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**THE DIFFICULTIES OF ESTABLISHING CAUSATION IN MURDER AND
MANSLAUGHTER CASES**

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RIGHT DECLARATION

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STUDENT'S SIGNED DECLARATION

This paper represents my own work, and it has not previously been submitted for degree at this or another university.

Nedziwe, Nchimunya N.

Nedziwe.....

DEDICATIONS

This work is dedicated to my Family and the improvement of the criminal law justice system in the Republic of Zambia.

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ABSTRACT

The aim of this research is to discuss the difficulties of establishing causation in murder and manslaughter in Zambia and to analyse whether or not courts need more legal principles and provisions on the law of causation. Causation is widely regarded as presenting very difficult issues for criminal law. Causation is an important area of criminal when determining whether or not an accused is guilty at law and in fact. The function of the law of causation is to identify the conditions under which criminal liability may be attributed to an accused. This research evaluates the law on causation in Zambia. The research analyses the procedural and substantive legal provisions that are used when establishing causation in murder and manslaughter. The research will also analyse case law on causation and highlight the difficulties that the courts face in establishing causation in the Zambian criminal justice system. The objectives of this research will be achieved by examining the literature on the law of causation and analysing primary sources such as legislation, case law in Zambia and English common law. By way of comparison this research analyses the difficulties of establishing causation in English common law. Some of the difficulties discussed in this research are arise in cases where there are intervening acts such as medical treatment and acts of third parties. One other difficulty the research discusses is the definition by law of substantial cause. There is need to revise the laws on causation to have a clear definition of what exactly will amount to a substantial cause of death. There is also need to improve the Zambian criminal justice system in respect to cases involving medical treatment and thorough postmortem processes when death has occurred to prevent wrongful convictions. The research covers the criminal law of Zambia and Common law on Causation.

TABLE OF STATUTES

The Constitution of Zambia, Cap 1

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R v Blaue (1975) 61 Cr App R 271.

R v Cheshire [1991] 3 All ER 670, 675

R v Evans and Gardner (No 2) [1976] VR 523

R v Jordan (1956) 40 Cr App R 152

R v Malcherek (1981) 73 Cr App R 173

R v Pagett (1983) 76 Cr. App. R. 279

R v Smith [1959] 2 QB 35

R v White [1910] 2 KB 124

Sablehand Zambia Limited v Zambia Revenue Authority (SCZ Judgement No. 20 OF 2005)

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CHAPTER ONE

THE CONCEPT OF CAUSATION

1. Introduction

The aim of this research is to discuss the difficulties of establishing causation in homicides, particularly murder and manslaughter and to establish whether or not the court needs more principle guidelines on the law of causation. This research will contribute to the development of criminal law particularly the law of causation and will also help the legislature establish whether or not the courts need more guidelines on the said law. This chapter introduces the research by providing an overview of what causation is and also justifies the need for conducting this research.

Chapter two evaluates the law on causation in Zambia. It analyses the guidelines and law of procedure used when establishing causation in murder and manslaughter. The chapter also analyses case law on causation and brings to light the difficulties the courts face in establishing causation. In chapter three, the research provides a comparative analysis of the difficulties of establishing causation in English common law and in Zambia. English common law is selected because of the historical relationship Zambia has with English common law being a former British Colony. This chapter will also focus on the similarities of the difficulties that the courts face in both jurisdictions analysed in chapters two and three to see what Zambia can learn from the practice of England. Chapter four concludes the discussions in the preceding chapters of the research and provides the conclusions that can be drawn in relation to the difficulties of establishing causation in murder and manslaughter cases. This chapter will also offer recommendations on what can be done to improve the lacking areas in the law of causation.

accused in fact cause the victim's death, and if so, whether he can be held to have caused it in law⁶.

In murder, the defendant causes the death of the victim. The result or consequence is the death. Therefore, some crimes are referred to as 'result' crimes. In these crimes, the offence specifies the consequence. Another example is assault occasioning actual bodily harm. The causing of the harm is the consequence. In order to secure a conviction the prosecutor must prove that the defendant caused the prohibited act.

Causation is classified into legal and factual causation. Causing death is defined in Section 207 of the Penal Code, Chapter 87 of the Laws of Zambia (hereinafter referred to as the "Penal Code") as inflicting bodily injury whether aggravated by treatment or not, and actual or threatened violence which causes or hastens death among others. An act may be deemed to have caused death even though it is not the immediate or sole cause of death. Section 207 in part states as follows:

- A person is deemed to have caused the death of another person although his act is not the immediate or sole cause of death in any of the following cases:
- (a) If he inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill;
 - (b) If he inflicts bodily injury on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living;
 - (c) If by actual or threatened violence he causes that other person to perform an act which causes the death of that person, such act being a means of avoiding such

⁶ S.E. Kulusika, Criminal Law in Zambia. Text, Cases and Materials. (Lusaka: University of Zambia Press, 2006) P. 113

violence which in the circumstances would appear natural to the person whose death is so caused;

(d) If by any act or omission he hastens the death of a person suffering under any disease or injury which apart from such act or omission would have caused death;

(e) If his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.

Section above is quoted in its entirety because it is of utmost importance to this research as it defines the concept of causation at law in Zambia and all the forms that causation takes. The section entails that at law death may be caused by someone whether or not their act or omission is the sole cause or if they are contributory factors by the deceased or other persons and any action that hastens the death of a person under any serious condition will still be considered as a cause of death. The section above also entails that if a person dies after proper treatment or surgery, the death is still imputable on the person that causes the injury in the first place. The essay will consider whether this definition by law sufficiently covers all cases of causation in murder and manslaughter is case law a reflection of the law.

In offences involving injury to the person, there may be a degree of remoteness between the act or omission of an accused and the result which is alleged to constitute an offence. Death may be due to additional factors which are more directly connected than is the conduct of the accused. The function of the law of causation is to identify the conditions under which the result may nevertheless be attributed to the accused. Causation is widely regarded as presenting very diverse issues in criminal law. The function of these principles and rules is to identify persons who may be held guilty of offences in the event that the mental elements are also established⁷.

Campbell (1980), 2 A Crime R 157 WACCA

In most jurisdictions where an attempt has been made to codify criminal law completely, most matters of causation have tended to be left to the common law⁸. Moreover, this could perhaps explain the different findings in case law on causation. For instance, the court found that, when examining causation:

What or who caused a certain event to occur is essentially a practical question of fact and can best be answered by ordinary common sense rather than by abstract metaphysical theory.⁹

In this case, it appears that the practical question of causation may be easy to answer in certain cases on the one hand, and on the other hand, in cases where death occurs in unclear circumstances, the court must be guided by comprehensive rules and principles to establish causation. For example, to convict X for murdering Z the court must be satisfied that the prosecution has established the necessary connection between X's conduct and the prohibited result. Where X's conduct is not in dispute, there will be no need for proving the link between X's conduct and the prohibited result. It follows therefore that the conduct of X caused the death or prohibited act. Therefore this research will not only ascertain the difficulties of establishing causation but will go further to assess whether or not the court needs more principle guidelines on the law of causation. It is against this background that this research particularly considers discussing the problems of establishing causation in murder and manslaughter cases.

3. Statement of Problem

The struggle that courts and commentators have had with causation cases may indicate either that causation is a much more complex phenomenon or that the strict rules of criminal procedure have not been strictly adhered to or even more that the courts of law need more guidelines on causation. Further, it is noted that a person's liberty is held in high regard in most legal systems

⁸ S. Gardner, 'Causation in Homicide' (1992) 108 Law Quarterly Review 24, 26.

