

**THE UNIVERSITY OF ZAMBIA**

**SCHOOL OF LAW**

**THE RIGHT OF AN ACCUSED TO A FAIR TRIAL: A CASE STUDY OF CHIBUYE  
AND OTHERS V THE PEOPLE**

**By**

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Being a Directed Research essay submitted to the University of Zambia Law Faculty in partial fulfillment of the requirements for the award of the Bachelor of Laws (LLB) Degree.

May 2012

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## ABSTRACT

The Right of an accused to a fair trial and its antecedent rights is one of the fundamental rights of every man. When one is charged with a criminal offence, it is incumbent on the trial court to ensure that he receives a fair trial and the entitlements there under. Though the right to a fair trial is absolute, the other rights that have been guaranteed to the accused such as the right to be present during trial, to be represented by a lawyer of one's choice and to put up his defence through a lawyer may be waived. In this regard this dissertation undertook to consider how the courts in Zambia have interpreted the right to a fair trial and the judicial attitude in exercising its discretion in implying waivers. The main focus of the research sought to determine whether the accused's in the case of *Chibuye and other v The People* herein the case study, received a fair trial based on the court's determination of their implied waiver of the right to be present. Further, the research also undertook to consider how the non liberal and non lenient attitude of the judge in the case study as well as the conduct of the accused's affected the realisation of a fair trial.

Upon conducting desk research and interviews with prominent lawyers, academicians and Judges, it was observed that there are inconsistencies and misconceptions on how the courts in Zambia have interpreted the right to a fair trial. The author also found that the courts as exhibited in the case study unlike in other jurisdictions were less liberal and rather more inclined to implying waivers as a result of the uncooperative conduct of the accused. On considering the whole trial, the author found that the accused's in the present case were actually denied a fair trial due to the judge's lack of impartiality which was discernible from the court's attitude in deciding to proceed with trial in the absence of the accused's, without making any efforts to compel them to attend trial. This was important in determining whether they had opted to waive their presence on trial and if the same was valid.

The author therefore recommends that the court in Zambia must be consistent in their interpretation of the right to a fair trial. Further, the court in deciding to invoke their discretionary powers to proceed in the absence of the accused need to be liberal so that justice is seen to be done and not just done. In addition, it was recommended by interviewees that there is need for civic education on the importance of the rights guaranteed under the right to a fair trial as some of the accuseds may behave in a manner detrimental to the assertion of their rights without knowing what they stand to lose.

## **DEDICATION**

This paper is dedicated to my loving and caring parents, Rev. Samson Tembo and Everlyn Tembo. I am what I am because of your teachings, love and support. Thank you for taking the time to care and I hope each day that passes by, you will see me grow from strength to strength until I attain my goals.

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**ABBREVIATIONS**

Universal Declaration of Human Rights	UDHR
International Covenant on Civil and Political Rights	ICCPR

## **TABLE OF STATUTES**

### **ZAMBIAN STATUTES**

The Constitution of Zambia Cap.1 as amended in 1996

The Criminal Procedure Code Cap, 88 of the laws of Zambia

The Constitution of South Africa

### **FOREIGN STATUTES**

The Federal Constitution of America, 14<sup>th</sup> Amendment

The Magna Carter Chapter 36 of the Laws of England

Criminal Procedure Act of South Africa, Act No. 56 of 1996.

## **INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS**

The Universal Declaration of Human Rights

The International Covenant on Civil and Political Rights

The African Charter on Human and Peoples' Rights

The American Declaration of the Rights and Duties of Man

The American Convention on Human Rights

The European Convention on Human Rights



## TABLE OF CASES

Amber v Stacy [2001] 2 ALL ER 88

Banda v The People (1970) Z.R. 14

Barberà, Messegue and Jabardo v. Spain [1994] E.C.H.R. 10588/83.

Chibuye and others v The People 2010 S.J.Z 33(unreported)

Diaz v USA. 223 US 442(1912)

Findlay v United Kingdom (1997) 24 EHRR 221

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General William Funjika V the Attorney General Z.R. 97 S.C.

Johnson v Zerbst (1938)304 US 458

Kalunga v The People (1988-1989) Z.R.90 S.C.

Patel v The Attorney General (1969) Z.R. 97 H.C.

Powell v Alabama 1932,287 US. 45(1932)

R v Abraham [1895] 21 VRL 345

Re Thomas Mumba (1994) Z.R. 38 H.C.

S V Cotty 1979(1) SA 912 (N)

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Shamwana and others v The People (1985) Z.R. 41 S.C.

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## 1.0 CHAPTER ONE

### 1.1 INTRODUCTION

Human rights are rights inherent in man and without which man would be incapable of existing as such.<sup>1</sup> They are viewed as what man requires in maintaining his dignity as a human being.<sup>2</sup> The right to a fair trial is one of the fundamental rights that every person charged with a crime is entitled to. Society has recognized the need for the accused to be afforded a trial whose procedures ensure fairness to the guilty and the innocent altogether through the adversarial process due to the consequences that may be attendant to a conviction and the impact this conviction may have on the social order supporting the conviction being the courts.<sup>3</sup>

Zambia like many other countries has guaranteed the right to a fair trial as enshrined in a plethora of international and regional instruments. However, though theoretically the right to a fair trial is ideally supposed to be universally the same, the interpretation, implementation and realisation of this right may vary in different jurisdictions. It is thus the objective of this research to determine how the right to a fair trial has been interpreted in the Zambian courts in reference to the case study. It will also be considered whether there has been consistency in the interpretation with regard to previous case law and the case study. One will also consider how other jurisdictions have dealt with the circumstances that arose in the case study and based on the same, consider if there has been consistency in the human rights practice by the courts in these jurisdictions as well as in Zambia.

