and High Courts. In the High Court the

trial of any civil cause or matter may if the presiding judge so decides be held with the aid of assessors, the number of whom shall be two or more .<sup>39</sup> The Judge in the High Court or Magistrate in a Subordinate Court may conduct a criminal trial with the assistance of two or more assessors.<sup>40</sup>

Trial with assessors was undoubtedly a measure designed to involve lay men in the judicial process. In the colonial period it was strongly felt that assessors would comparatively be in a better position than the European judges or magistrates to assess the veracity of the testimony of native witnesses.<sup>41</sup> The court in ***King Emperor Vs Redd*** (1901) ably put the role of assessors, where it stated that ,

" Assessors are analogous to expert witness and in principle the opinion of an assessor is substantially on the same footing as the opinion evidence of expert witnesses... thus it will be seen that the purpose was made by the legislature for Europeans administering justice in a foreign and therefore deficient in their knowledge of the customs and habits of the parties and witnesses appearing before them and also in judging of their demeanour in the witness box, have the benefit of the opinion of two or more respective natives of the land as assessors possessing such knowledge and judgement..."<sup>42</sup>

Trial with assessors as discussed above provides some form of participation in the justice delivery system by laymen. However it falls far below the form of participation

that a jury enjoys in a jury trial. It can be argued that the colonialists included the use of assessors in the law as they thought that with the level of understanding of the locals, this was as far as they could go as a jury would have been somewhat to complicated for them.

## **1.8 THE INADEQUACIES OF THE CURRENT JUSTICE DELIVERY SYSTEM**

There are a lot of factors that have contributed to the inadequacies of the current justice delivery system prompting this advocacy of a change. Delving into these inadequacies would be quite voluminous hence best suited for a separate discussion in a different paper altogether . However for the purposes of this paper, some of the major inadequacies will be examined briefly. The current system where a single magistrate or judge presides over a matter has a fundamental disadvantage because it appears that there is a lack of independence of the judiciary in Zambia. On paper the three arms of government that is the executive, the legislature and the judiciary are separated <sup>43</sup> but in practice it is seemingly very difficult to draw a clear-cut line.

The independence of the judiciary requires the state to guarantee the independence of the judiciary as enshrined in the constitution. An Independent judiciary is one that dispenses justice according to law without regard to the policies and inclinations of the government. The organs administering justice must be subordinate to the law and that only the law must influence their decisions. The judiciary is independent if there is

personal, collective and internal independence of the judges<sup>44</sup> who must decide cases on the basis of the relevant law and facts pertaining to the case without external interference from the executive or the legislature or indeed any kind of pressure, be it political, business, financial and so on.<sup>45</sup> It seems the Zambian judiciary is far from being independent, the other arms of government continue to exert undue influence on the judiciary.

Independence of the judiciary means the independence of the Court to decide cases according to law. The universally accepted norm that to be independent of the executive, a judge must be secure from the risk of dismissal by the government of the day <sup>46</sup>does not obtain in Zambia. The judiciary continues to have very poor conditions<sup>47</sup> of service making them very susceptible to concede for certain favours. Therefore it follows that the current justice delivery system based on a single judge deciding a matter is inadequate as owing to the lack of independence it is doubtful whether one can obtain a fair hearing in matters with the government or other influential people.

Furthermore the issue of political intimidation of the judiciary in Zambia is nothing new. A case in point would be at the incident when Court of appeal quashed sentences imposed on two Portuguese soldiers by the lower court in the case of ***Silva and Freitas Vs The People (1969)***<sup>48</sup> the then President Dr. Kenneth David Kaunda openly denounced the decision, the chambers of the Chief Justice was ransacked by youths accusing him of being a racist. As a result the then Chief Justice and two other white



judges resigned and left the country for good<sup>49</sup> In the recent past after the court passed judgement in the case of ***Mulundika and Others Vs The People***<sup>50</sup> wherein section 5 (4) of the Public Order Act was struck off as being unconstitutional, the legislature led by the leader of the House the then Vice- President General Godfery Miyanda launched a virulent attack on the Chief Justice from the floor of the House. The government of the day incited its party functionaries to demonstrate against the Court and falsely accused Chief Justice of molesting a female court worker.<sup>51</sup>

Moreover in the very recent past the government of the day has used the Courts to settle political scores. The ***Treason Trial*** (1999) is a case in point where a number of persons such as the former president Dr Kenneth Kaunda, Zambia Democratic Congress President, Dean Mung'omba and others were detained and charged as being conspirators in the Coup attempt of October, 1997 but only to have the charges dropped. Even citizens have had their liberty taken away from them on trumped up charges with the courts entertaining such acts with impunity. The government has used the Constitutional office of the Director of Public Prosecution<sup>52</sup> to detain and try innocent people who have later been released after dropping the charges upon entry of a *nolle prosequi* by the state. One such embarrassing episode was the arrest and indictment of nine Ukrainian cargo Plane crew, with espionage. Upon the case crumbling in court the Director of Public Prosecution discontinued the case<sup>53</sup>. If the indictment of persons on serious offences was done by way of a grand jury most of the numerous cases that have gone before would not have found their way into the Courts.

Thus the current justice delivery system does not have enough safe guards for the citizens. From the fore going it can be deduced that in its present form it can be used by the state arbitrary to the detriment of the people. Hence the people must have more say in the dispensation of justice thus this advocating of the long overdue change.

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## **NOTES**

- <sup>1</sup> Ndulo M. Law in Zambia, East African Publishing House, Nairobi, 1984.p.47
- <sup>2</sup> British Acts Extension Act, Cap 10 of The Laws of Zambia.
- <sup>3</sup> Procedure in Matrimonial Proceedings, High Court Act Cap 28 of The Laws Of Zambia
- <sup>4</sup> Roberts , A History of Zambia, Heinman Publishing, London, 1976.p.32
- <sup>5</sup> Artice 22 Royal Charter of Incorporation of the British South Africa Company, October 29, 1889
- <sup>6</sup> Roberts.p.42
- <sup>7</sup> Royal Charter 1889, Article14
- <sup>8</sup> Allot, New Essays in African Law, Butterworths, London 1970 p.266
- <sup>9</sup> Northern Rhodesia Proclamation No 1 of 1913
- <sup>10</sup> Ndulo p 49
- <sup>11</sup> Hall R., Zambia 1890-1964, The Colonial Period, Longman, London 1976.p43
- <sup>12</sup> Articles 27,31and 35 Northern Rhodesia Order In Council,1924
- <sup>13</sup> Ibid. article 27
- <sup>14</sup> Article 27 (2) Northern Rhodesia Order in Council, 1924
- <sup>15</sup> Kanganja J.L, Courts and Judges in Zambia: The Evolution of the Modern Judicial System, University of London, Ph.D. Thesis 1980.p 574
- <sup>16</sup> Nadan Vs R ( 1926) A.C. 481
- <sup>17</sup> Section 2 , Native Courts Ordinance, No 33 of 1929
- <sup>18</sup> Ndulo p. 52
- <sup>19</sup> Article 91 Constitution Of Zambia, Cap 1 of the Laws of Zambia
- <sup>20</sup> Supreme Court Act, Chapter 25 Of The Laws Of Zambia
- <sup>21</sup> Section 2 The Supreme Court and High Court ( Number of Judges ) Act Cap 26 of the Laws of Zambia.
- <sup>22</sup> Article 41(2) op.cit at note 16
- <sup>23</sup> Akashambatwa Mbikusita Lewanika & Four Others Vs Fredrick Jacob Titus Chiluba & Another SCZ/EP/344/1996
- <sup>24</sup> ibid. See sections 23 and 24.