⁹ *Alphacel Ltd. v Woodward* (1972) AC 824

and Zambia is not an exception. Article 13 of the Constitution Chapter 1 of the laws of Zambia (hereinafter Cap 1) provides that:

(1) A person shall not be deprived of his personal liberty except as may be authorised by law in any of the following cases:

(a) in execution of a sentence or order of a court, whether established for Zambia or some other country, in respect of a criminal offence of which he has been convicted;

(b) in execution of an order of a court of record punishing him for contempt of that court or of a court inferior to it;¹⁰

This 13 protects the right to liberty in Zambia with respect to criminal cases. Therefore, the rules or procedures that lead to loss of liberty must be critically analyzed and improved on from time to time. Therefore, the rules or procedures that lead to loss of liberty must be critically analyzed and improved on from time to time.

This research considers whether the Zambian courts properly apply selected principles of criminal procedure in cases of causation, namely, standard of proof and clearly linking the acts or omission of the accused in cases of murder and manslaughter. Moreover, when consideration is had to the effect of the principles above, it becomes a matter of necessity that such an examination is conducted as failure to follow such rules of procedure results from either the difficulties in causation or the lack of adequate guidelines which then lead to the danger of wrongful convictions.

4. Objectives

The objectives of this research are to: -

¹⁰Cap 1 of the Laws.

1. critically discuss the difficulties of establishing causation in murder and manslaughter cases and
2. critically evaluate Zambian case law and common law case law on how the courts analyse and establish causation in homicides
3. establish whether or not the court needs more principle guidelines on the law of causation

5. Rationale and Justification

The justification of this research emanates from the some decisions of the court which prima facie¹¹ seem questionable in cases of causation like the decision in the *John Lilanda, Peter Musukuma, Ezron Mwaba*¹², which will be discussed in detail in this research. The right to liberty is an important human right which should only be derogated from for very convincing reasons such as the conviction of an individual for having committed a crime. Therefore in cases of causation in murder and manslaughter the accused must only be convicted if it is proven beyond all reasonable doubt that he caused the death of the deceased. The rationale and justification of this study is grounded on this very proposition.

It is noted that numerous wrongful convictions are as a result of the courts not strictly adhering to principles of criminal law such as admissibility of confessions, standard of proof and causation. In terms of criminal matters the aspect of causation is of great importance because one should not be punished until they are found guilty. In offences involving injury to the person such as in murder and manslaughter, it is important that the court ensures a fair and just trial as

¹¹ 'Prima facie' means at first view defined by: Steven H. Gifts Baron's Dictionary of Legal Terms 4th Ed. (Hauppauge: New York.2008) P.396

¹² H.C HB/125/111

the punishments are harsh. The prosecution must prove beyond all reasonable doubt that the accused caused the death of the deceased before the court

Therefore, this study is justified in examining the extent that Zambian courts adhere to procedural rules in cases of causation and also to establish the difficulties they face. This is imperative by virtue of the fact that loss of the accused's liberty must be arrived at after adherence to a fair and proper procedure.

In this regard, the research will evaluate the difficulties of establishing causation in murder and analyse instances such as intervening acts or events, death caused by medical treatment and death caused by dangerous driving. The research will focus on bringing out these difficulties and proposing ways that may be employed in criminal law to reduce on these constraints.

6. Methodology

The objectives of this research will be achieved by examining literature and secondary sources involving the law of causation. The research will further study and analyse primary sources such as legislation, case law in Zambia and other jurisdiction. Moreover, secondary sources to be referred to shall include books, dissertations, journal articles, as well as reports. Internet data will also be referred to particularly for its value in being updated with current affairs.

7. An overview of causation

Kulusika¹³ notes that there are two types of causation. Firstly, there is factual causation; which means that *'but for the conduct of the accused the prohibited act would not have occurred'*. This means that X as a matter of fact caused the proscribed conduct. The test is that X's conduct must

¹³S. E. kulusika, Criminal Law in Zambia.Text, Cases and Materials. (Lusaka: University of Zambia Press, 2006) p. 109

be a sine qua non, 'but for'¹⁴. Factual causation is established by applying the 'but for' test. This asks, 'but for the actions of the defendant, would the result have occurred. If yes, the result would have occurred in any event, the defendant is not liable. If the answer is no, the defendant is liable as it can be said that their action was a factual cause of the result. In *R v. White*¹⁵, the accused put cyanide in his mother's drink intending to kill her. She had a heart attack and died before drinking any. The accused's actions had not caused her death. His actions did not satisfy the 'but for' test. Questions of factual causation rarely arise and if they do, they are not usually very complex. The range of 'but for' causes leading to a particular prohibited harm or conduct would often be very wide. The requirement that the acts or omissions of the accused must also satisfy the test of legal causation acts as means of limiting this scope.

Secondly legal causation entails that the court must be satisfied that the accused conduct was the cause at law. In order to establish causation the law requires the prosecution to meet certain requirements described by phrases such as operative cause or substantial cause.¹⁶ On the one hand operative cause requires that the prosecution shows that the initial wound inflicted on a victim is still the operative cause of the prohibited consequence, the same conclusion must be reached in a situation where there are intervening acts. Even bad treatment which itself contributes to the prohibited consequence will not break the chain of causation.

On the other hand substantial cause entails that the conduct of the accused must be the considerable cause of the prohibited act¹⁷. It must be the most important cause of the prohibited

¹⁴ H. Hart and T. Honore, *Causation in the Law*, 2nd Ed, (Oxford: Clarendon 1985) P. 175

¹⁵ [1910] 2 KB 124

¹⁶ J. Martin and C. Turner, *Criminal Law*. 2nd Ed.,(London: Hodder & Stoughton , 2004) p.64

¹⁷ S. E. Kulusika, *Criminal Law in Zambia. Text, Cases and Materials*. (Lusaka: University of Zambia Press, 2006) p. 110

act. Therefore a claim that a third party also contributed to the consequence will not be enough to absolve the accused where her acts are still the substantial cause.

In considering issues of legal causation, the courts have determined that several 'rules' or guidelines should be followed and certain conditions need to have been met in order for causation to be established in individual cases¹⁸. Firstly, consequence must be attributable to a culpable act. This is a very good example of how criminal law focuses on the actions of individuals rather than the harm caused by the commission of a particular offence. In a lot of situations, the outcome in terms of whether or not the victim suffers may not differ but in terms of the development of the law, it may be the case that if the courts focused on the harm that has arisen rather than on the blameworthiness of individuals.

Secondly, culpable act must be more than a minimal cause. This is the '*de minimis*' (minimal cause) principle; the law disregards matters that are very minor or trivial. Problems can arise in determining how great a cause needs to be in order to be considered more than '*de minimis*'. This matter was addressed in the case of *R. v. Pagett*¹⁹. Goff LJ stated:

In cases of homicide, it is rarely necessary to give the jury any direction on causation as such. Even where it is necessary to direct the jury's minds to the question of causation, it is usually enough to direct them simply that in law the accused's act need not be the sole cause, or even the main cause, of the victim's death, it being enough that his act contributed significantly to that death.

This case advances the point that substantial conduct of an accused was deemed the considerable cause of the victim's death and the jury needed not to address their minds to the question of causation. Thus it still remains open to question what should be understood by substantial

¹⁸ S. E. Kulusika, Criminal Law in Zambia. Text, Cases and Materials. (Lusaka: University of Zambia Press, 2006) p. 112

¹⁹ (1983) 76 Cr. App. R. 279

causation. This research will therefore also make an evaluation of what the law should consider substantial cause and better even suggest whether the law should come up with a legal test of what amounts to substantial cause.

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In establishing whether or not the chain of causation has been broken, it is necessary to examine whether any act or event which occurs subsequent to the act of the accused has in fact 'broken' the chain of causation. In the event that such an act or event does break the chain of causation, then the accused will not be liable for the offence. This is sometimes referred to by the Latin maxim: *Novus actus interveniens*.