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<sup>1</sup> Anyangwe Carlson, *Introduction to Human Rights and International Humanitarian Law* (Lusaka: UNZA Press, 2004), 11.

<sup>2</sup> Bearn G. Alexander, ed., *Useful Knowledge: The American Philosophical Society Millennium Program* (Philadelphia: American Philosophical Society, 1999), 135.

<sup>3</sup> Newman J. Donald, *Conviction: The Determination of Guilt without Trial* (Toronto: Little Brown and Company, 1966), 4-5.

In order to diligently explore the research topic, one will outline what the research undertakes to discover, the questions the research will seek to answer or will raise and how this will be done.

## 1.2 STATEMENT OF PROBLEM

The rights that ensure a minimum guarantee of a fair trial are encapsulated in various international, regional and national instruments. These include the Universal Declaration of Human Rights,<sup>4</sup> International Covenant for Civil and Political Rights<sup>5</sup> as well as regional instruments such as the African Charter of Human and Peoples Rights, the European Convention of Human Rights, the American Declaration of the Rights and Duties of Man and national constitutions. The Constitution of Zambia also guarantees the accused the right to a fair trial in all criminal proceedings.<sup>6</sup>

Although the right to a fair trial is recognized in many jurisdictions, the extent to which it is achieved is dependent on stakeholders who include: the courts, the defendant, lawyers and other institutions of government such as the Legal Aid Department. The basis on which the research is conducted is the decision of the High Court and Supreme Court in the case of *Chibuye and Others v The People*.<sup>7</sup> In this case, it was recognized that the obligation of the court is to ensure that the accused is afforded with minimum rights that are guaranteed under the right to a fair trial. These include the presumption of innocence, the right to a lawyer, and equality of arms between the prosecution and the defence and procedural equity. The court further held that both the prosecution and the defence must be heard and must be allowed to call witnesses and to cross examine them.

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<sup>4</sup> Article 10

<sup>5</sup> Article 14

<sup>6</sup> Constitution of Zambia, CAP. 1, Art. 18 (1)

<sup>7</sup> *Chibuye and Others v The People* (2010) S.J.Z 33. 32



However, in this case, the accused were tried in their absence and without legal representation. As a result of their absence, no plea was taken by one and none of them cross examined the witnesses of the prosecution nor did they give evidence in their defence. Further, the accused were charged under a different section which had a lesser punishment than the one under which they were convicted. The court held that the accused lost their opportunity to be represented by a lawyer of their own choice when they refused to come to court. The conduct of the accused was seen as having been targeted at disrupting the proper proceedings of the trial. It was further held that as they knew what they stood charged with, no prejudice was suffered<sup>8</sup>. In light of the plea, they could not complain because they caused the default in the first place, thus it could not be alleged that there was no transparency or that trial was unfair.<sup>9</sup> The court reiterated that the rights enshrined under the constitution could only become alive and enjoyed if the citizens asserted them, failure to which they would remain dormant in the statute books in which they are inscribed. This categorically shows how the courts and the accused both have a role to play in the realisation of the right to a fair trial.

In light of the decision above, it is evident that the defendants did not receive the rights guaranteed by the right to fair trial as they were deemed to have waived their right to a trial based on their conduct. According to the international standards, in order for a waiver to be valid, it must satisfy certain requirements: must be unequivocal, voluntary and one must be able to discern the consequences of such waiver<sup>10</sup>. Further, in exercising their jurisdiction to proceed

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<sup>8</sup> Kalonga v The People (1988-1989) Z.R. 90. (SC), distinguished because there both Charge and Particulars did not disclose the use of a gun

<sup>9</sup> Banda v The People (1970) Z.R. 14, trial without plea as a general rule was held to be a nullity. Created an exception in the present case.

<sup>10</sup> Johnson v Zerbst (1938)304 US 458

with trial in the absence of the accused, the courts in other jurisdictions have been liberal by adopting a level of leniency and safeguards before invoking such discretionary powers.

In light of the foregoing, the author is of the view that the decision of the High Court in the case study did not exhibit fairness based on the fact that the court could be perceived to have had bias to the accused as people who were guilty and merely trying to delay being convicted. In fact, the trial judge in the High Court was commended for not falling prey to the antics of the defendants in trying to avoid being tried. As Zambia is a follower of the adversarial system of justice and due process of the law model of criminal justice, it is incumbent that the courts consider the adverse effect that readily invoking their discretion to proceed with trial in the absence of the accused may have on the impartiality of the court and the right of an accused to receive a fair trial. In addition, the courts have an active role in protecting the rights of the defendants and it does not necessarily follow that if the accused fails to assert his right, the courts are also relieved of their duty to protect the accused's right in any way they best can.<sup>11</sup> Thus, these issues will be analysed in light of legislation and case law in Zambia and other jurisdictions.