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- <sup>25</sup> Kennuir Vs Hatting ( 1974 ) Z.R. 162
- <sup>26</sup> Section 12 & 14 Cap.. op.cit
- <sup>27</sup> Article 94, The Constitution of Zambia, Cap 1 of The Laws of Zambia
- <sup>28</sup> Section 3 High Court Act, Chapter 26 of The Laws of Zambia
- <sup>29</sup> Michael Chilufya Sata Vs Post Newspapers Limited 1993/HP/1395( Unreported)
- <sup>30</sup> ibid 94 ( 1 )
- <sup>31</sup> Section 18, The High Court Act, Cap 27 of The Laws of Zambia
- <sup>32</sup> ibid section 19
- <sup>33</sup> Cap 87 of the Laws of Zambia.
- <sup>34</sup> Chitengi P. How Efficacious has the Adversary System been in Zambia, University of Zambia, Obligatory Essay1983. p. 24
- <sup>35</sup> Jones Vs National Coal Board ( 1957 ) 2QB 55
- <sup>36</sup> op.cit section 4 Cap 27
- <sup>37</sup> Article 92 Africa Order in Council 1889
- <sup>38</sup> Allot P, New Essays In African Law, Butterworths, London, 1970 .p. 266
- <sup>39</sup> op.cit. section 5 Cap 27
- <sup>40</sup> Section 197, Criminal Procedure Code, Cap 88 of The Laws of Zambia.
- <sup>41</sup> Ibid
- <sup>42</sup> King Emperor Vs Redd ( 1901 ) T.L.R. 24
- <sup>43</sup> Art 91 ( 2 ) Constitution of Zambia
- <sup>44</sup> Silomba S.S. Judicial Activism : A Hazardous But Worthwhile Form of Adjudication, University of Warwick, LLM. Thesis, 1997. P. 26
- <sup>45</sup> Ibid
- <sup>46</sup> Kunda G, The Zambian Judiciary in The 21<sup>st</sup> Century, Zambia Law Journal Volume 30,. 1998.p.33
- <sup>47</sup> Chief Justice Nglube when he addressed a judicial workshop in Siavonga, The post, No 1379, 16<sup>th</sup> December, 1999. P.4
- <sup>48</sup> Silva and Freitas Vs The People ( 1969) Z.R.121
- <sup>49</sup> Hatcher J, Individual Freedoms and State Security in The African Context: The Case of Zimbabwe Boaobab Books, Harare,1993.p.132

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<sup>50</sup> Christine Mulundika and others Vs The People 1995/SCZ/25

<sup>51</sup> Silomba, p.34

<sup>52</sup> Article 56 Constitution of Zambia

<sup>53</sup> The Post, No. 1377, Tuesday 14<sup>th</sup> December 1999.

## CHAPTER TWO

### TRIAL BY JURY

#### 2.1 DEFINITION OF TRIAL BY JURY

The underlying premise in a trial by jury is that justice is handed up from the community and not down from some gilded hilltop legislature. The people have an inherent conception of justice, which they will apply when a member of that community is charged with a crime or where there is a dispute between two members of the community. Thus the power lies with the people and not the judges or the legislature. The question that one is confronted with is that what then is a trial by jury? This question was ably answered by an American Federal Court in ***Capital Traction Co. Vs Hof, (1899)***, wherein the court stated that,

“Trial by jury in the primary and usual sense of the term at common law, is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and advise them on the facts and (except on acquittal of a criminal charge) he may set aside their verdict if in his opinion it is against the law or the evidence.”<sup>1</sup>

The function of the jury as stated by the Court in ***Williams Vs Florida (1970)*** is to safeguard the citizen against arbitrary law enforcement and preventing oppression by the government and providing the accused an insulatable safeguard against the corrupt or overzealous prosecutor and against the complacent, biased or eccentric judge. Furthermore it entails the interposition between the accused and his accuser of the common sense judgment of a group of laymen and the community participation and share the responsibility that results from the groups determination of guilt or innocence.<sup>2</sup>

In most jurisdictions, which employ the jury system, the jury consists of members of the general public aged between eighteen and seventy selected at random using the electoral roll. Some people such as those who have served a prison term are automatically disqualified from jury service. In a criminal trial it is the jury's duty to decide the truth or other wise of evidence therefore the juries must be impartial. After the hearing is over the jury will then have to pass a verdict, which is the jury's decision, about whether the accused is guilty or not guilty. Where the jury is used in a civil case the jury shall find for the plaintiff and judgment is made against the defendant.

The jury is drawn from a cross section of the community. In ***Swain Vs Alabama (1965)***, it was amplified that the requirement for community participation includes the need for a representative cross- section of the community in jury

decision-making.<sup>3</sup> Moreover as per ***Ballew Vs Georgia (1978)*** meaningful community participation cannot be attained with the exclusion of minorities or other identifiable groups from jury service.<sup>4</sup>

Trial by jury is a pre-eminently a political institution: it must be regarded as one form of the sovereignty of the people; the jury is that portion of the nation to which the execution of the laws is entrusted as the house of parliament constitutes that part of the nation which is entrusted with making the law.<sup>5</sup> Lord Justice Devlin Further stated on the jury that,

" ...each jury is a little parliament. The jury sense is the parliamentary sense. I cannot see the one dying and the other surviving. The first object of any tyrant in Whitehall would be to make parliament utterly subservient to his and the next to overthrow or diminish trial by jury for no tyrant could afford to leave a subjects freedom in the hands of twelve of his country men. Trial by jury is more than an instrument of justice and more than one wheel of the constitution. It is the lamp that shines that freedom lives..."<sup>6</sup>

Perhaps the most eloquent justification of the jury was the one made by Sir William Blackstone in his commentaries on the Common Law. He stated that,



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Perhaps the most eloquent justification of the jury was the one made by Sir William Blackstone in his commentaries on the Common Law. He stated that,

".. But in settling and adjusting a question of fact when entrusted to any single magistrate, partiality and injustice have an ample field to range in; either by asserting that to be proved which is not so; or by more artfully suppressing some circumstances, stretching and varying others and distinguishing away the reminder. Here therefore a competent number of sensible upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth and the surest guardians of public justice. For the most powerful individuals in the state will be cautious of committing any flagrant invasion of another's right when he knows that the fact of his oppression must be examined and decided by twelve indifferent men not appointed till the hour of the trial; and that once the fact is ascertained the law must of course redress it. This therefore preserves the hands of the people that share which they ought to have in the administration of public justice and prevents the encroachment of the more powerful and wealthy citizens."<sup>7</sup>

The landmark case that illustrates the people's justice theory as a basis for trial by jury is the **Zenger Case** (1735). In this case Peter Zenger published a muckraking newspaper that regularly criticised and taunted the corrupt New York Governor William Cosby. The Governor was particularly detested because he freely used the colonial courts to benefit himself and his cronies. He also tried to use the courts to silence Zenger and his cohorts. Thus Zenger was eventually

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arrested and prosecuted under a Law that made it illegal to criticise government officials even if the accusations were true. The jury in this case decided that despite the written law Zenger was not guilty. The British masters were furious but the verdict stood.<sup>8</sup> The jury in this case demonstrated ably that it could exercise its own sense of community justice and could put severe limits on any rulers' use of power

## **2.2 THE HISTORICAL BACKGROUND OF THE JURY SYSTEM**

Trial by jury has a rich long history that can be traced back to the times of early civilisation. The birth of the first rudimentary jury system was in relatively ancient times in olden Greece. As Greece was the cradle of liberty so was it the place of the origin of the jury system. The key to the Greek system was the use of *diskastenes*, well before the birth of Christ, the Greeks selected by lots six thousand citizens above thirty years of age and divided them into smaller groups called *decuries*, when a civil or criminal trial was ready to be heard, lots were drawn to determine in which *decury* and court the case was to be heard. At this time the *decury* consisted of between two hundred and four hundred people.<sup>9</sup> The second great society to use a form of jury was the Roman Empire the issues of the dispute were defined by a judge; the decision of how to dispose of the issues was referred to one or more private persons known as a *judex* or in the

plural *judices*. These private persons correspond roughly to the present day jury.<sup>10</sup>

Although all historians today are not in accord to the topic, many of them say that the germ of the modern jury is to be found in ninth century France where it began as a royal administrative device perhaps borrowed from fifth century Rome.<sup>11</sup> The principle of a common law jury or jury of your Peers was first established on June 15th, 1215 at Runnymede, England when King John signed the Magna Carter after a bitter struggle with the nobles It was the Magna Carter and the statute of Westminster which established the principle of the due process of Law.<sup>12</sup> The roots of the jury can be found in both criminal and civil inquiries conducted under old Anglo- Saxon Law. In earlier times the method of ascertaining criminal guilt was by ordeal which took a number of forms, the ordeal of the hot Iron required the accused person to carry a red hot pound of Iron in his or her hand for a certain distance usually nine feet. At times the accused would be told to dip one hand in a pitcher of hot water and pluck out a stone hanging out by a string. In both ordeals the injured hand was bound up in bandages if after three days the hand had not become infected the person was judged innocent. The assumption underlying the ordeal was that God would intervene on the side of the innocent person. In civil cases trial by battle was used, the two parties to the dispute would fight on the battlefield and the winner of the battle won the legal case.