8. Conclusion

This chapter has given an introductory aim of the research. It went on to give an overview of the concept of causation which will be considered in depth in the subsequent chapters of this research. The chapter has outlined the statement of problem, objectives, as well as methodological approach that this research adopts and lastly the chapter has given an outline of the chapters to follow. An overview of the concept of causation, its forms and the tests that the courts use when establishing causation in murder and manslaughter cases have been discussed briefly.

CHAPTER TWO

THE LAW OF CAUSATION, MURDER AND MANSLAUGHTER IN ZAMBIA

1. Introduction

The aim of this chapter is to analyse the law on causation in Zambia and the criminal laws the courts use and case law. This chapter highlights the difficulties the Zambia Courts have faced when establishing causation in murder and manslaughter cases. This will enable the research to outline the specific difficulties and help establish what can be done to improve the law on this subject.

2. Rules of Criminal Procedure on Causation and case law.

The courts being the custodians of justice are tasked with the responsibility to preside over all cases, in Zambia the courts that preside over criminal cases are the Magistrate Court, High Court and the Supreme Court on appeal. The powers of subordinate courts in dealing with criminal matters are set out in sections 4-17 of the Subordinate Court Act Chapter 28 of the laws of Zambia (hereinafter Cap 28). Briefly the position of sections 4-17 is that, any offence under the Penal Code may be tried by the High Court or the Subordinate Court. Any offence under any other Act may be tried by the court specified in the Act or by the High Court, or, if no court is specified, by High Court or Subordinate Court.

The High Court is empowered to pass any sentence or make any order authorized by law. Subordinate courts of the First, Second or Third Class may try any offence under the Penal Code or any other law but powers of imprisonment and, in the case of one court, fining, are restricted. Further restrictions are placed on the powers of a subordinate court by section 10 of the Criminal Procedure Code of the laws of Zambia (hereinafter Chapter 88) which states:

The High Court may, by special order, direct that in the case of any particular charge brought against any person in a subordinate court, such court shall not try such charge but shall hold a preliminary inquiry under the provisions of Part.

Furthermore under section 11 (2) of Chapter 88, the powers of the Subordinate Court are restricted in respect to murder charges:

No case of treason or murder or of any offence of a class specified in a notice issued under the provisions of subsection (1) shall be tried by a subordinate court unless special authority has been given by the High Court for such trial.

Section 11 (2) quoted above envisage that in Zambia the High Court is the first court of instance in murder and manslaughter cases of which are of particular interest to this research.

Causation is covered under section 207 of the Penal Code which has been discussed and explained in chapter one of the research²⁰. When considering murder and manslaughter, it is imperative to take note at which point causation is imputable. Murder is defined in section 200 of the Penal Code as “any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder. The law indicates in section 200 of the Penal Code that a person commits murder when he commits the act of causing the death also known as *actus reus* with intent or malice aforethought. In other words murder is committed when a person kills another with the most blameworthy state of mind²¹.

Manslaughter on the other hand is defined in section 199 of the Penal Code as:

Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed "man-slaughter". An unlawful omission is an omission amounting to culpable negligence

By law the difference between murder and manslaughter espoused by the legal definitions above is that in manslaughter malice aforethought is absent. Causation in murder and manslaughter is

²⁰ Chapter one, Paragraph two, line four. P1

²¹ C.M.V Clarkson. and Keating , H.M., Criminal Law: Text and Materials, 4th Ed. London: Sweet and Maxwell 1998 P. 633

therefore the act of killing which is also known as *actus reus*. Kulusika notes *actus reus* of murder and manslaughter is generally said to be the same the unlawful act which is common in both definitions²².

The terms “adversarial” and “inquisitorial” are used to describe models of justice systems that exist. The prosecutorial or adversarial system on one hand is a legal system where two advocates or parties to a proceeding represent their positions or parties’ positions before an impartial judge or jury²³. On the other hand, the inquisitorial system has a judge or group of judges who work together to investigate a case²⁴. The adversarial system is generally adopted in common law countries and Zambia ascribes to this system.

In Zambia the burden of proving criminal cases rests on the prosecution. The burden of proof or onus of proof refers to the obligation on a party to satisfy the court to a specified standard of proof that certain facts in issue are true. The general rule is that the burden lies on a party who asserts in the affirmative. In criminal cases, the burden of proof rests entirely with the prosecution. In the case of *the People v Mwewa Muro*²⁵, the appellant was convicted of murder contrary to Section 200 of the Penal Code, and sentenced to death. He appealed against the conviction and sentence, the court found that:

Where the accused introduces new things in his defence such as self-defence, automatism and provocation, the burden does not shift to the accused. It is up to the prosecution to disprove the defence raised.

This case is an exposition that in criminal cases in Zambia, the rule is that the legal burden of proving every element of the offence charged, and consequently the guilt of the accused, from

²²Simon E. Kulusika, *Criminal Law in Zambia. Text, Cases and Materials*. (Lusaka: University of Zambia Press, 2006) p P.451

²³ Jennifer Corrin, *Civil Procedure and Courts in the South Pacific*: (Cavendish: Routledge, 2002) P.3

²⁴ Jennifer Corrin, *Civil Procedure and Courts in the South Pacific*: (Cavendish: Routledge, 2002) P.3

²⁵SCZ Judgement No. 23 of 2004

require that person to pay compensation to another for losses incurred, this imposition of liability will be derived from the idea that those who injure others should take responsibility for their actions and thus causation must be established. Thus in murder and manslaughter cases most courts look to establish liability by showing that the accused was the cause of the particular injury or loss.

Having explained the law in Zambia and the guidelines that the courts follow, it is important that the research takes an in-depth analysis of the reported cases on causation in Zambia starting with the case of *the people v John Lilanda, Peter Musukuma, Ezron Mwaba*²⁹ (hereinafter the Lilanda case) from which the research draws its title. The analysis will focus on whether the courts adhere to the provisions of section 207 of the Penal Code and also whether the rules of criminal procedure have been followed strictly, and if not what difficulties have then arisen in establishing causation.

In *the Lilanda case*, the accused and his friend went poaching in CMR Farm, whilst carrying two sacks of meat; they were confronted by four CMR Farm workers one of whom fired in the air and ordered them to stop. The two dropped the sacks of meat and ran in different directions. With the accused carrying a shotgun and his friend, an axe, the accused was pursued by the deceased and in the process the deceased was shot and left lying on the ground. The courts had to establish whether the accused caused the death of the deceased. In its attempt to establish causation, the court stated inter alia:

I find so despite accused's denial that the gun he had shot the deceased. However, it is not clear from accused's account as to who fired the single shot that killed the deceased because the three of them were struggling before they fell and the gun fired. An act or omission which could not have caused death on its

²⁹ H.C HB/125/111

own may be deemed to have done so even when it is not the immediate or sole cause of death. Accordingly the accused was held to be the substantial cause of the death of the deceased.

According to this finding in some cases the court will interpret act or omission which could not have caused death on its own may be deemed to have done so even when it is not the immediate or sole cause of death. Thus the accused in the *Lilanda* case was held to be the substantial cause of the death of the deceased. In this case, the accused committed an unlawful act of poaching and was resisting to being apprehended. The struggle that eventually resulted in the gun shot which resulted in death. Had the accused not resisted being apprehended, the unfortunate incident would not have happened. In the *Lilanda* case the circumstances under which the accused is held to be guilty are not a reflection of the law because there was no proof that the accused amongst the three that were struggling is the one who actually fired the gun. The court's decision in this case does not fulfill the mandatory requirement of the constitution in Articles 13 and 18 discussed above. The court should have adhered to the rules and guidelines in criminal cases before making such a decision as the law should protect personal liberty.

A thorough analysis of what the definition of causation is as espoused by section 207 of the Penal Code clearly indicates that there should be an 'act' or 'omission' by the accused. In the *Lilanda* case, the court did not properly establish causation based in law when arriving at the decision. The court based their decision on the fact that had the accused not escaped apprehension for poaching then the deceased would not have been shot. But the question in law is not that the one who starts the circumstances in which death arises should be the one to blame for the death.