### **1.3 OBJECTIVES OF THE RESEARCH**

The purpose of the research in general is to:

- 1 Analyse the role of the court in protecting the right of an accused to a fair trial. In particular how they have interpreted the right to a fair trial and how they have exercised their discretion to dispense with some of the rights that ensure that an accused has a fair trial and to advocate for a more sparing approach in invoking waivers.

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<sup>11</sup> Steiner , Henry, Philip Alston, Ryan Goodman, *International Human Rights In Context: Law, Politics, Morals and Text*(Oxford: Oxford University Press,2008), 107

- 2 The accused's conduct is also another important factor that may limit the realisation of the right to a fair trial. He may conduct himself in such a way as to waive his rights to a fair trial. Thus the purpose of the study is to consider the role of the accused in the realization of the right to a fair trial and to advocate for more cooperative conduct which can be realized through the necessary civic education of the benefit of asserting his rights.
- 3 To analyse whether the court's interpretation and exercise of their discretion in proceeding with trial in the absence of the accused is consistent with the right to a fair trial as established by international standards.

#### **1.4 RATIONALE AND JUSTIFICATION**

Fairness in criminal trial is of great importance particularly as the liberty and life of the accused which are fundamental human rights are at stake and to the very integrity of the court system.

##### **1.4.1 Practical Justification**

This research is significant mainly because it addresses the issue of the right to a fair trial in criminal proceedings. This is of practical importance because the need for the court to observe the minimum guarantees of a fair trial hinges on the credibility of the judiciary if they are to remain relevant and true to the society they aim at and are appointed to serve and maintain their status as arbiters of justice. Further, this research is relevant because the observance of a fair trial is of even greater importance in criminal proceedings mostly due to the gravity of the implications that may follow upon conviction. Thus the need by the courts to protect this right of the defendant cannot be reiterated any less.

#### **1.4.2 Theoretical Justification**

The study will be of theoretical importance as it will fill the gap on how the courts have exercised their discretion in invoking waivers due to the conduct of the accused and how these may affect a fair trial. Further, the right to a fair trial is not a closed concept and thus its meaning and scope is still undergoing judicial interpretation, which may be more expansive or limited thus the need to keep at brace with these developments through this research.

#### **1.5 RESEARCH QUESTIONS**

- How have the courts in Zambia and internationally interpreted the right to a fair trial?
- How have the courts in Zambia and other jurisdiction exercised their discretion to invoke or infer waivers of the rights under the right to a fair trial and: whether the courts rightly proceeded with trial in the absence of the accused in the case study?

#### **1.6 METHODOLOGY**

This research will primarily rely on desk research which will entail collecting secondary data in form of books, scholarly articles, journals and the use of the Internet which will be consulted in order to obtain contemporary information on the research being undertaken. One will also conduct interviews with eminent judges, advocates and scholars on the subject matter of this research paper.

#### **1.7 OUTLINE OF CHAPTERS**

##### **Chapter One**

This chapter introduces the basics of the research and what the researcher undertakes to achieve as well as the mode the research will take.

## **Chapter Two**

This chapter introduces the concept of a fair trial, its rationale, development and waivers of the rights guaranteed the under.

## **Chapter Three**

This chapter deals with how other jurisdictions have interpreted the right to a fair trial and the judicial attitude to inferring waivers based on the circumstances that arose in the case study.

## **Chapter Four**

This Chapter considers in detail how the court interpreted the right to a fair trial based on current and previous law and if there has been consistency with international standards and practices.

## **Chapter Five**

In this Chapter, one will analyse the findings and based on the same a conclusion will be made. Finally, one will tender recommendations.

## **1.8 CONCLUSION**

The next chapter introduces the concept of the right to a fair trial, its development, essence and the instruments that have guaranteed this right. One will also consider its development in Zambia's legal frame work.

## **2.0. CHAPTER TWO**

### **THE RIGHT OF AN ACCUSED TO A FAIR TRIAL IN CRIMINAL PROCEEDINGS: CONCEPT, DEVELOPMENT AND ITS GUARANTEE AND LIMITATION**

#### **2.1 INTRODUCTION**

Each society has a certain standard of behaviour it considers acceptable or unacceptable. It has labeled some behaviour as criminal and thus imposing sanctions upon any person engaged in such behaviour. However, before one is punished for the crime alleged to have been committed, it has been recognized that the accused is entitled to certain rights one of which is the Right to a fair trial. This chapter is thus aimed at giving a general appreciation of the right to a fair trial. To achieve this, one will first begin by considering the concept of human rights which is the bed rock from which the right to a fair trial emanates and thus earns the status it has as a fundamental right as distinguishable from other rights. Its development and its essence will also be considered. Lastly, one will consider the international and regional instruments that give expression to this right.

#### **2.2 CONCEPT OF HUMAN RIGHTS**

The concept of human rights mainly emanates from the natural law philosophers. According to these scholars, human beings have natural rights which exist in the state of nature naturally and not through enactment by society as positivists argue<sup>1</sup>. Anyangwe has describe human rights as rights that are inherent in mankind's nature and the absence of which man would be incapable of living as such because they are the core of his existence.<sup>2</sup>International instruments have also

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<sup>1</sup> Lekham S. Chandra, Ortega Martin, Herman Johanna, *Human Rights Emanating from Natural Law and Natural Rights* (New York: Routledge, 2010), 32.