One of the first ever-recorded Jury trial happened around 900 AD in a case in which one Alfonth claimed title to some land in Swaffham that was in the possession of the Monastery of Ramsey. The court hearing this case consisted of some king's officers and a number of prominent men of the County. The two parties and the court agreed that thirty-six persons should decide the dispute, eighteen of whom would be friends of the other. These individuals called compurgators retired to consider the merits of the claim. The unanimous decision was that the Monastery should keep title to the land and that the claimant should forfeit his property to the King for making false claims.<sup>13</sup>

However after William conquered England in 1066 he introduced some changes to the legal system. By 1215 the jury appeared and began replacing the ordeals the justices would summon a jury to determine which form of ordeal was to be used or whether some legal action was brought maliciously. At this time an accused person was allowed to opt for trial by jury instead of submitting to an ordeal. But the jury at this stage consisted more or less of witnesses as the persons were called upon to testify about the facts of the involved parties. Thus this set the stage for the present day jury system, which originated as seen above in ancient England. The system as it evolved was transferred to the colonies where in some cases it underwent some metamorphoses to fit the local conditions obtaining there.

In the nineteenth century there was more of a liberal feeling, which resulted in the adoption of the jury system by many countries. The impetus to change the old judicial system of despot- appointed judges' high-handedly rendering decisions was mostly a by-product of the French revolution. Prior to the revolution in France of 1789, judges alone tried criminal charges, the trials being held in secret, which resulted in great injustice and the frequent use of torture. One of the demands of the revolutionaries was trial by jury and the constituent assembly thus established the system in September 1791.<sup>14</sup>

### **2.3 TRIAL BY JURY IN THE UNITED STATES OF AMERICA**

The right to trial by jury is deeply embedded in the American democratic ethos. The fifth, sixth, and seventh Amendments to the United states constitution guarantee the right to a jury trial for all criminal cases and all civil cases exceeding twenty dollars. The American jury system began as a direct transplant from England, but its root of separate evolution began in the colonial period. After the American Revolution new theories of law as well as social and political forces and pragmatic concerns had a strong impact on the jury's role, sometimes expanding it and other times curtailing it. Even today the jury is not a static institution but one, which continues the processes of gradual evolution.

The jury in America has been recognised as an instrument of liberty; thus the jury has occupied a position of exalted status in American thinking. Thomas Jefferson wrote on the jury that,

“ Were I called up to decide, whether the people had best be omitted in the Legislature or judiciary department. I would say it is better to leave them out of the legislature. The execution of the law is more important than making them.”<sup>15</sup>

As stated above in the United States of America the jury system is firmly grounded in the constitution. The American Constitution in Article III Section 2 provides,

“ The trial for all crimes, except in cases of Impeachment shall be by jury and such trial shall be held in the state where the said crimes shall have been committed. “

The Fifth Amendment provides,

“ No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a Grand jury except in cases



arising in the land or naval forces or in the military, when in actual service in time of war or public danger “

The Sixth Amendment provides,

“ In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed...”

The Seventh Amendment provides,

“ In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved....”

The Courts in the United States are divided into two systems, the Federal Courts and the state Courts. The federal system of Courts consists of District Courts, which are given power or jurisdiction over a specified area of all or part of the state and Circuit Courts of Appeals with power to hear appeals from the District Courts in the states assigned to them. At the top of the hierarchy is the Supreme Court. Each state constitution provides what judicial power shall be vested in each court that it creates. The state system of courts consists of courts, which sit at the county seat of each county. These courts have jurisdiction over parts of a

county or a whole county or more than one county according to the will of the legislature. Courts covering more than one county are known as circuit courts; they circulate holding terms of court at each county seat. Jury trials are held in the county courts and district courts only.

## **2.4 OPERATION OF THE JURY SYSTEM IN THE UNITED STATES OF AMERICA**

The jury system operates at two levels at the indictment level and the trial level. At the indictment level it is referred to as the grand jury whereas at the trial level it is simply known as the jury. The Fifth Amendment to the American Constitution provides for the grand jury, it states;

“ No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a Grand jury except in cases arising in the land or naval forces or in the military, when in actual service in time of war or public danger ”<sup>16</sup>

A Grand jury is a body of men, in number twelve or twenty-three summoned usually from the regular jury list for the purpose of investigating into crime in general or act of crime committed by individuals. It has no relation to a trial jury.

The prosecuting attorney presents evidence involving crimes for which arrests have been made or probably should be made to the grand jury to determine if there is probable cause to hold a person or persons for trial and if so to return an indictment, which sets forth the crimes, for which the person is to be tried. The sessions are held in secret and rather informal. This procedure, which can be regarded as a preliminary investigation, is a protection against unfounded prosecution.<sup>17</sup>

As stated earlier a trial by jury of ones peers is a constitutional provision. In criminal trials it is ones constitutional right whereas in civil cases the plaintiff has a choice to have a jury trial or not. The procedure by which a citizen becomes a juror is prescribed for by legislation. A typical jury statute would provide

“ No person shall be competent to act as a juror unless he be a citizen of the United States and a resident of the state, over twenty one years of age and under sixty five years of age, able to read and write and to understand the English language and a good and lawful person who has never been convicted of a felony or a misdemeanour involving a moral turpitude ”<sup>18</sup>

Once a person is selected he is called a venireman, he is formally informed by being served with a summons to be present at court at a certain time, any

venireman who does not respond to the summons may be arrested and brought into court and he may be fined. One with certain hardships can explain to the judge and he can excuse him or grant him a delay depending on the circumstances.

The most fundamental attribute of a juror is ones impartiality. An impartial juror knows nothing before hand about the case he is about to judge because he brings no personal knowledge or opinions to the case and he can judge it with the distance and disposition that makes impartial justice. He can with integrity swear the sacred oath to decide the case solely upon the evidence developed at the trial.<sup>19</sup> The first step in a jury trial is to satisfy any doubt that the statutory procedure has been followed. If doubt exists counsel who raises the question may challenge the jury panel. If this challenge to the array is allowed, the panel is dismissed. This challenge to the array has been tested under the fourteenth amendment in the United States Supreme Court twenty five times since 1879 to challenge the legality of a jury list, which did not contain the names of black Americans.<sup>20</sup> If the panel is accepted that is with out a challenge it is then examined by a *voir dire* to their fitness to serve. This is to ensure that only qualified, unbiased, unprecedented jurors sit in the particular trial. During the *voir dire* the veniremen are given a brief description of the case and the litigants are identified.

After the selection process is dispensed with the trial is begun in earnest. During the presentation of evidence, jurors are forbidden to discuss the case itself so the end up discussing trivialities such as food, politics, current affairs, sports and so on. After the trial has been conducted the judge will then state the law to the jury. The judge will charge the jury, his instruction will explain the issues, explain the position taken by both sides, the principles of evidence and their application, the rule or rules of law which will be applicable to any factual situation which may be found in the evidence.

When the jury retires to a jury conference room it now has the case. Jury deliberation is the heart of the jury system. There are three major theories that have come up in explaining the function of the jury at this stage. The first is the naïve theory, which states that the jury merely finds the facts, that it does not and should not and does not concern itself with legal rules, but faithfully accepts the rules as stated to them by the trial judge. The second theory has it that the jury not only finds facts but in its deliberation in the jury room uses legal reasoning to apply to those facts the legal rules it learned from the judge. Lastly the third theory known as the realistic theory is that in many cases the jury often without heeding the legal rules determine not the facts but the respective legal rights and duties of the parties to the suit.