In the *Lilanda* case the court should have convicted the accused only after establishing beyond all reasonable doubt that he caused the death of the deceased. In many cases the actions of others or even of the deceased person may be identifiable as causal factors in the death. It is necessary to identify those situations where other contributing factors will absolve the accused from liability. Thus the courts should have considered the fact that the accused was not the only one capable of shooting during the struggle as three people were all on the ground when the gun shot went off.

The importance of adhering to criminal procedure was emphasized in the case of *Mayonde v. the People*³⁰ the facts of which were that, the appellant appeared first before the senior resident magistrate; the appellant sought an adjournment for time to engage an advocate. At the adjourned hearing the appellant was represented by an advocate. The latter applied for an adjournment on the basis that he had been instructed only that morning and was also due to appear before the High Court. The senior resident magistrate granted a thirty-minute adjournment. The advocate withdrew and the trial continued. The court made the following advancement:

Once an accused seeks time to engage an advocate the provisions of Article 20 (2) of the Constitution indicate that he must be granted all reasonable adjournments.

(ii) While it can be said that the appellant should have instructed his advocate before the trial date, nonetheless the advocate's application for an adjournment was a perfectly reasonable one.

This case emphasises that judges, magistrates or any officers of the court must follow procedure as laid down in the Constitution and the Criminal Procedural Code. Therefore it is important that judges must follow all laid down procedure when presiding over cases. Importantly to this

³⁰ (1976) Z.R. 129 (H.C.)

research cases of murder and manslaughter whose punishments are very heavy and infringe on the right of liberty which is a fundamental human right embedded in the constitution of the land.

One of earliest reported case on causation in Zambia is *Kazembe and Zebron v. the People*³¹; in this case the two appellants were at tasked with carrying the coffin which contained the body of a child. According to the evidence of two witnesses, whilst the two appellants were carrying the coffin on their shoulders, they struck the deceased with it, using sufficient force to knock her down twice. There was evidence from some of the witnesses that they were compelled to accompany the coffin to the burial ground and they left the deceased lying on the ground outside her house. On her return, the deceased was still lying on the ground outside her house and they moved her inside, in a very weak condition. Some hours later that night the deceased's house was set on fire by one Samson, and as a result the deceased's burns and injuries, she died not long afterwards. The court held that:

In the instant case, the pathologist had no difficulty in finding that the death could be traced back in a clear caused chain to the burns suffered as a result of what the appellant feloniously did.

In the *Kazembe and Zebron case* the cause of the death was clearly established to be the burns and not the injury inflicted by the coffin when it hit the deceased. The case also shows clearly that the guidelines as explained in this chapter on the standard of proof were followed by the court. In view of this decision, this research argues that the court adhered to the requirement for establishing causation. This cannot be said in relation to the *Lilanda case* discussed earlier.

When the decision in the *Kazembe and Zebron case* is compared and contrasted with the *Lilanda case*, it is evident that the *Lilanda case* was wrongly decided because it is not always the first act

³¹ (1969) Z.R. 22 (C.A.)

deceased and her children from the burning inferno. The major ground of appeal was to the effect that it was wrong to find that the appellant had caused the deceased's death, having regard to the fact that she died three months later and had undergone medical treatment the details of which were not led in evidence. The argument was that the learned trial commissioner should not have merely accepted the pathologist's report in which he proposed that a detailed autopsy was not required since the cause of death was so obvious to him, namely, circulatory failure due to toxæmia due to extensive burns. The court held that:

It seems to the Court that, if at the time of death the original wound is still an operating and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death does not result from the wound. Putting it in another way, only if the second cause is so overwhelming as to make the original wound merely part of the history it can be said that the death does not flow from the wound. The chain of causation was clearly not broken in this case where, on the facts accepted, the appellant evidenced a determined intention to cause death of the deceased

This decision by the court advances the view that where a person inflicts an injury and the injured person later dies of a cause not directly created by the original injury, but caused by it, the requirement of causation is satisfied. Where the cause of death can be traced back in a clear chain to the actions of the person causing the injury, it is not always necessary for direct evidence to be led that the injured person received proper medical treatment. The requirements laid down by the law in section 207 (e) of the Penal Code which emphasizes the point that at law the act or the omission of the accused may not be the only consideration the court will make when establishing causation.

In most cases like the *Patson Simbaiula* case the court will look at all other factors and if the act or omission of the accused is overwhelming then the death will be imputable on the accused. From the acts of the accused, it is not wrong to state that the accused had malice aforethought as per section 200 of the Penal Code discussed above to commit murder. The chain of causation was clearly not broken in *Patson Simbaiula* case where, on the facts accepted, the appellant evidenced a determined intention to cause death of the deceased. The variance in the courts establishment of causation as regards intervening acts or events and substantial cause is of great importance to this research because it's a source of difficulty in causation. This case is important to this research as it discusses one source of the difficulties in establishing causation which is intervening acts.

The general position is that the resultant harm suffered by the victim for instance death must be seen to be a natural consequence of the actions of the accused³⁶. In considering issues of legal causation, the courts should determine that several rules and guidelines should be followed and certain conditions need to have been met in order for causation to be established in individual cases. The victim was guilty of hunting but did the court determine beyond all reasonable doubt that he is the one that shot the deceased.

The other difficulty which shows uncertainty of the law on causation is that where medical treatment is involved. Where the cause of death can be traced back in a clear chain to the actions or omissions of the accused, it is not always necessary for direct evidence to be lead that the injured person received proper medical treatment. But in certain cases medical treatment of great importance as it can be a cause of the death despite the actions of an accused person.

³⁶ Robynne Blake, Internet Project Manager, The School of Law, The University of the South Pacific or fax: (678) 27785. Last Update: Monday, June 02, 2012 at 08:20. (Accessed October 23rd, 2012)

In the case of *Abel Banda v. the People*³⁷ when the appellant entered the deceased's house, the deceased's wife, who was the first prosecution witness, noticed that the appellant was carrying a bottle of *kachasu* liquor and a cup. When the appellant settled down and poured out some *kachasu* into the cup he had and offered it to the deceased. The deceased accepted and drank from the cup. The appellant did not partake of the liquor that night. Thereafter the appellant told the deceased to keep the remaining *kachasu* in the bottle until the following morning. Later that night the deceased was taken ill, complaining of "a paining" throat. Early the following morning the appellant returned and after exchanging pleasantries with the deceased's wife, the deceased's wife told the appellant that her husband was not feeling well. She did not explain the details the appellant settled down and drunk the remaining contents of the bottle. The following day the deceased died. The court found the accused guilty of murder after a thorough medical examination of the deceased.

In the *Abel Banda* case the accused was found guilty of causing death by poisoning because the act of poisoning was clearly traced to him and the medical examination showed clearly that the deceased died from poisoning. Can the same certainty shown in the *Abel Banda* case be said about the *John Lilanda* case, certainly not because in the *Lilanda* case it is not certain that the accused fired the gun.

In offences involving injury to the person, and especially murder and manslaughter,, there may be a degree of remoteness between the act or omission of an accused and the result which is alleged to constitute an offence. The death may be the product of additional factors which are more directly connected than is the conduct of the accused. The function of the law of causation is to identify the conditions under which the result may nevertheless be attributed to the accused.

³⁷ (1986) Z.R. 105 (S.C.)

This problem in the law of causation arises in cases where there are intervening acts or omission and the manner in which these are handled in the Courts of Law.