<sup>2</sup> Carlson, *Introduction to Human Rights and International Humanitarian Law*, 11.

reiterated the nature of human rights as rights inherent from the inherent dignity of man.<sup>3</sup> The most fundamental of such rights includes the right to life, liberty and property.

Human rights due to their fundamentality have been characterized as being among others inherent, inalienable and claims upon the state. They are inherent because man is born with them and not given by the state, inalienable because they cannot be taken away from an individual and given to another and they are claims upon the state because they can only be enforced against the state thus the state has a positive role in their protection and realization<sup>4</sup>.

The above notwithstanding, human rights are not absolute. This entails that they can be taken away or limited in certain instances and under certain circumstances. However, due to their fundamentality, it has been internationally recognized that the process and procedure under which these rights are taken away or limited should be fair and that there must be proper administration of justice thus the introduction of the right to a fair trial.<sup>5</sup>

### **2.2.1 THE CONCEPT OF THE RIGHT TO A FAIR TRIAL AND ITS DEVELOPMENT IN ENGLAND**

The concept of the right to a fair trial developed from the British common law which is one of the oldest systems of conflict resolution. Britain began recognizing defendants' rights through trial and error. This move came about contemporaneously with the procedural development that took place in the notion of a fair trial. The legal system of England that existed previously provided for a system where in the event a person was apprehended by the police and accused of having committed a crime, he had to appear before the crown unrepresented. The mode of trial

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<sup>3</sup> Universal Declaration of Human Rights Preamble

<sup>4</sup> Carlson, *Introduction to Human Rights and Humanitarian law*. 21-22

<sup>5</sup> Doebller F. Curtis, *International Human Rights Law* (Washington DC: CD Publishing, 2006), 108.

was by way of inquisition. The accused in certain criminal matters such as treason and felony was not entitled to legal representation as the assistance of counsel was seen as an impediment to efficient and successful prosecution and punishment, by obstructing criminal process and at times preventing convictions. Employing counsel was seen as likely to interfere with the states protective efforts. Thus, the system operated in such a way that the accused was presumed guilty until the reverse was proven. The justification of such a system was anchored on the need by the crown to maintain peace and order and any threat to his reign.<sup>6</sup> However, this system proved to be unfair thus it led to civil disobedience and uprisings in a quest by people to realize their civil liberties.

It is against the above background that Hamid submits that the evolution of the defendants' rights came upon the realization that the fairness of a trial depended on how the legal system handled the criminal complaint, criminal defendant and imposed punishment on the convicted culprit. This handling process it was observed had to be consistent, balanced and impartial<sup>7</sup>.

The Magna Carter which is often looked at as the genesis of the defendants' rights in England introduced the Right to Due Process of the Law. This statute was enacted against a background of arbitrary and blatant disregard of the rights of the crown's subjects. It gave expression to the fundamentality of the rights to life, liberty and property and it provided<sup>8</sup>:

“No freeman shall be taken or imprisoned, deseized or outlawed or exiled or any wise destroyed nor shall we go upon him nor send upon him but by the lawful judgment of his peers or by the law of the land.”

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<sup>6</sup>Tomkovicz J. James, *The Right to Assistance of Counsel: A Reference guide to the USA Constitution* (Westport: greenwood publishing group, 2002), 1-4.

<sup>7</sup>Hamid R. Kusha, *Defendant Rights: A Reference Handbook* (New Jersey: ABC publishers, 2004), 118.

<sup>8</sup> Magna Carter , Chapter 36 of 1215



Among the fair trial rights it guaranteed in criminal proceedings was the right to legal representation, the right to be notified of the proceedings, and that for trial to only be conducted by the authorized courts. Others were that trial was no longer conducted at the king's courts by the king, had to be unadulterated, without delay or denial of justice. Yet another was the right to be tried only before the functionaries of the king who were competent in knowledge of the law<sup>9</sup>

In light of the above, it can be seen that the mode of trial changed from that of inquisition to that which was adversarial in nature, whose spirit is in line with that of a fair trial, which is a trial where emphasis is on procedures that try to ensure the rights of the defendant are protected.

<sup>10</sup>The king was no longer the judge but trial was left to functionaries who had knowledge of the law so as to ensure that the accused was guaranteed with the right to justice.<sup>11</sup>

### **2.2.2 DEVELOPMENT OF ZAMBIA'S COURT SYSTEM AND THE CONCEPT OF A FAIR TRIAL**

The Court system as it now exists in Zambia was as a result of the British colonization of Zambia. When the white settlers came to Africa, they introduced their own laws. The introduction of English laws entailed a clash with the already existing customary laws. As a result of this, customary law was relegated to special courts which only handled civil matters among the natives while criminal matters were now subject to English law.<sup>12</sup> Upon attaining independence, the British Government who were already familiar with the concept of human rights and had a bill in their country to that effect facilitated the drafting of a constitution and annexed to it the Bill of Rights which among others included a guarantee of the right to a fair

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<sup>9</sup> Magna Carter, chapter 36. clauses 14-24, 32, 36-40, 45

<sup>10</sup> Reid T. Sue, *Criminal Justice Essentials* (West Sussex: Wiley Blackwell, 2012.), 14.