The jury should examine every pertinent fact. The initial question of the jury is to decide the guilt or liability of the defendant. In certain instances juries will assess the penalty to be imposed on criminal defendant and in civil cases the amount of award, which will fairly compensate the plaintiff for, the damage suffered. Where the jury finds for the plaintiff in a civil trial each juror will write down the amount he wants to award, the total will be added and the average taken as the verdict.

A mistrial can occur at any time before the conclusion of taking the evidence. It sometimes happens that a question which is improper under the rules of evidence or an answer to a question or an act in the presence of the jury is so prejudicial to the litigant that the judge believes that the prejudicial effect can not be overcome by admonishing the jury to ignore the matter. The litigant is prejudiced beyond remedy. In such a situation the judge will state to the jury that he declares a mistrial, the jury is then dismissed and the case is set for retrial at a future date with a new jury. A mistrial can be declared on account of prejudicial statements made in final arguments, misconduct of juror, prejudicial outbursts from spectators and other prejudicial events which the jurors can not be expected to ignore. Moreover a mistrial can be brought about by a judge who may be aware that he has by some word or act made reversal possible if the verdict is appealed.

## **2.5 TRIAL BY JURY IN THE UNITED KINGDOM**

In the United Kingdom trial by jury is provided for and regulated by the Juries Act 1974. A person is eligible for jury service if he or she is not less than eighteen and not more than seventy and is included on the Register of Electors for parliamentary and local government elections, and has been resident in the United Kingdom, the Channel Islands, or the Isle of Man for at least five years since the age of thirteen.<sup>21</sup> There are certain persons who are by law excluded from serving on the jury these include members of the judiciary, lawyers, police and prison officers, the clergy and mental patients. The law further disqualifies persons who have served a prison term of between three months and five years from serving as a juror for at least ten years. Moreover those that have been sentenced to a term exceeding five years are barred for life from serving as jurors.

The law further provides for the court to exercise its discretion in excusing persons with physical disabilities and those without a sufficient understanding of English from serving as a juror. The responsibility of summoning jurors lies on the Lord Chancellor who does the summoning through the court's administration at each centre. Jurors once summoned to serve are paid travelling and subsistence allowances and are compensated for loss of earnings and other

expenses. The position is that all indictable offences are triable by a jury of twelve persons. At any one time a panel of more than twelve prospective jurors is summoned at which twelve are selected by ballot. Those that are selected are then processed through a *voir dire* in which the defence can object to the inclusion of the said prospective juror for reasons they advance the prosecution too has the liberty to object the inclusion any among the potential jurors.

The twelve persons who survive the selection procedure are then sworn, by each holding a Bible in his right hand if they are Christians and reading the following oath:

“ I swear by almighty God that I will try the defendant and give a true verdict according to the evidence. ”

Non-Christians makes the following affirmation,

“ I do solemnly and sincerely and truly declare and affirm that I will faithfully try the defendant and give a true verdict according to the evidence.”<sup>22</sup>

The jurors take the oath in the presence of each other. The jurors are then addressed by the clerk who explains the charges and tells them that having heard the evidence they must decide whether the defendant is guilty or not and the trial begins officially at this point. At the trial the prosecution will open the case, it is incumbent on the prosecution to advise the jury that they have the burden of proof to prove the case beyond a reasonable doubt.



The prosecution will then call their witness and lead him in examination in chief. The defence then has the right to cross-examine the prosecution witness in an effort to gain favourable evidence or to undermine the witness's testimony. After the cross-examination the prosecution may re-examine the witness to patch up any damage resulting from the cross-examination. This procedure is repeated for all the witnesses that the prosecution will call at the trial.

When the prosecution has called all its witness the defence will present its case and call witnesses to support it. In certain instances the defence before calling its witnesses may try and end the trial by persuading the court that there seems to be no case to answer in that either the prosecution has not produced sufficient evidence to warrant the trial or the evidence adduced so far fails to prove the charge. This argument takes place without the jury and if the court agrees with the defence the jury is summoned and instructed to acquit the accused in a criminal case or dismiss the case in a civil matter. However if the defence opens its case it too will summon its witnesses who will go through the examination procedure. Upon exhaustion of the defence witnesses the prosecution makes its closing speech followed by the defence who too will make their closing submissions.

At this juncture it is the duty of the judge to sum up by way of instructing the jury on its and his role. The summing up involves the judge giving a synopsis of

the evidence submitted from both sides and will then define the law. The jury will then retire to decide on the verdict to render. The jury's verdict must be unanimous, and is delivered in open court by the foreman of the jury. The traditional position of a unanimous verdict no longer obtains the Juries Act 1974 provides for majority verdicts in criminal proceedings.<sup>23</sup> The law allows for the jury to find an alternative verdict in a criminal case and convict the accused of an offence other than the one with which he is charged<sup>24</sup>

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## **NOTES**

- <sup>1</sup> Capital Traction Co. Vs Hof, 174 U.S.1 ( 1899 )
- <sup>2</sup> Williams V Florida, 399 U.S 78 ( 1970 )
- <sup>3</sup> Swain Vs Alabama, 380 U.S. 202 ( 1965 )
- <sup>4</sup> Ballew Vs Georgia, 435 U.S. 223 ( 1978 )
- <sup>5</sup> De Tocqueville A. American Institutions, Barnes & Co., New York 1851,p.2 8
- <sup>6</sup> Devlin P., Trial by Jury, London, Stevens & Maxwell, 1956
- <sup>7</sup> Sir William Blackstone, Commentaries on The Common Law, Butterworths. London. 1963
- <sup>8</sup> Katz S.N. A brief Narrative of the Case and Trial of Peer Zenger, Cambridge Belknap Press of Harvard, 1972.
- <sup>9</sup> Bloomstein M.J., The Jury system, Dom Mead & Company, New York, 1968.P.12
- <sup>10</sup> Ibid.
- <sup>11</sup> Frank J, Courts on Trial, Princeton University Press, Princeton , 1950.p. 108
- <sup>12</sup> McCart W.S., Trial by Jury. Philadelphia, Chilton Books, 1964.p.4
- <sup>13</sup> Hans P and vidmar N. Judging the Jury, New York ,Plenum Press, , 1986.p 23
- <sup>14</sup> Bloomstein p.117
- <sup>15</sup> Plunknett T.F.T A Concise History of The Common Law, Butterworths, London 1956. p. 108
- <sup>16</sup> Fifth Amendment, Constitution of the United States of America
- <sup>17</sup> McCart S.W Trial by Jury, Chilton Books, Philadelphia, 1964 . p. 48
- <sup>18</sup> ibid p. 22
- <sup>19</sup> Abramson J. We the Jury, the Jury system and the Ideal of Democracy, New York Bask Books, New York, 1994.p.34

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<sup>20</sup> Ibid p.28

<sup>21</sup> Keenan D., English Law, Pitman Publishing, London 1995.p.92

<sup>22</sup> ibid p. 95

<sup>23</sup> Section 17 Juries Act 1974

<sup>24</sup> Section 6 ( 3 ) ( 4 ) Criminal Law Act 1967

## **CHAPTER THREE**

### **INTRODUCTION OF TRIAL BY JURY IN ZAMBIA**

#### **3.1 INTRODUCTION**

This chapter serves to critically evaluate the need for the introduction of trial by jury in Zambia. For reasons mentioned in the preceding chapters, it appears the current justice delivery system has out lived its usefulness and can not meet the challenges of a budding democracy. Therefore the only way forward is to introduce trial by jury which will be a meaningful contribution to the democratisation of the judicial process. The ordinary citizen will hence have a say in the judicial process and what better way than the introduction of trial by jury. This chapter in the first instance shall justify the introduction of the jury system and then examine other t socio- economic factors prevailing in the country that would support the introduction of the trial by jury in Zambia.

#### **3.2 JUSTIFICATION OF THE INTRODUCTION OF TRIAL BY JURY IN ZAMBIA**

It has been stated previously that the jury system is as old as civilization itself. Therefore it is without a shade of doubt that the system has invaluable advantages that have made the system exist to this day in many jurisdictions the world over. Definitely the jury system has undergone some evolution but at the

core it remains the same old system from mans early civilization. A number of countries that use the system have had to modify it to suit their purpose but at the end of it all the jury system has remained a trial by ones peers. Therefore Zambia would do well to introduce the jury system that is best suited for its needs.