For instance in the case of *Mbomena Moola v. the People*³⁸, the appellant, was convicted on one account of murder, contrary to Section 200 of the Penal Code. The appellant upon his conviction was sentenced to death and he against both conviction and sentence. The prosecution evidence was to the effect that the deceased was the father of the appellant and they were staying in the same village. The wife to the deceased's mother brewed some beer. On been questioned as to why they could not take any *Maheu* from his grandmother, the appellant is said to have told them that she was a witch. Meanwhile the deceased on arrival back home he decided to take some of the *Maheu* and after taking some he called his wife, and complained to her that it appeared the *Maheu* had been tampered with, probably poisoned. Later that same day she heard that her husband had died. In arguing the appeal, four grounds of appeal were advanced; the first ground of appeal advanced was that the learned trial judge erred in law and fact in convicting the appellant on a charge of murder when there was no evidence on record as to the cause of death of the deceased. It was argued that there was no post mortem report or a report of a public analyst. On to this ground of appeal the court found that:

It is not necessary in all cases for medical evidence to be called to support a conviction for causing death. Where there is evidence of assault followed by a death without the opportunity for a *novus actus interveniens*, a court is entitled to accept such evidence as an indication that the assault caused the death. The court also stated that this was not a case fit to establish medical evidence as the paraffin had caused the death of the deceased.

Following the court's decision that this was not a case fit enough for medical evidence to be employed to establish causation, it shows the court's reluctance in ensuring thorough medical

³⁸ (SCZ Judgment No. 35 OF 2000)

evidence. There could be many reasons as to what caused the death of the deceased, one could argue that the paraffin there was just put there because of it has a strong scent and maybe the real cause of death was Roger. These are the factors the questions the court should have considered.

This was a case proper to carry out a post mortem.

3. Conclusion

This chapter has discussed and analysed the law on causation in Zambia and the guidelines that are used by the courts of law in criminal matters of murder and manslaughter when establishing causation. The chapter has placed emphasis on the law's protection of personal liberty as enshrined by Article 13 and 18 of the Constitution to prevent wrongful convictions in cases of causation and manslaughter. The chapter also focused on reported selected case law on the subject of causation to bring to light the difficulties the Zambia Courts have faced when establishing causation in murder and manslaughter cases. The position that the Zambian courts adhere to the principles and guidelines of criminal procedure in cases of causation needs to be critically looked into. Just like they argue with most principles of evidence, they posit that the Zambian courts theoretically adhere to these principles but actual practice breeds different results. The main difficulties that have arisen from the analysed cases, are those of medical treatment, intervening acts, and in cases where the decisions of the court do not reflect the requirements of article 13 and 18 for example the *Lilanda* case, the standard of proof was not met. There is a need to ensure strict adherence to the law on criminal procedure as provided for in the penal code and Criminal Procedural Code cap 88 of the laws of Zambia discussed above. The *Mbomena Moola* case also shows one significant difficulty we have in establishing causation in the Zambia criminal justice system which is the reluctance of the court in requesting for medical evidence. In the *Mbomena Moola* case the court held that this was not a case fit for medical

evidence, but the facts in themselves show the need for thorough medical evidence and postmortem.

CHAPTER THREE

A COMPARATIVE ANALYSIS OF CAUSATION WITH ENGLISH COMMON LAW

1. Introduction

The aim of this chapter is to consider the difficulties of establishing causation in the English Common Law legal system for purposes of making a comparison with the Zambian criminal justice system. Chapter two has considered the law on causation in Zambia as well as of the difficulties in establishing causation thereto it is imperative to give a comparative analysis so as to establish if Zambian legal system needs more principle guidelines on the law of causation. English Common law has been selected from the three judicial systems because Zambia ascribes to the common law system which draws from English common law³⁹. Laws of each country vary but it is important to make a comparative analysis of how different issues are tackled in different legal systems. Hence, this work would present an incomplete picture without analyzing how the Zambian criminal justice system differs from other legal systems. The aim of this chapter will be achieved through a critical analysis of the English common law on causation and highlight the difficulties if any.

2. English Common Law on Causation

English common law is defined as that part of the law of England formulated on the common customs of the country and unwritten. It is opposed to equity and statute⁴⁰. This entails that English law is unwritten, unlike the Zambian law which is written. It is important to note that the definition of causation and its forms in discussed in chapter one of the research also apply in the

³⁹ Margret. M. Munalula (2004) Legal Process: Zambian Cases, Legislation and Commentaries. Lusaka: University of Zambia Press P. 17

⁴⁰ Margret. M. Munalula (2004) Legal Process: Zambian Cases, Legislation and Commentaries. Lusaka: University of Zambia Press. P. 18

law in section 207 (e) of the penal code which emphasizes the point that at law the act or the omission of the accused may not be the only consideration the court will make when establishing causation.

In contrast in the case of *R v Jordan*⁴³, the accused stabbed the victim who was admitted to hospital and died eight days later. The Court of Appeal, evidence of doctors was allowed to the effect that in their opinion death had not been caused by the stab wound, which was mainly healed at the time of the death, but by the medical treatment. The court held that the stab wound was merely the setting within which another cause of death operated, and quashed the conviction.

The decision in *R v. Jordan* shows that sometimes medical treatment can break the chain of causation and it's the duty of the court to ensure that a thorough report from the pathologists establishing the cause of death amidst intervening act acts is presented. The decision in the *R v. Jordan* case should be a learning example to the Zambia criminal justice system. This decision is also at variance with the Zambia decision of *Patson Simbaiula v. the People*, where the court held inter alia that, the learned trial commissioner should not have merely accepted the pathologist's report in which he proposed that a detailed autopsy was not required since the cause of death was so obvious to him.

It is therefore important to ensure medical evidence of the cause of death needed in the establishment of causation must be undertaken as prescribed by law to prevent wrongful convictions of innocent people and to uphold the freedom of liberty which is protected by the Zambia constitution.

⁴³ (1956) 40 Cr App R 152

In *R v. Smith*⁴⁴ the accused stabbed the victim twice. When the victim was carried to the medical centre by another person he was dropped twice. When the victim was finally brought to the medical centre there was a delay of approximately 1 hour before he was seen by the medical officer. On appeal, the accused who had been charged with murder the accused argued that the chain of causation between the stabbing and the death had been broken by the way in which the victim had been treated. The accused further argued that the chain of causation had been broken by the actions of the person who tried to carry the victim to the medical centre and the negligence of the doctor in delaying giving the victim the necessary attention. The court of appeal found that:

the accused's stabbing was the "operating and substantial cause" of the victim's death. In this case the victim clearly died from loss of blood caused by the stab wounds inflicted by the defendant. Only if the original wound could be said to have merely provided the setting in which another cause of death operated could it be said that the death did not result from the wound.

The decision in *R v Smith*, means that were the intervening act is not the substantial cause, causation will still rest on the accused. The only difficult that arises in a case like *R v Smith* is to draw the line on what exactly is substantial from a case to case basis. In the case of *R v Smith*, there is no clear explanation of what exactly amounts operative and substantial cause in cases of intervening medical treatment. It is thus safe to argue that both the English criminal justice system and the Zambian justice system do not have a proper definition or test of what exactly amounts to substantial causation as their decisions seem to suggest that no test has been established. The law on causation in both systems would be much certain and predictable if substantial causation is defined.

⁴⁴ [1959] 2 QB 35

In the case of *R. v. Blaue*⁴⁵: The accused stabbed a woman in the lung. She refused to have a transfusion of blood because it was against her religion. She later died and the medical evidence showed that if she had had the transfusion she would have survived. The accused was convicted of manslaughter but appealed on the ground that causation had not been established. Lawton LJ opined:

It has long been the policy of the law that those who use violence on other people must take their victims as they find them. This in our judgment means the whole man, not just the physical man. It does not lie in the mouth of the assailant to say that his victim's religious beliefs which inhibited him from accepting certain kinds of treatment were unreasonable. The question for decision is what caused her death. The answer is the stab wound. The fact that the victim refused to stop this end coming about did not break the causal connection between the act and death.