<sup>11</sup> Magna Carter clauses 14-24, 32, 36-40, 45

<sup>12</sup> Munalula Margret, *Legal Process : Cases and Material* (Lusaka: UNZA Press, 2006), 51

trial.<sup>13</sup> Thus the Colonial era marks the advent of the introduction of the formalized criminal court system as it now exists. This period also marks the introduction of the Criminal Procedure Code among others and later on a constitution which contains the rights to a fair trial among others.

### **2.2.3 ESSENCE OF THE RIGHT TO A FAIR TRIAL**

The main essence of the right to a fair trial is to ensure the proper administration of justice.<sup>14</sup> This entails that its aim is not to ensure that the judge has applied or interpreted the substantive law as he should but that in arriving at his judgment, he has followed a fair procedure. It can thus be said that the right to a fair trial consists of procedural rights which ensure that there is fairness. However, at times even adherence to procedure itself may not lead to a fair trial but ultimately what is important is that there has been a fair trial.<sup>15</sup>

### **2.2.4 INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS THAT GUARANTEE THE RIGHT TO A FAIR TRIAL**

The right to a fair trial is one of the most expansive and complicated of all rights. It is often protected under more than one article in the various international human rights instruments and in a variety of manners.<sup>16</sup> It can thus be said to encompass a minimum guarantee of various rights in criminal proceedings. The standards and extent to which these rights are protected and

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<sup>13</sup> Carlson, *Human Rights and International Humanitarian Law*, 199-200

<sup>14</sup> Curtis, *International Human Rights Law*. 108

<sup>15</sup> Harding Arthur, *Fundamental law in Criminal Prosecutions*(Dallas :southern Methodist University Press,1959),43

<sup>16</sup> Curtis, *International law*, 410

realized differ from jurisdiction to jurisdiction depending on the prevailing economic, social and political factors.<sup>17</sup>

Some scholars have submitted that among the general fair trial protections are: Firstly the right to be heard by an independent and impartial tribunal, the right to a public hearing, the right to be heard within reasonable time, the right to counsel and the right to an interpreter.<sup>18</sup>

The right to a fair trial as guaranteed under various international, regional and national legislation can best be understood by separating the rights of an individual which they guarantee and the institutional guarantees for the maintenance of a judicial mechanism free from bias. The provisions, as will be seen in some of the requirements of a fair trial are that the tribunal has to be independent, impartial and or competent and established by law. These are regarded by some scholars as the underlying requirement for the rights guaranteed to the accused.<sup>19</sup> A tribunal is regarded as independent if it is not subject to the pressure and influence of the legislature and executive. Impartiality is not based on the subjective element but how it appears to an outside onlooker. In criminal proceedings, a judge is impartial if he places the other hand at a disadvantage and not necessarily for his benefit<sup>20</sup>. Lastly for an accused to be subject to a fair hearing, the tribunal must have the authority to make binding decisions and not be subjected to approval or otherwise by another body.<sup>21</sup>

#### **2.2.4.1 INTERNATIONAL INSTRUMENTS**

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<sup>17</sup> Chanda AW, “ Case Study on Human Right in Commonwealth Africa”(JSP Thesis, Yale School, 1972), 24

<sup>18</sup> Curtis, *International Human Rights Law*, 411

<sup>19</sup> Inazumi Mitsel, *Universal Jurisdiction in Modern International Law: Expansion of national sovereignty* (Belgium: Intersentia Publishers, 2005), 189.

<sup>20</sup> Mahoney Paul, “ The Right of an accused to a fair trial in criminal matters under Article 6 of the European Convention of Human Rights”. <http://www.jsi-journal.ie-Mahoney>[accessed.22/12/2012]

<sup>21</sup> Findlay v United Kingdom(1997) 24 EHRR 221

The Universal Declaration of Human Rights (UDHR): This is the basic human rights instrument. It lays out the right to a fair trial in a restrictive manner. The right to a fair trial is guaranteed in Article 10 and it provides:

“Everyone is entitled in full equality to a fair trial and public hearing by an independent and impartial tribunal in determination of his rights and obligations and in any criminal charge against him.”

It also guarantees the right to be presumed innocent until proven guilty as one of the rights of a fair trial in Article 11.

The International Convention on Civil and Political Rights (ICCPR). This covenant was enacted as an expansion of the UDHR. It also guarantees the right to a fair trial in Article 14(3) and it provides:

“all persons shall be equal before the courts and tribunal in determining of any criminal charge against him or his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law....”

This instrument has gone a step further by guaranteeing a broad category of rights that the accused will be entitled to in criminal as well as civil proceedings. Unlike the Universal Declaration of Human Rights in criminal proceedings, the accused is entitled to several rights. In criminal proceedings these rights among others include: The right to be brought promptly to court and informed of charges against him, to be tried within a reasonable time or be released, to be provided with adequate facilities for the preparation of his defence and to enable him employ a lawyer of his own choice. If he cannot afford to employ a lawyer of his own choice, to have

one assigned to him for free in the interest of justice and to examine or through his lawyer have witnesses against him cross examined<sup>22</sup>:

#### 2.2.4.2. REGIONAL INSTRUMENTS THAT GUARANTEE THE RIGHT TO A FAIR TRIAL

The right to a fair trial as a necessary element in the proper administration of justice tends to reveal itself through its enshrinement in various regional conventions. It can be reiterated that these instruments are region-specific, catering for the specific needs of particular regions. The right to a fair trial has been enshrined by the following conventions:

The African Charter on Human and Peoples Rights: This instrument sets the common standard for those African countries that have ratified it. It guarantees the right to a fair trial in the following terms:<sup>23</sup>

Every individual shall have the right to have his cause heard. This comprises (a) the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force (b) the right to be presumed innocent until proved guilty by a competent court or tribunal (c) the right to defence including the right to be defended by counsel of his choice (d) the right to be tried within a reasonable time by an impartial court or tribunal.