Nevertheless like with a coin there are two sides to every issue,. Thus where there are advantages there must be some disadvantage. Some scholars have argued furiously on the disadvantages of the jury system but those that argue in support of the jury system far outweigh those that argue against it. A discussion of the arguments for and against would be perhaps best suited in another discourse as a follow up to this paper as the purpose of the discussion in this paper does not dwell on the same.

It seems that the justice delivery system as stated in the preceding chapters has failed to meet the aspirations of the Nation. This is a dangerous trend and if not checked would rock the very foundations on which the nation rests. Zambia is a constitutional democracy with the rule of law at the heart of the nation. The justice delivery system is the guarantee of the rule of law. The administration of justice in Zambia has been dogged with a number of problems over the years ranging from inadequate personnel, inadequate funding, lack of lawyers, lack of qualified supporting staff, to delays in the dispensation of justice.<sup>1</sup> This has even

been a source of concern to government who recently stated that the rising complaints from the public on delays to dispense cases in courts of law were worrying.<sup>2</sup> Moreover the people's trust and confidence in the justice system has been on the wane that is why the government has urged the judiciary to work hard to retain the public's confidence.<sup>3</sup>

The advent of the third Republic in 1991 ushered into Zambia a culture of plural politics and democracy. Thus it has been the purpose and object of this new dispensation to democratise all areas of human endeavor. The justice delivery system has been unscratched by the dawn of the new democratic era in that justice is dispensed in the same manner as it was done during the colonial period and the first two Republics. Hence there is need to democratise the justice system as well, so that it does not lag behind. The best way for this "democratisation " of the justice delivery system is by way of introducing trial by jury in Zambia. Trial by jury is about the best of democracy. No other institution of government rivals the jury in placing power directly in the hands of the citizens. It has been stated that the jury version of democracy stands alone today in entrusting the people at large with the power of government, the jury remains in this age the only realistic opportunity for the people to participate in governing themselves.

In line with the democratic ideal that the jury pursues an American jurist said,

" the jury is an important symbol that helps to confer legitimacy to law...in a democracy the average citizen obeys the law not so much because of its threat but because he or she grants it legitimacy that is accepts it as a body of rules to be followed "4

The justice delivery system as it is in Zambia at present alienates the people from it. The people feel that justice is not their concern but that of those charged with the responsibility and perched on a hilltop.<sup>5</sup> There is an urgent need to make the people of Zambia participate actively in the judicial process for them to feel part and parcel of it. Most Zambians that have never had a brush with the law do not even know what goes on in the courts. <sup>6</sup> The Zambian people's attitude towards the judiciary has been quiet negative, as the judiciary has historically been known to be a tool of oppression. In the colonial days it was viewed as a tool for the colonial masters to perpetuate the injustice and since independence it has been viewed as a tool of those in power to legitimise their stay and use to suppress the opposition.<sup>7</sup> This perception and attitude of Zambians towards the law in Zambia was a source of lamentation by the first President of Zambia Dr. Kenneth David Kaunda when he said that,



“ Zambia today labours under many legacies of the colonial era. One of these is a very unfortunate attitude of many people towards the police and the courts and indeed to law itself. ”<sup>8</sup>

Therefore the introduction of the jury system would not only educate the masses on the law but would also bring the people closer to it and enhance democracy. Moreover it is also a known fact that the jury is an educator and creator of confidence in the government. The jury adds the needed impetus to democracy by way of popular participation by the citizens in the administration of justice. The jury provides an important civic experience for the citizens. The jury contributes powerfully in the increase of the intelligence of the people, it may be regarded as a gratuitous public school ever open in which every juror learns to exercise his right and becomes practically acquainted with the laws of his country.<sup>9</sup>

Nevertheless the actual dispensation of justice as it were leaves much to be desired in its present format in which a single magistrate or judge sits alone to determine a matter. This is so due to the fact that the judiciary is under staffed *the few magistrates and judges are over stretched leaving plenty of room for them to err when considering a matter.* Therefore if trial by jury was introduced it would go along way in assisting the over worked and underpaid judges. Moreover it has been established that juries are better fact finders than judges.<sup>10</sup>

An eminent American judge thus stated on this inherent advantage of a jury that,

“ the law has established this tribunal because it is believed that from its numbers, the mode of their selection and the fact that jurors come from all classes of society they are better calculated to judge the motives and weigh the possibilities than a single man however wise he may be.” <sup>11</sup>

The inherent advantage of the jury is that it is usually composed of twelve people compared to a single judge and the collective wisdom of twelve heads is usually superior to that of one individual. Furthermore it can be stated that,

“the jury as a group has wisdom and strength which need not characterize any of its individual members, it makes up in common sense and common experience what it may lack in professional training and that its very inexperience is an asset because it secures a fresh perception of each trial avoiding the stereotypes said to infect the judicial eye.”<sup>12</sup>

In addition to this, it is further contended that the legal rules made by the legislators or formulated by the judges often work injustice and the juries through their general verdicts wisely nullify these rules. Juries apply a measure of fairness and equity to a case that a judge preoccupied with the fine points of

the law will ignore. It is often difficult for a judge not to apply the law as it is to the particular facts of a case in the current justice delivery system, the hands of the judge are tied. This has resulted in certain instances to injustice due to this application of strict law. Thus the introduction of the jury would work towards addressing this problem in that the jury will normally take other considerations in reaching a decisions .The jury in the privacy of its retirement adjusts the general rule of law to the justice of the particular case. Thus the *odum* of inflexible rules of law is avoided and popular satisfaction is preserved. Therefore the jury trial supplies that flexibility of legal rules which is essential to justice and popular containment. The jury would bend the law to comport with its own standards of justice and fairness of the outcome of a particular case considering all the circumstances.

It has been established that this war between the law and juries takes place but it only occurs when strict application of the law would result in an injustice. In such situation jury nullification will result as a result of the jury's refusal to apply the law when they believe that to follow the latter of the law would mean an unjust verdict. This phenomenon of the jury applying its own standard of justice other than applying strict law is known as jury nullification, the jury will only ignore the law if the strict application of the law would result in an injustice.<sup>13</sup> Jury nullification is an important and integral part of jury trial. It is as old as the jury itself. In eighteen and nineteenth century England for example the Bloody

Code prescribed over two hundred offences that were punishable by death. Many of the crimes covered by the code were as minor as stealing bread and a number involved political dissent. Juries often acquitted guilty defendants rather than send them to their death.<sup>14</sup> On the other hand in the United States of America the Jury proved to be an important tool for the abolitionist of the slave trade before the civil war. The fugitive slave laws enacted in 1850 outlawed helping slaves to escape or impeding their capture and return. Northern juries frequently acquitted the abolitionists who assisted slaves even though the evidence clearly revealed guilt.<sup>15</sup>

Jury nullification entails the jury to disregard the law and uphold a higher justice. This was the premise in the case of ***United States Vs Anderson (1973)***, in which twenty-eight people went on trial for destroying draft records at the local selection office. The defendants conceded that their conduct was unlawful. Nonetheless they asked the jury to acquit them because the higher justice of opposing the Vietnam War necessitated their violations of the law. The judge permitted the defendants to mount a jury nullification defence. In his closing argument the defence counsel argued that the term nullification,

“ describes the power of the jury to acquit if they believe that a particular law is oppressive, or if they believe that a law is fair but to apply it in certain circumstances would be oppressive. This power that jurors have is

the reason why we have you jurors sitting there instead of computers, because you are supposed to be the conscience of the community. You are supposed to decide if the law as the judge explains it to you should be applied or should not.... You decide considering the circumstances of the case..."<sup>16</sup>

In the above case the jury acquitted all twenty-eight defendants even though the Federal Bureau of Investigation had caught them red handed inside the draft office destroying records.