The cases that the research has considered on the effect medical treatment on the chain of causation, indicate that the courts have been very reluctant raise a possibility that medical treatment will have such an effect even if, it is prima facie construed that the acts or omissions of in medical treatment such as switching off a life supporting machine may contribute substantially to the death of the victim.

The only English law reported case in which the actions of a medical treatment has been deemed to have broken the chain of causation is that of *R. v. Jordan* and this has been very definitely confined to its facts in subsequent judgments. In this case, the treatment that had been administered was found to have been abnormal and had thus acted to break the chain of causation and the court also suggested that the doctor's negligence was very independent of the accused. In *R v Jordan* the court held that the stab was merely the setting within which another cause of death operated.

⁴⁵(1975) 61 Cr App R 271.

In *R v. Evans and Gardner*⁴⁶, the two accused stabbed a fellow prisoner Hamilton in the stomach. The injury was inflicted in April 1974 and after a bowel resection operation Hamilton resumed normal activities. In 1975 he became unwell and died, the cause of the death was a stricture in the bowel at the site of the resection operation which was not uncommon. The full court applied in the case of *R v. Smith* and held that the fact in issue were whether the blockage of the bowel was due to the stabbing. Court held that there was enough evidence to support such a finding and the two were convicted of manslaughter.

In *R v. Cheshire*⁴⁷ the court is of the position that even though negligence on the treatment of the victim was the immediate cause of his death the jury should not be regarded as excluding the fact that defendant shot a man in the stomach and thigh. The man was taken to hospital where he was operated on and developed breathing difficulties. The hospital gave him a tube inserted into the windpipe connected to a ventilator. Several weeks later his wounds were healing and no longer life threatening. However, the deceased continued to have breathing difficulties and died from complications arising from the tracheotomy. The accused was convicted of murder and appealed. His conviction was upheld despite the fact that the wounds were not the operative cause of death. The court held that:

Intervening medical treatment could only be regarded as excluding the responsibility of the defendant if it was so independent of the defendant's act and so potent in causing the death, that the jury regard the defendant's acts as insignificant. Since the defendant had shot the victim this could not be regarded as insignificant.

The *R v Cheshire* case advances the view that when establishing causation in medical treatment, the accused will still be guilty of causing death of the victim unless intervening medical

⁴⁶ (No 2) [1976] VR 523

⁴⁷ [1991] 3 All ER 670, 675.

treatment is so independent of his acts, and medical treatment in itself so potent in causing death, that they regard to be contributory by his acts as insignificant. Thus the acts of a medical practitioner should be very independent of those of the accused. English common law seems to suggest in the *R v Cheshire* case that any acts of medical treatment that are resultant from the treatment of an injury caused by the accused, causation is still imputed on the accused as such.

Thus it can be stated that in both the Zambian criminal justice system and the English common law system, the defence of the chain of causation being broken due to medical treatment has been difficult to prove, as the accused must firstly show that the negligent treatment was independent of the injury caused by the accused. This on its own is an excuse for negligent doctors because it is hard to prove that the doctor's negligence will be independent of the treatment of the injury. In most cases the gap between the doctors' medical treatment and the injury is difficult to bridge.

The second difficulty that the research established in chapter two is that of intervening acts. Thus the research will look at how English common law deals with intervening acts. Intervening acts are a source of difficulty in establishing whether or not the chain of causation has been maintained or broken. A *novus actus interveniens* is a new act which breaks the chain of causation. In the event that such an act or event does break the chain of causation, then the accused should not be liable for the offence. Intervening acts are sometimes called actions of third parties and can also include acts of the victim.

The general position is that the voluntary act of a third party will break the chain of causation. This means that the accused will not be guilty. However the accused may still be found guilty even where the acts of a third party have contributed to the death of the victim, or other

prohibited harm, where the accused's original act remains a substantial and operative factor at the time of death. The type of action taken by the accused and the third party and the time of their actions in relation to each other may determine whether both should be charged jointly. It is necessary to examine how English common law has dealt with cases where there is a question of intervening act.

In *R v Pagett*, the defendant tried to resist lawful arrest, held a girl in front of him as a shield and shot at armed policemen. The police instinctively fired back and killed the girl. The Court of Appeal held that:

“The accused's act had caused the death and that the reasonable actions of a third party by way of self-defence could not be regarded as a *novus actus interveniens* (new act intervening)”.

This case entails that the accused will still be deemed at law to have caused the death if the intervening act was a foreseeable consequence of his action and the court will not consider the intervening acts to have broken the chain of causation.

It is imperative to note that in certain circumstances the victim may die as a result of some act or event which would not have occurred but for the act done by the accused. The death may also be a natural consequence of the defendant's act that is; it was foreseeable as likely to occur in the normal course of events. In such a case, the defendant will still be held to have caused the death at common law⁴⁸. For instance, a man is attacked and left lying in the road. The attacker will be responsible for the death if the man dies from loss of blood, exposure, infection of the wounds,

⁴⁸ R v. Cheshire [1991] 3 All ER 670, 677

or if he is run over by a car. However, the defendant would not be liable if the man was struck by lightning, killed by another assailant or killed by a collapsing building during an earthquake⁴⁹.

Hart and Honore⁵⁰ point out that, the decisions the courts make in English common law in cases of intervening acts may be correct but the reasoning is unsatisfactory. Further, it has been observed from the analysis of the two criminal law systems that the reasoning underpinning the decision-making in medical treatment cases is also unsatisfactory because it is not transparent in both criminal systems that have been discussed. The standard that the courts have established that the negligent treatment need be independent of the acts of the accused is not legally explained and plausible. Due to the difficulties in establishing causation, it is one area of the law where the case law overlaps significantly even when facts are similar with general doctrines of causation. These difficulties that have been established indicate that they could be a number of causation cases that have contributed to wrongful causation in both jurisdictions and it is imperative that these difficulties are addressed.

3. Conclusion

This chapter has considered causation in the English Common Law criminal justice system in respect to cases of murder and manslaughter and the difficulties that the courts encounter when establishing causation. The chapter also made a comparative analysis the of Zambia criminal justice system on the law of causation in murder and manslaughter. The chapter concludes that there are gaps in both jurisdictions especially in respect to what exactly will amount to substantial causation in relation to causing death. For instance in the case of The other difficulty discussed is in cases of medical treatment and intervening acts because the cases in both systems

⁴⁹L. Brudner, "Owning Outcomes: On Intervening Causes, Thin Skulls, and Fault-Undifferentiated Crimes" Canadian Journal of Law and Jurisprudence (1998) P.40

⁵⁰ H. Hart and T. Honore, Causation in the Law, 2nd Edn, (Oxford: Clarendon, 1985), pp. 261, 361

seem unsatisfactory when handling cases that could probably have more than one cause of death. The other difficulty arises in the court's reluctance to give serious consideration of the effect of medical treatment on the chain of causation. For instance the case of *R v Blaue* indicates that the courts have been very reluctant raise a possibility that medical treatment will have such an effect. For example in the case of *R v Smith* discussed above the court held that medical treatment was no the substantial cause of death. This research still sees the need to have a definitive guideline of what will exactly amount to substantial cause on a case to case basis.

CHAPTER FOUR

RECOMMENDATIONS AIMED AT REMEDYING THE DIFFICULTIES ASSOCIATED WITH THE LAW OF CAUSATION.

1. Introduction

The aim of this chapter is to give to conclude the research and also give recommendations aimed at remedying the difficulties associated with the law of causation and its implications on the rights of the accused. The preceding chapters discussed the difficulties in establishing causation in murder and manslaughter cases in the Zambian criminal justice system and also made a comparative analysis with the English common law cases. The chapters also highlighted that these difficulties often lead to wrongful convictions. This chapter is the concluding chapter and it ends this work with recommendations aimed at resolving some of the challenges and effects that result from the difficulties of establishing causation highlighted in the Zambian criminal justice system. In order to systematically cover this topic, the chapter will present a specific challenge faced by the Zambian criminal justice system and follow it up with a recommendation of how it can be resolved. After these recommendations have been submitted, a conclusion will be drawn.