The American Declaration on the Rights and Duties of Man: Also guarantees the right to a fair trial to its member states. Being a declaration, it is not legally binding on the states but depends on the political free will of its state parties. In its Due Process Clause, it guarantees an accused in

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<sup>22</sup>ICCPR, Article. 9 (2) (3)

<sup>23</sup> Article 7

criminal proceedings to by providing the right to a fair trial for the accused to be given an impartial public hearing by courts previously established by law<sup>24</sup>”

The European Convention of Human Rights: This is the most detailed instrument in terms of the scope of fair trial rights among the three regional instruments we have considered, as it guarantees more or less the rights in the ICCPR. It provides,<sup>25</sup>

“In any suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Judgment shall be pronounced publicly ....”

The European Convention on Human Rights further guarantees certain minimum rights to a person charged with a criminal offence in full equality irrespective of race, religion or beliefs. Some of these rights are to be informed of the charge against him promptly in the language he understands best, to be provided with adequate facilities for the preparation of his defence and to communicate with a lawyer of his choice where he is able to afford to employ one and to be provided with free legal counsel if he is not able to afford one, to be present during trial and lastly though not exhaustively, the right to cross examine witnesses against him in person or through a lawyer he has employed or who has been assigned to him.

The Right to a Fair trial as guaranteed under Article 6, paragraph 1 under this instrument is generic covering also the specific guarantees in its sub articles which are also not exhaustive. To determine if the defendant has had a fair trial, the trial must be taken as a whole because these

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<sup>24</sup>Article XXVI

<sup>25</sup>Article 6

may be cured on appeal or by subsequent procedure. However, even minor procedural error may as a whole compromise a fair trial<sup>26</sup>

In light of the afore legal provisions the author submits that the right to a fair trial is a general concept which requires that there is equality of arms between the prosecution and the accused, thus as the prosecutor who represents the state will usually be trained to prosecute cases, the accused is entitled to the right of legal representation among other rights so as to strike a balance between the two sides. It may further be submitted that at international level, the International Covenant for Civil and Political Rights which was enacted after the Universal Declaration of Human Rights guaranteed a broad scope of rights to the accused. However, what is evident from both the regional and international instruments is that they all with a few differences provide for the elements that the Judiciary must possess that is be independent, impartial, competent and established by law. In relation to regional instruments, the European Convention gives a detailed scope of the right to a fair trial guaranteeing more or less the rights guaranteed by the ICCPR.

#### **2.2.5 LIMITATIONS ON THE RIGHT TO A FAIR TRIAL**

The right to a fair trial as guaranteed under the instruments dealt with above is absolute and so are the elements of a fair trial that is the institutional guarantees of a fair trial; Court being independent, impartial, competent and trial within a reasonable time. These cannot be derogated from and neither are they subject to exceptions. This is in contradiction to the rights that have been guaranteed under the sub articles which can in proper instances be waived. Provided the waiver is unequivocal, intelligently and knowingly made. However, the court must prove that

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<sup>26</sup> Barberà, Messegué and Jabardo v. Spain [1994] E.C.H.R. 10588/83.

there has been a waiver beyond reasonable doubt.<sup>27</sup> Thus, placing a heavy burden on the courts to show that there was a waiver.

The ICCPR as well as all the instruments dealt with above has expressly provided for derogations from the fair trial rights it guarantees by allowing the court to dispense with having a public hearing in the interest of public morals, public order, national security, for the interest of democracy, or where the interest of private lives of the parties requires so, or to the extent strictly necessary in the opinion of the of the court in special circumstances where publicity would prejudice the interest of justice. However, in light of judgments in criminal proceedings, it requires the same to be made in public except in proceeding dealing with matrimonial matters or the guardianship of children.<sup>28</sup>

Heidi has observed that human beings are social beings that have self autonomy. They can thus explicitly or tacitly waive or do away with asserting their rights to a fair trial. He however cautions judicial officers to be cautious in allowing such waivers. He submits that even though human beings are autonomous and can thus waive their right, this autonomy must be safeguarded and the courts must be satisfied among others that the waiver is in the interest of the public. He therefore reiterates the interpretation that has been given of the provisions of the European Convention on Human Rights which recognizes the legality of waivers provided they are unambiguous, unequivocal and made knowingly.<sup>29</sup>

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<sup>27</sup> McBride Jeremy, *Human Rights and Criminal Procedure: Case Law of European Court Of Human Rights*(London: Council of Europe Publishing, 2009), 286

<sup>28</sup> Article 14(1)

<sup>29</sup> Heidi Rajamae, “ Legality of Contractual Waivers of Human Rights in the European Context”( Master thesis, Lund University,2011), 8,12-13