Moreover the judiciary in Zambia has been accused of being corrupt and in matters involving government being biased on the latter's side. The question of the independence of the judiciary keeps coming up and some quarters argue vehemently that the judiciary is not independent and thus the decisions that come from the courts are totally tilted towards the government. After the judgement in the ***Kaunda Citizenship Case*** (1999), in which the High Court declared that the first President of Zambia was a stateless person, certain persons stated that the said decision was that of government, the decision was biased and showed a clear testimony on the lack of independence of the Judiciary. <sup>17</sup> Therefore the introduction of the jury would make the system more transparent and accusations of corruption would greatly reduce. The jury would become the buffer and issues of the independence of the judiciary would come

to pass. The jury would be a check on the judiciary and government. It has further been stated that ,

“the jury provides the escape from the corrupt or incompetent trial judges. Where some judges are corrupt or subject to dictation by political bosses or where some judges are rigid bigots the jury is the best alternative. The jury is the guarantor of integrity since it is said to be more difficult to reach twelve men than one.”<sup>18</sup>

In the criminal process the current system has not performed to expectation. Certain persons in society have been convicted and sent to prison on crimes that ordinarily would not have warranted such convictions. A number of convicted prisoners stated that when they were on trial they did not understand what was going on in the Court, before they got to grips with the process they were convicted and sent to jail. They argued that it is difficult for an accused to present his case fairly as the system is against him. In the magistrate Courts for example the trial is fast tracked giving the accused little or no room to offer a meaningful defence.<sup>19</sup>

The Introduction of jury trial at some level of the process in Zambia would obliterate the above stated concerns. In a criminal trial the jury is usually regarded as a means of necessary humane individualisation. The jury in most

instances is more merciful to the alleged criminal and more responsive to the unique elementary circumstances relating to the alleged crime. Juries provide a buffer to judges against popular indignation aroused by unpopular decisions. That is to say that the jury can be an insulator for the judge, or a buck passing device. The jury is also a remarkable device for insuring that the spirit of the law governs people and not the letter by insuring that the rigidity of any general rule of law can be shaped to justice in the particular case.

The jury differs from the judge on the value it brings to a case and on the freedom to apply to these values. In a certain case in America for example, a woman shot her common law husband. For fifteen years the said woman had suffered physical abuse and threats of death from him. He had threatened to kill her if she reported the assaults to the police. Finally she purchased a gun. When her husband threatened to assault her in a drunken rage she took the gun and shot him in the leg. Due to the premeditated nature of her act a judge would have been compelled to follow the letter of the law and find her guilty but the jury acquitted her.<sup>20</sup>

Thus the jury should be introduced in Zambia to guarantee a fair trial and to ensure that the accused is not a victim of the pure letter of the law but is given his due in the eyes of the community. A conviction by ones peers reflects a sense of community justice, when an accused is brought before the jury their

verdict will take into account all the circumstances. The accused is one of them and thus they are better able to understand why the alleged crime was committed and whether the accused should be punished for it or not. The jury will normally be a reflection of the community in its composition and therefore dispense community justice. It was authoritatively stated by the Supreme Court of the United States of America in ***Smith Vs Texas*** that a jury should be a body that is truly representative of the community.<sup>21</sup>

Furthermore the basis of the jury being representative and providing a community's sense of justice was ably amplified in ***Taylor Vs Louisiana***. The facts of the case was that Taylor was tried, convicted and sentenced to death by a Louisiana jury for the crime of aggravated kidnapping. He appealed to the Supreme Court arguing that his constitutional right to trial by a jury representative of the community was denied to him by the systematic underrepresentation of women on the jury list. The Supreme Court held that Taylor was denied his constitutional right to an impartial jury because by definition no jury was impartial unless it was drawn from sources representative of all segments of the community. The Court stated,

“ It must be remembered that the jury is designed not only to understand the case but also to reflect the community sense of justice in deciding it. As long as there are significant departures from this cross-sectional goal



biased juries are the result- biased in the sense that they reflect a slanted view of the community they are supposed to represent. "22

Further more the current justice delivery system has not been efficient. There seem to be an inordinate delay in the delivery of judgments and in some cases accused persons have been held for years without their matters being concluded. The delay in the dispensation of justice in Zambia can be said to be a notorious fact.<sup>23</sup> The only way of over coming this problem would be to introduce trial by jury in that in a jury trial it is the jury that renders the verdict and the judge simply follows suit. The jury would act as a check on the judges in that they would is essence determine the pace of the trial and once the trial is over would render the verdict there and then.

Hence from the foregoing it is without a shade of doubt that there is every need to introduce trial by jury in Zambia.

### **3.3 SOCIO - ECONOMIC FACTORS THAT SUPPORT THE INTRODUCTION OF TRIAL BY JURY IN ZAMBIA.**

Perhaps the greatest challenge to introducing trial by jury in Zambia would be the state of the economy. Can the economy in its present state support the jury?

It is no secret that the economy of Zambia has been shrinking over the years resulting in government spending less in all areas such as education, health, and the justice system. The struggle of putting the economy on its feet has been a struggle that has consumed the energies of the Zambian people since Independence.

To understand the present socio- economic situation in Zambia it would be prudent to have a quick synopsis of the economic history of the country. At Independence the picture of the economy was not so gloomy. The government of the day received one of the best economies on the continent on a silver platter from the British. However the governments economic policy and objectives at the time was to attain economic independence, to transform the copper based economy by making backward linkages with the rest of the economy. This was due to the fact that Copper was the mainstay of the economy. It accounted for 47.5 % of the gross national product, 90 % of the total export and was the main foreign exchange earner.<sup>24</sup>

The issue of economic independence occupied the government resulting in the Matero and Mulungushi reforms that saw the nationalisation of key companies in the economy that is to say the mines. Following the reforms was the introduction of the one party state and the coming of the second Republic. The most unfortunate aspect of the one party system was the decline of the economy. The

era was the period of the worst economic performance of the country. As a result Zambia was reclassified from a middle income country to an impoverished low-income country.<sup>25</sup> The state of the economy was one of the major reasons that lead to the collapse of the one party state and the rebirth of plural politics.

Nevertheless despite the advent of democracy and liberalization of the economy in the third Republic, the economy continues to perform below par. For instance at the beginning of 1998 the economy was targeted to achieve a real gross domestic product rate of 4 % but real gross domestic product declined by 2 %. This unsatisfactory performance was mainly attributed to the inadequate supply of foreign exchange owing to low export earnings and the withholding of donor balance of payment support and poor performance of the agriculture sector due to bad weather.<sup>26</sup>

However the economy of Zambia should make a turn around in the next few years after the completion of the privatisation of the mines. The Minister of Finance and Economic Development, Dr Katele Kalumba recently remarked,

" the year 2000 is a true turning point for Zambia... because the foundations for the renaissance in the economic life of this nation have been set. The year 2000 will see a lifting of the two debilitating burdens that have plunged our developmental efforts in the nineties, one - the

problem of Zambia Consolidated Copper Mines completely, and the other- the unsustainable external debt burden- significantly eased through the enhanced highly indebted poor countries initiative ...<sup>27</sup>

Thus the impending economic boom will provide an opportune time for introducing trial by jury. The recovery of the economy will mean more resources available for government to spend on areas such as the judiciary.

There has been a considerable amount of good will on the part of co-operating partners. If the government approached some of these partners in development to help the judiciary introduce trial by jury, it is likely that they would gladly oblige. Since the advent of the third Republic donor support levels in almost all areas has doubled compared to the support given in the second Republic. Zambia has continued to receive external assistance amounting to hundreds of millions of dollars which normally consists of balance of payments support, commodity assistance and project assistance. In 1996 for example Zambia received external assistance amounting to US\$ 591 million from her co-operating partners. This amount comprised of US\$313 million in Balance of Payments Support, US\$38 million in commodity assistance and US\$ 240 million in project assistance.<sup>28</sup> The government of the United States of America is currently working with the judiciary in setting up a Commercial Court and a center for Alternative Dispute Resolution.<sup>29</sup> Thus if the American government were asked to

assist in implementing the introduction of the jury system, it is probable that they would actively consider the request.

Moreover the Zambian people would strongly meet the challenges that would come as a result of introducing the jury system. Zambians are a very versatile people who would perform jury duty perfectly. Zambians are amongst the most literate in Africa with seventy five percent of the population with the ability to read and write.<sup>30</sup> Therefore functions of a jury would not be too much to ask from them. In addition to this Zambia has a defined court structure with courthouses in the major cities and towns. Thus to introduce the jury will not require the creation of any new court structure or building of purpose built courthouses.