Chapter one introduced the research and gave an overview of what causation is and justified the need of this research. Chapter two found that certain cases like the *Lilanda* case envisage reluctance in respect to strict adherence to the rules of the criminal procedure such as the burden of proof and standard of proof. Chapter two also analysed Zambian case law to established difficulties in the courts' decisions mostly in respect to cases of substantial causation. Further chapter two also found that most of the difficulties arise in cases of intervening acts such as medical treatment and acts of third parties. Chapter two also found that there is reluctance by the court to call for medical evidence. For example in the Abel Banda court's decision that "this was

not a case fit enough for medical evidence to be employed to establish causation”, shows the court’s reluctance in ensuring thorough medical evidence. Chapter three achieved a comparative analysis of the difficulties in establishing causation in the English Common Law and Zambia criminal justice system. Chapter three found that there are gaps in both jurisdictions especially in respect to what exactly will amount to substantial causation. The other difficulty found in chapter three is in cases of medical treatment and intervening acts because the cases in both systems seem unsatisfactory when handling cases that could probably have more than one cause of death. The other difficulty arises in the court’s reluctance to give serious consideration of the effect of medical treatment on the chain of causation. For instance the case of *R v Blaue* indicates that the courts have been very reluctant raise a possibility that medical treatment will have such an effect.

2. Recommendations

The recommendations are divided into short and long term. For purposes of this research, Short term recommendations on the one hand are those which, in the author’s considered view, could be implemented fairly expeditiously without need for significant financial resources. Long term recommendations on the other hand are those that would require the injection or sourcing of substantial financial resources, hence the need for more time to implement them⁵¹.

3. Short term recommendations

The first challenge is with the courts’ failure to strictly follow rules of criminal procedure when making determinations of causation in murder and manslaughter cases. This challenge focusses on the decision in the *Lilanda case*. The recommendation to this challenge is that courts’ should follow strictly rules of criminal procedure such as the rules on burden of proof and the standard

⁵¹ Winnie S. Mweenda Paradigms of Alternative Dispute Resolution and Justice Delivery in Zambia, November 2006, P. 345

of proof considering that they play a very important role in the judicial system. In terms of criminal matters, there are principles of criminal procedure which must be adhered to, for examples the standard of proof set in criminal matters as provided by Article 18 of the Constitution which protects personal liberty of those convicted in criminal law. Invariably, when these principles of criminal procedure such as those discussed above in chapter two are not followed, they result in wrongful convictions. This will also prevent convictions of innocent people.

It's a misconception to wish for faultless criminal justice system, but it is reasonable to place as many safeguards in the system as practically possible. If the cost to prevent such problems is a reasonable solution, such as putting in place more principle guidelines on the law of causation or ensuring strict compliance with the already existing law. The justice system must comprise of safeguards and technicalities that seemingly prevent most of the outcomes of these difficulties one of which is wrongful conviction. Errors inevitably occur, and all systems become better ones by learning what causes the errors and how best to prevent them.

The second difficulty of establishing causation that has been noted in this research is that of intervening acts. Courts do not handle properly circumstances where there are more than one causes, or where the chain of causation seem to have been broken down. The best recommendation that may be advanced is to read the law in section 207 of the Penal Code which has been discussed in chapter two and construe it strictly not as to distort its meaning. The chapters explain all the instances in which causation is imputable and thus officers of the law must always read the section in its entirety. It would be wrong to advance that the law does not define causation adequately, but from the cases read it has been observed that there is a tendency

in most judges and lawyers when making submissions only to read the first part of section 207 of the penal code and not in its entirety.

The recommendation that the research makes in respect to the definition of causation is that of what exactly amounts to 'substantial cause' in relation to causing death in manslaughter. It is important that the legislature and the drafters of the Penal Code exactly state what amounts to substantial cause especially in cases where death may result from many causes. Kulusika states that substantial cause entails that the conduct of the accused must be the considerable cause of the prohibited act⁵², nonetheless this definition has not been used in any of the analysed cases and it is not a pronouncement of the law per se.

The law should be drafted in simplest form so that people are able to understand without much difficulty. Most matters of causation have tended to be left to the common law. Moreover, these difficulties perhaps explain the diffidence shown by judges in tackling the law of causation. Unfortunately, the courts have often retreated into ad hoc judgments because of uncertainty on what exactly amounts to substantial causation in the law.

For example as seen in the analysis of the *Lilanda case* the court seems to suggest that poaching and resistance to be arrested was the substantial cause of the death. But the courts' primary concern should be to establish causation instead of establishing what circumstance took place before the death occurred. The question still remains what exactly amounts to substantial cause because it is only normal that anyone that most suspects of poaching, in possession of a prescribed trophy will resist being apprehended. However this does not entail that if death occurs while resisting apprehension then that amounts to substantial causation. Consideration must

⁵² Simon E. Kulusika, *Criminal Law in Zambia. Text, Cases and Materials*. (Lusaka: University of Zambia Press, 2006) p. 110

always be had on what exactly the court suggests when it stated that section 207 should be interpreted using common sense. This is a problem let alone because it entails that even police in their duty of apprehending suspects can kill and causation will still be placed on the accused as the court seems to suggest that 'resisting apprehension' is substantial cause of death. However what exactly amounts to substantial cause still remains blur. Therefore it is a recommendation that the penal code be revisited and amended to the extent that it should state and address what exactly should amount to substantial cause.

Apart from some modifications in the penal law there has been no serious attempt to look at the various aspects of the criminal justice system. The third difficulty in establishing causation that the research has found particular in the case *Mbomena Moola v. the People* is that where medical treatment and postmortem is involved. The recommendation that the research advances in the Zambian criminal justice system in a bid to make the establishing of causation much easier in cases of murder and manslaughter is need for the establishment of the forensic unit within the police service. Admittedly, forensic science in Zambia is not as developed as in other jurisdictions. However, the establishment of this unit clearly goes a long way in preventing wrongful convictions as evidence adduced is scientifically proven.

However, this unit has received criticism alleging that the personnel employed to operate it are not qualified for the job. It has been claimed that the personnel are often trained for a few weeks when the forensic sciences in question require that one goes for lengthy and comprehensive training⁵³. This arrangement obviously leads to increased chances of errors by the said personnel and sometimes this can lead to proving causation wrongly and also the difficulties of unclear medical report. Therefore, it is submitted that much as the forensic unit has been set up, the

⁵³ Interview: Kabwe Chilufya, Police Officer Forensics Department Lusaka, Zambia, May 16, 2013.

Zambian criminal justice system, it remains flawed. In this respect, it is essential that the highlighted challenges are swiftly resolved if causation problems arising from medical reports and postmortems are to be prevented significantly.

The other step that needs to be taken to achieve the above recommendation is to bridge the gap at law, between the interest of justice in cases of postmortem and the ethics that surround respecting the wish of the dead and their families⁵⁴. A post-mortem, also known as an autopsy, is the examination of a body after death⁵⁵. The aim of a post-mortem is to determine the cause of death.

Some people have been victims of wrongful convictions because consent to undertake a postmortem has been denied by the family to the deceased and thus causation is not established beyond all reasonable doubt. Therefore in murder and manslaughter cases, when establishing causation especially where circumstances which led to death are not clear, post-mortem should be mandatory at law. This raises the issue of conflicting interests between the interference of a dead person's body but if someone's right of liberty be abrogated, the law must ensure that all reasonable steps are taken to ensure that the accused is the cause of the death.