## 2.3 CONCLUSION

In summation, human beings are by nature endowed with certain fundamental rights such as the right to life, liberty and property. It is for this reason that various international and national instruments have been enacted to guarantee, promote and protect these rights. Among the rights that an accused is entitled to in criminal proceedings is the right to a fair trial. The genesis of this right has been traced to England and has found expression in Zambia's criminal justice system through the advent of colonization. Due to the fundamentality of these rights, they have been assigned with the status of being inalienable and inherent. They have also been characterized as claims upon the state thus placing the burden of promotion, protection and realization of these rights on the state which includes the courts. It is therefore imperative that the courts take an active role in promoting, protecting and realizing these rights.<sup>30</sup>

The above notwithstanding, as fundamental as these rights may be, their enjoyment may be limited or taken away for the good of the rest of society or other individuals. However, international instruments have been enacted which have guaranteed the right to a fair trial which consists of procedural rights to ensure that the process in which these rights are taken away is fair and fair procedure is followed. The right to a fair trial is not absolute thus it can be limited as provided by the laws of particular jurisdictions. Moreover its enjoyment may be restricted by the accused himself through a valid waiver. However, in order for a waiver to be acceptable at international level, it must be unequivocal and made knowingly of the consequences of the waiver.

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<sup>30</sup> Beitz Charles, *The Idea Of Human Rights* (Oxford: Oxford University Press,2009),65

Having given a general overview of the concept of a fair trial and the issues surrounding it, one will in the next chapter consider how the right to a fair trial in criminal proceedings has been interpreted in relation to the issues that the case of *Chibuye and Others V The people* raised. The jurisdictions to be considered are South Africa, United States of America and England.

### 3.0 CHAPTER THREE

#### HOW OTHER JURISDICTIONS HAVE INTERPRETED THE RIGHT OF AN ACCUSED TO A FAIR TRIAL; IN RELATION TO THE PROCEEDINGS IN THE CASE STUDY.

##### 3.1 INTRODUCTION

The right to a fair trial as was shown in Chapter two has been guaranteed at both international and regional level. As was observed, the right to a fair trial from a human rights perspective consists of certain human rights guarantees to the accused which among others include: the rights to be present during trial, to put up a defence, to legal representation and to cross examine the prosecution witnesses. The case of *Chibuye and other v the People*<sup>1</sup>, herein referred to as the case study, involved an appeal against the High Court's decision in which the accused were tried and convicted in their absence after they refused to attend court proceedings while in the court holding cells. Based on the same, the accused alleged that they had not been afforded the right to legal representation and that they had been subjected to some procedural irregularities which had the effect of nullifying the trial against one and reducing the sentence for the others. The Supreme Court held that the accused could not claim that they had not received a fair trial as they had by their conduct waived their fair trial rights. This chapter will thus consider how the courts in America, South Africa and England have interpreted the right to a fair trial and the efficacy of some of the rights which were deemed to have been waived in the case study. One will also consider the judicial practice in proceeding with trial in the absence of the accused in similar circumstances as the ones that prevailed in the case study. The case law cited in these states may

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<sup>1</sup> (2010) S.C.J 33(unreported).

well include claims of violation of the right to a fair trial due to a court decision in that state appealed against to a regional body to which they are party.

The right of an accused to be tried in his presence has been regarded as a fundamental component of the right to a fair trial in international law. Thus the requirement of a fair trial is not met if the accused is tried in his absence. This right is viewed as fundamental as the other rights which include the right to cross examine the prosecution witnesses and to put his defence which are dependent on it. Further, it is regarded as important to the effective participation of the accused in his trial. The rationale for the presence of the accused at trial is not only based on the public interest in the case, but is also deemed as important to the establishment of the factual circumstances of the case and to the court's ability to correctly assess the accused's character and personality. It further gives the accused an opportunity to influence the court's decision on the charge in which he has a personal interest.<sup>2</sup> Moreover, it is important if it is not to be perceived that justice was not done.

International courts and tribunals have had the occasion to decide on issues of trial in absentia and their repercussions on the right to a fair trial. While in most common law countries, trials in absentia are prohibited, they are allowed in civil law jurisdictions. However, even when allowed, certain requirements or safeguards must be observed such as need for the accused be represented by legal counsel and only in exceptional circumstances should the court resort to imply waiver of trial by the accused.<sup>3</sup>

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<sup>2</sup>S v Ariantos, <http://www.uir.unisa.ac.za>[accessed.17/2/2012]

<sup>3</sup>Anonymous, " Trial in Absentia," [http//, www.Criminal Bureau.com](http://www.CriminalBureau.com)[accessed.17/2/2012]

### 3.2 AMERICA.

America is one of the States that has a written federal constitution which guarantees the right to a fair trial. Apart from the federal constitution, different States in America have enacted constitutions which have also recognized the right to a fair trial as set out in the international and regional human rights instruments.<sup>4</sup>In the case of *Vaughn v State*<sup>5</sup>, the court of appeal of America interpreted the right to a fair trial to mean fundamental fairness and substantial justice. One of the claims that were raised in the case study was that the court had denied one of the accused the right to be represented by a lawyer of his choice. From the facts the accused were obliged to take on a legal aid lawyer failure to which trial would proceed without a lawyer to represent them. In the landmark case of *Gideon v Wainwright*,<sup>6</sup>the court made mention of the fact that the requirement of an attorney was the very essence of a fair trial.<sup>7</sup> This was reinforced by a subsequent case where it was stated that;