### **3.4 IMPLEMENTING THE JURY SYSTEM IN ZAMBIA**

There is not one universally acceptable form of the jury system in the world. However the jury has certain salient features that are common to all. Therefore introducing the jury in Zambia will not entail transplanting the system as it is in some other jurisdiction. Zambia can introduce trial by jury by way of selecting certain invaluable attributes from jurisdictions where the system has stood the test of time and infusing other aspects after taking into account local peculiar conditions.

Firstly introducing the jury system in Zambia would mean providing the necessary legal framework. It would be prudent to have the provision of the jury imbedded in the constitution with an Act of parliament providing for its operation. Like in the American system where the jury is provided for in the constitution whereas each state has an Act that provides for all other incidental matters.

Introducing the jury system would also entail the introduction of the use of the grand jury for purposes of indictment. Thus any person charged with a felony must only be indicted by a grand jury. For practical reasons the jury system should be first introduced in the High Court in both civil and criminal trials. In civil cases the litigants would be given an opportunity to either elect a trial by jury or not. In criminal matters the trial should be by jury with no option to elect the mode of trial. The High Court sessions are at present held in the major cities and all provincial towns. Therefore it would not be an awesome burden to implement the system in that the present Court structures would work perfectly well.

The most impartial method of selecting jurors that would work well for Zambia would be to use the computer to make a random selection from the existing voters roll. The voters roll covers the whole of the country hence coming up with

a jury list to be used for each High Court session in the different localities would be no tall order. In order to enlighten the public on their civic responsibility of jury duty, a deliberate mass media campaign would have to be carried out together with the use of non- governmental organisations specialising in civic education. Public debate and discussions would have to be organised to sensitise the people on the happenings in a jury. In introducing trial by jury the criminal and civil procedure of the trial would not be a major departure from the present day procedure. The system would definitely bring in some changes that are inherent in the jury system but this would not entail a wholesale re- writing of the procedural law. In a trial by jury the first thing is to select a jury from those that have been summoned after being randomly selected from the voters roll. Once these potential jurors come before the court the selection process commences in that those that are excusable like members of the defence force would be excused. The litigating sides have a right to examine the potential jurors to select those that they feel will be helpful to their case. This can be a tedious process but for purposes of expediency in a setting like Zambia a time limit should be given for jury selection for any one trial. When the jury is in place then the trial can commence.

The trial procedure that would be introduced would be as follows: the prosecution would open the case first by making an opening statement. This statement is a general out line of what the prosecution intends to prove. Next

the defence will then present its opening statement which will be a summary of the evidence that will be brought before the court to deny the prosecutions allegations. After the opening statements the prosecution will then adduce its evidence by calling its witnesses and leading them in examination in chief. The defence would then if they so wish exercise their right to cross-examine the prosecution witnesses.

When the prosecution closes its case the defence would open theirs and adduce evidence to rebut the prosecution evidence. The prosecution can also cross-examine the defence witnesses if they so wish. When the defence closes its case the two sides would now present closing arguments first by the defence and then the prosecution. The closing arguments are a summary of the case presented by each side and they would include statements outlining the inferences that they would like the jury to make from the evidence.

At this point it is time for the Judge to instruct the jury in two areas. The judge will inform the jurors what their task consists of during deliberation and what procedures they should employ in reaching a verdict. The procedures defined by the judge in a criminal trial would generally include the instruction that the jurors to regard the defendant as innocent until proven otherwise; that the burden of proof is on the prosecution; that the jurors task is to determine the facts on the basis of credible evidence; that certain information may be regarded as evidence



such as the direct testimony of witnesses, charts and exhibits; that other information may not be regarded as evidence such as statements and questions passed by the counsels, or race, and background of the defendant. The second portion of the judges instructions defines for the jurors a complete set of possible verdicts of which the must chose one. Then comes the crucial part of jury deliberation, the case would then be handed to the jury by the judge.<sup>31</sup>

The issue then would be must the verdict be unanimous or a majority verdict? This issue has been a source of contention in jurisdictions that have the jury system. It has been argued that the verdict must be unanimous whereas some have strongly advocated for a majority verdict. In ***Thomson Vs Utah*** (1898) the Supreme Court of the United States of America stated that,

“ the wise men who framed the constitution and the people who approved it were of the opinion that life and liberty, when involved in criminal prosecutions would not be adequately secured except through the unanimous verdict of twelve jurors.” <sup>32</sup>

It has been further argued for the case of unanimity, that if the necessity of unanimity were dispensed with and the finding of a jury made to depend on a bare majority, jury trial instead of being one of the greatest improvements in the judicial department of government would be one of the greatest evils.<sup>33</sup> In 1967 Great Britain abolished the centuries old unanimity requirement in the wake of

the discovery that in trial of professional criminals, some juries had been bribed and intimidated to vote not guilty. The British passed a law that allowed the jury in a criminal trial to return a majority verdict of 11:1 or 12: 2. However for the purposes of Zambia a unanimous verdict in criminal trials would do well while the majority verdict would be just fine for civil trials. This could b a starting point and amends can be made with time if it does not work well.

The other issue that comes to the fold is the number of jurors that should sit in on a trial. This issue of number has also exercised the minds of jurists for sometime now. In *Williams Vs Florida* (1970) the American Supreme Court examined the issue of what should be the correct number of jurors in any one trial. *The Court traced the history of the twelve-person jury and concluded that the number twelve appeared to be a historical accident unrelated to the great purpose, which gave rise of the jury in the first place. The court held that the six-person jury did not undermine the jury's essential functions.*<sup>34</sup> Hence for Zambia owing to the lack of a solid financial base and other circumstances introducing the six man jury would be adequate for the purpose of the system.

## NOTES

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  - <sup>2</sup> Vice President Lt Gen C. Tembo in his address to a judges seminar, Times of Zambia, No 10.615, 16<sup>th</sup> December, 1999. P.1
  - <sup>3</sup> *ibid*
  - <sup>4</sup> Alexis de Tocqueville, Democracy in America ( 1833 )
  - <sup>5</sup> Interviews with a cross section of people in Lusaka and Ndola.
  - <sup>6</sup> *ibid*
  - <sup>7</sup> Chilembo T.S., Lay Participation In The Judicial Process, With Particular Reference Zambia, Obligatory Essay, University Of Zambia, 1984
  - <sup>8</sup> Kaunda K.D., The Functions of Lawyer in Zambia Today, Zambia Law Journal, 1971 & 1972. P. 3
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  - <sup>10</sup> Frank J., Courts On Trial. Princeton University Press, Princeton 1950.p . 126
  - <sup>11</sup> *ibid*
  - <sup>12</sup> Kalven H. & Zeisel H., The American Jury, Little Brown & Co., Boston, 1966.p 8
  - <sup>13</sup> *supra* Hans.p.118
  - <sup>14</sup> Kalven H. & Zeisel H. The American Jury, Little Brown & Co., Boston, 1966.p. 149
  - <sup>15</sup> *ibid* p. 156
  - <sup>16</sup> United States Vs Anderson ( 1973 ) 356
  - <sup>17</sup> Remarks made by Opposition Parties, University of Zambia Students Union, Pan -African Peace Foundation, Zambia reconstruction Organistaion, The Post Newspaper, No. 1201, April 1999.
  - <sup>18</sup> Abramson J, We The Jury, The Jury System and Ideal of Democracy, New York, Bask Books 1994. p. 45