The fourth recommendation is that there must be a substantial investment of funds in the forensic unit existing in the police service in order to raise it to a more effective unit. Forensic science faces a lot of challenges in the Zambian criminal justice system. One such challenge is that it has stagnated as it only sticks to more traditional forms of scientific investigation mentioned earlier and as such has not moved to more novel forms of scientific investigation such as DNA testing. Another challenge is that the persons employed to work in the forensic unit are not sufficiently

⁵⁴ Interview: Kabwe Chilufya, Police Officer Forensics Department Lusaka, Zambia, May 16, 2013.

⁵⁵ Steven H. Gifts Baron's Dictionary of Legal Terms 4th Ed. (Hauppauge: New York.2008) P.387

qualified as they are only trained for a few weeks before being unleashed on society to decide the fate of accused persons⁵⁶.

It is this background that necessitates the need to invest huge sums of money in the forensic unit in order to raise it to acceptable standards. The funds invested should be channeled towards the development of DNA testing in order to ensure that when a person is deprived of their liberty, it is for reasons that are cogent such as having their DNA sample at the crime scene; this makes the establishing of causation much easier and reliable. Moreover, massive investment would also ensure that the personnel employed in the forensic unit are properly trained. It would also be expected that better qualified personnel would be lured to the police forensic unit due to the increased funding.

The above paragraph is a clear indication that the police should work hand in hand with the courts to know what facts are in issue before such evidence is even allowed in court. In the *Lilanda* case it was not in dispute which gun fired the shot. The issue in question was whether or not the accused had killed the deceased during the struggle. Therefore an effective forensic detective will examine the DNAs on the gun instead of just ensuring that the gun shots came from the same gun. That was not in question, what the forensic detective should have done was to determine who had fired the shot. This also raises the point that the courts should be very careful when receiving forensic evidence and the court should be able to make a determination on whether or not the evidence is addressing the facts in issue.

⁵⁶ Interview: Kabwe Chilufya, Police Officer Forensics Department Lusaka, Zambia, May 16, 2013.

4. Long term recommendations

There is urgent need to look into infrastructural facilities available to the investigating officers in the country. Most importantly in regard to accommodation, mobility, connectivity, use of technology, training facilities are grossly inadequate⁵⁷ and they need to be improved as top priority. A prompt and quality investigation is therefore the basis of the effective criminal justice system. Police are employed to perform diverse duties and quite often the important work of prompt investigation gets relegated in priority. A separate wing of investigation with clear mandate that it is accountable only to rule of law is a necessity. Criminality has undergone a tremendous change qualitatively as well as quantitatively⁵⁸. Therefore the apparatus designed for investigation has to be equipped with laws and procedures to make it functional in the present context. If the existing challenges of crime are to be met effectively, not only the mindset of investigators needs a change but they have to be trained in advanced technology, knowledge of changing economy, new dynamics of social engineering, efficacy and use of modern forensics to mention but a few. Investigation Agency is understaffed, ill equipped and therefore the gross inadequacies in basic facilities and infrastructure also need attention on priority. There is need for the Law and the society to trust the police and the police leadership to ensure improvement in their credibility.

The other recommendation is that Zambia should create an organization to deal with wrongful convictions. The reason behind this recommendation is to remedy the effects of wrongful convictions due to many flaws in the criminal justice system one of them being causation. Like

⁵⁷ A check at the police by author found a very small building and very tiny room where all suspects are put without enough room.

⁵⁸ Interview: Inspector Frank Michelo an Immigration Officer, Ministry of Home Affairs Immigration Department. 11/06/2013

the Innocence Project, this institution's mandate should be twofold,⁵⁹ it should firstly be mandated to study applications from convicts that believe that they were wrongly convicted and decide the cases with merit. Upon this selection, the institution should acquire the relevant evidence and try to exonerate the person that was wrongfully convicted. The second mandate should be to suggest reforms that can be made to the criminal justice system aimed at preventing wrongful convictions. It is envisaged that the creation of such an institution would greatly reduce the dangers of wrongful convictions by virtue of application of the said mandates.

Zambian criminal justice system should create an institution like the 'Innocence Project' in America founded in 1999. It assists prisoners who can be proven innocent through DNA testing but also works to reform the criminal justice system to prevent wrongful convictions."⁶⁰ This will give a chance to the people who are affected by decisions made from wrongly decided causation cases to get a second chance to their right to personal liberty. There is no institution in Zambia that looks into the exoneration of wrongly convicted persons as its main objective. The only hope for a convicted person is the appeal process and when it is exhausted at Supreme Court level, the convicted person cannot obtain justice elsewhere.

The none existence of an organization that studies convictions for the purpose of exonerating the wrongfully accused and further looks at means in which the Zambian criminal justice system can be improved on in order to prevent wrongful convictions is a major flaw in the said system. The lack of such an organization means that there are possibly hundreds of wrongful convictions that have not been considered and the liberty of these innocent persons has been unfairly curtailed due to other problems in the system as well as those of the difficulties the court faces in

⁵⁹ FPT Heads of Prosecutions Committee, *the Path to Justice: Preventing Wrongful Convictions* (New York: FPT, 2011), P. 8.

⁶⁰ www.ppsc.gc.ca (accessed April 10, 2013)

causation cases due to failure of judges to follow the laid down guidelines and the flaws of the forensic unit in Zambia.

The Zambian criminal justice system was devised more than four decades back, and has now become ineffective; a large number of guilty people go unpunished in a large number of cases and difficulties in establishing causation have been proved to be a contributing factor. The system takes years to bring the guilty to justice. Crime is increasing rapidly every day and types of crimes are proliferating and as such, the citizens live in constant fear. It is therefore imperative that the government of the Republic of Zambia constitutes a Committee on reforms of criminal justice system to make a comprehensive examination of all the functionaries of the criminal justice system, the fundamental principles and the relevant laws.

There is an urgent necessity in the light of recommendations to have a detailed look at the way our criminal justice institutions have been functioning. Although a few suggestions have been made in this regard in terms of amending the Penal Code, strict adherence to the rules of procedure, advancing forensic science unit and create an organisation to deal with wrongful convictions strengthening them with new information technologies and finding sufficient resources for these are also matters of great urgency. Equally urgent is the matter of programs and measures to improve and keep up-to-date their training and keep high the motivation of those who run the systems. This applies to all parts of the Criminal Justice System. It is the duty of the State to protect fundamental rights of the citizens as well as the right to liberty.

5. Conclusion

The research has discussed the difficulties of establishing causation in homicides, particularly murder and manslaughter. The research went on to evaluate the law on causation in Zambia. It

analysed the guidelines and law of procedure used when establishing causation in murder and manslaughter to establish whether or not the court needs more legal guidelines on the law of causation. The research also analysed case law on causation and brought to light the difficulties the courts have faced in establishing causation. In chapter three, the research analysed common law and made a comparative analysis of the difficulties the courts have faced in establishing causation in the English and Zambia criminal justice system. The research found that there are gaps in both jurisdictions especially in respect to what exactly will amount to substantial causation in relation to causing death. For instance in the case of *The other difficulty discussed* is in cases of medical treatment and intervening acts because the cases in both systems seem unsatisfactory when handling cases that could probably have more than one cause of death. The other difficulty arises in the court's reluctance to give serious consideration of the effect of medical treatment on the chain of causation. This Chapter has given recommendations on what can be done to improve the lacking areas in the law of causation.

Most of the difficulties are in cases where medical treatment is involved after an injury and other intervening acts of third parties. The other difficulties arise due to the definition of causation itself as certain aspects have been left to the judge's interpretation and discretion such as those of substantial causation. Due to the difficulties in establishing causation, it is one area of the law where the case law overlaps significantly even when facts are similar with general doctrine of causation. These difficulties established indicate that there could be a number of causation cases that have contributed to wrongful causation in both jurisdictions. The success of reforms would ultimately depend on how they are carried out in their details and to what extent they reflect the spirit of the recommendations that the research has submitted.

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