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- <sup>19</sup> Oral interviews with remanded and convicted prisoners at Lusaka Central prison.
- <sup>20</sup> *Supra* Hans V.P. p. 116
- <sup>21</sup> Smith Vs Texas 311 U.S 128
- <sup>22</sup> Taylor Vs Louisiana 419 U.S., 524
- <sup>23</sup> *Supra*, Kunda p 23
- <sup>24</sup> Mulwila J., Economic Independence In Zambia And The Role Of Law In Economic Development, LL.M Thesis, University Of Zambia, 1976.p.10
- <sup>25</sup> Sichone O. & Chikuko B.C., Democracy in Zambia, Sapers Books, Harare, 1996.p.155
- <sup>26</sup> Bank of Zambia Annual Report 1998,
- <sup>27</sup> Dr Katele Kalumba, Budget address, 28<sup>th</sup> January, 2000.p.21
- <sup>28</sup> United Nations Development Programme, Development Co-operation Zambia 1996 Report.
- <sup>29</sup> Oral interview with Mr Philip Musonda, Administrator of the Judiciary, 10<sup>th</sup> January 2000. At the time of going to print the Commercial Court Had been formally established.
- <sup>30</sup> Study Undertaken by The United Nations Economic Commission for Africa, The Monitor, Issue No.81, November 19025, 1999.
- <sup>31</sup> Hastie R., Penrod D., Pennington N., Inside The Jury, Harvard University Press, Massachusetts, 1983.p.17.
- <sup>32</sup> Thomson Vs Utah (1898) 170 U.S. 344
- <sup>33</sup> Calhoun J., A Disquisition on Government, Bobbs Merril, Indianapolis, 1979.p.23
- <sup>34</sup> Williams Vs Florida ( 1970 ) 399 U.S.78

## **CHAPTER FOUR**

### **TRIAL BY JURY IS THE WAY FORWARD**

#### **4.1 SUMMARY OF FINDINGS**

The Current justice system in Zambia is a legacy of the colonial period. Prior to colonization, the indigenous central African tribes enforced their own customary laws through their own courts,<sup>1</sup> which has had very little impact on the justice system today. In the pre-colonial era what was exercised through the chiefs in the traditional courts was the community's sense of justice. The justice system in Zambia has not moved with time, in its very nature a number of lapses have been observed that need immediate attention.

The people of Zambia would like a bigger and better role in the dispensation of justice. At present they still feel alienated and regard the law as an imposition of those in power to perpetuate their power and regulate their lives to their own detriment. The people do not have a sense of belonging to the law like the proud American citizens who would gladly lay down their lives in defence of the Constitution of the United States of America. The justice system therefore must be brought home so that the people can embrace it and uphold the law with glee.

The current justice delivery system is not commanding the due respect that it deserves as the people have lost faith in it. The public would rather institute vigilante justice than let the law take its course on accused persons. The judgments being churned out of the Courts are being looked upon with scorn by those who feel the system is meant and being used by those in power to prolong their hold on power. A lot of dissatisfaction in the courts has been expressed by various quarters of society. It is said that, "justice delayed is justice denied" and this is a true reflection of the Zambian Court system. Complaints have been raised on the delay in the delivery of judgments with very little being done to remedy the situation. Moreover the holding in ***Miyanda Vs Chaila*** (1985) has compounded this by laying down the principle that there is no civil remedy for the delayed delivery of judgement by the court.<sup>2</sup> Thus in its current state the justice system is a pure recipe for anarchy.

The current justice delivery system is open for abuse. The government has used it for their own selfish motives. The government has violated peoples rights with impunity and the Courts have almost looked the other way. A number of people have been indicted, detained and brought before the courts on trumped up charges, which should not have been made in the first Place.<sup>3</sup> The government continues to use the instrument of *nolle prosequi* on frivolous prosecutions and the Courts have not put their foot down.<sup>4</sup>

Zambia is now a multiparty democratic state. The people of Zambia have embraced democracy in its totality hence the need for this democracy to touch on all areas of human endeavor. The people must be able to participate effectively in the dispensation of justice. Justice to be delivered must reflect the dreams, aspirations and hopes of the people.

Therefore from the foregoing it is only prudent that the justice delivery system in Zambia be changed. The introduction of trial by jury would be a welcome tonic to address most of the ills outlined earlier. The jury system has stood the test of time and proved its worth in a number of jurisdictions in the world.<sup>5</sup> It has undergone some metamorphosis but at heart it still remains the jury system developed a number of centuries ago. The jury system is a system for the people by the people just like democracy. Most Zambians have heard of the Jury system and even seen it in action in movies and read about it in fiction books. Those that have some idea have stated that all things considered it is the system that should be introduced in Zambia.<sup>6</sup> Persons in remand and those doing time feel the jury would guarantee a fair trial than what is currently obtaining.<sup>7</sup>

The introduction of the jury system in Zambia will not be a financial burden on the government as the system would be donor driven in the beginning and then become self sustaining as it becomes more entrenched. Trial by jury should be held in both criminal and civil cases in the High Court. The Zambian people are

literate enough to understand what the duty of being a juror would demand of them. The population of Zambia is well spread giving every city and town that holds High Court sessions enough people for the jury pool. The Jury system to be introduced in Zambia will be a high breed taking into account the local conditions prevailing in the country without taking away the essence of the system

## **4.2 CONCLUSION**

It is time for Zambia to put in place a legal order that is vibrant with the principles and values underlying an open and free democratic system. Democracy among its varied attributes upholds the right of the people to participate in decision-making<sup>8</sup> and the peoples right to participate in the delivery of justice will go along way in crystallizing democracy in Zambia. This is now the twenty- first century and the need to reform the justice delivery system is now more than ever before. The justice system that should be in place in Zambia must be progressive and closer to the people's values and needs.

In order to try and overcome the insurmountable problems that the current justice delivery system is facing there is an urgent need to reform it by way of introducing the jury system of justice in Zambia. The jury system may have some certain set backs but it has been tried and tested and found that it is the



system that guarantees the freedom and liberty of the people. In a democracy the average citizen obeys the law not so much because of its threat but because he or she grants it legitimacy that is accepts it as a body of rules to be followed. The judicial power must derive its legitimacy, acceptance and authority from the will of the people in order to safeguard, protect and promote the enjoyment of the people of their basic rights and freedoms.<sup>9</sup>

The famous jurist Lord Blackstone called the jury

“ The glory of the English Law,”<sup>10</sup>

he considered the jury as a,

“Champion of the popular cause cherished as a bulwark against oppressive government and acclaimed as essential to individual liberty and democracy”.

Furthermore Lord Devlin had this to say about the jury,

“ In a democracy, law is made by the will of the people and obedience is given to it not primarily out of fear but from good will. The jury is the means by which the people play a direct part in the application of the law.”<sup>11</sup>

The people need a bigger role to play in the administration of justice hence the only way forward that will guarantee this role is to introduce the trial by jury in

Zambia. History will judge the nation harshly if this opportunity to reform the justice system is lost.

#### **4.3 RECOMMENDATION**

A national debate in the form of a seminar inviting eminent persons and people from all interest groups such as the judiciary, the government, the church, non-governmental organisations and the people at large must be called to discuss the way forward in Zambia's justice delivery system. The justice system is the foundation of the nation hence consultation as wide as possible is needed to avoid a catastrophe. Introducing the jury system must be consensual thus in the final analysis the people must decide by way of a referendum.

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## **NOTES**

- <sup>1</sup> Milner A., African Penal Systems, Routledge & Kegan, London.1969.p.24
- <sup>2</sup> Miyanda Vs Chaila (1985) Z.R 193
- <sup>3</sup> The Case of the Nine Ukrainians Charged with Espionage and latter released when the state withdrew the case, Post Newspaper December 12<sup>th</sup> 1999.
- <sup>4</sup> Cases such as the Zero option Saga, The Misprision of Treason Charges on former president Dr. Kenneth Kaunda, Dean Mungomba, Princess Nakatindi Wina
- <sup>5</sup> Currently used in The United States of America, United Kingdom. Canada, The Netherlands,
- <sup>6</sup> Oral interviews with a cross section of People in Lusaka, Ndola and Kitwe.
- <sup>7</sup> Oral interviews with prisoners and remanded persons at Lusaka Central Prison
- <sup>8</sup> Kabanje S, The Machinery For Legal Reform To Enhance The Rule Of Law and Good Governance in Zambia. The Zambia Law Development Commission Act Act No. 11 of 1996 Seminar Paper.
- <sup>9</sup> Ngulube C.J., Challenges of The Bench, In Legality Journal, 1993/94. p.1-2
- <sup>10</sup> Cockrell E, Successful Justice, Michile & Company Law Publishers, Virginia, p.15.
- <sup>11</sup> Devlin P. The Judge, Oxford University Press, London. 1979. P.127

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