The fundamental right of an accused to a fair trial will mean little or nothing if it did not take into account the right to legal representation. Even an intelligent and educated layman has small sometimes no skill in the science of law. If charged with a crime he will generally be incapable of determining for himself the validity of the charges against him. He generally lacks both the skill and knowledge to defend himself in court and he is unfamiliar with the courts rules of procedure and evidence. Without this representation though not guilty, an accused faces the danger of conviction simply because he does not know how to establish his innocence. In the interest of justice and to respect the fair trial rights of an accused, the accused must be expressly informed of his right to legal representation.

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<sup>4</sup>14<sup>TH</sup> amendment provides for trial to be heard by a competent and impartial court, and also guarantee the right to be represented by a counsel. The six amendments also list fair trial rights which include the right to be present at trial.

<sup>5</sup>*Vaughan v State* 3 tennn. criminal APP, 25

<sup>6</sup> 372 US.335(1963) 34

<sup>7</sup>*Powell v Alabama* 1932,287 US.45(1932), 5

The above notwithstanding, the author submits that the accused in the case study were deemed to have waived their right to be present on trial where they would have asserted their right to legal representation. In other words, their presence was at the core of their asserting other rights such as the right to a lawyer of their own choice as was being claimed. It is therefore imperative to determine whether the court can hold trial in the absence of the accused and in what circumstances.

The Federal Constitution of America has guaranteed the right to be present at one's trial.<sup>8</sup> The courts have however dealt with instances when trial has been allowed to proceed in the absence of the accused. In the case of *Diaz v US*,<sup>9</sup> the defendant had been voluntarily absent at some of the stages of the proceedings. After conviction, he appealed against sentence on the grounds that he had not exercised his right to confront the prosecution witnesses and that the courts had no right to proceed in his absence even if he voluntarily absented himself. This he argued was because, this right was the very core of the right to a fair trial. It was held that one could waive this guaranteed right. However, an accused who was in police custody and charged with a capital offence was held as being incapable of waiving his right to trial in his presence because the decision whether or not to be present on trial was not in his control and further, he was likely to suffer apprehension of the awful penalty of conviction. Based on this, the author submits that though waivers are possible, they must be made before the courts, which have to determine their validity and on being satisfied that they were voluntary, unequivocal and knowingly made. Thus the courts may compel the accused to attend court in order to ascertain if truly a valid waiver has been made where he is in their custody.

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<sup>8</sup> 6<sup>TH</sup> Amendment dealt with in *Diaz v USA*.

<sup>9</sup> 223 US 442(1912)

Another case of relevance to this research is the case of *Damukovsky etal v Georgia*.<sup>10</sup> The facts of the case were that the defendants were removed from trial and subsequently sentenced to death. After exhausting available avenues on application to a United Nations committee, it was held that the right to defend oneself was inalienable and had to be adhered to at all times without any exception. It was further stated that this right encompassed the right to be tried in one's presence, defended by a lawyer of one's choice and not to be compelled to accept an ex officio lawyer. Thus, the state was found to be in violation of the right to a fair trial as it had not taken reasonable steps to ensure the accused's continued presence in court despite their disruptive conduct and for not having ensured that each was defended by a lawyer of his choice.

It can thus be concluded that in America, one will have a fair trial if there has been substantial justice. Further the courts have realized that the very essence of a fair trial hinged on the right to be represented by a lawyer of one's choice which right can only be asserted when trial is conducted in the accused's presence. It can be concluded that while the accused is in custody, the courts can order that he be brought before the court where he may waive his rights unless he absconds. Where he conducts himself in a disruptive manner, the courts must endeavour to secure his presence failure to which trial in his absence will not be fair.

### **3.3 SOUTH AFRICA.**

This is another state that has domesticated the right of an accused to a fair trial through its constitution. Among the rights that it guarantees are the right to legal representation, the right to put up a defence, the right to be present when being tried and the right to adduce and challenge

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<sup>10</sup> Communication No 632; 624,626,627/1995, *V.P. Damukovsky etal v Georgia*. UN doc GAOR,A/53/40(Vol.11), Para 18.9

evidence among others<sup>11</sup>. It also has a criminal procedure code which has provided that the accused must be present during his trial.<sup>12</sup>

The courts in the Republic of South Africa have had an opportunity to make pronouncements on the right to a fair trial as set out in the constitution. One of the rights that the defendants in the case study lost was the right to cross examine the prosecution. The South African courts in the case of *S v Wellington*<sup>13</sup> espoused the rationale of the requirement of cross examination as a necessary requirement of the right to a fair trial. Moreover, cross examination was perceived as the greatest engine ever invented for the discovery of the truth.

The above notwithstanding, the right of an accused to a fair trial under the South African Constitution just as under the international and regional instruments has been subjected to limitations. Thus the courts have been authorized to hold trial in the absence of the accused under the Criminal Procedure Code.<sup>14</sup> In the case of *S v Moko*<sup>15</sup>, the court dealt with the issue of trial in the absence of the accused in instances where he misconducts himself during trial. It was held that before the exercise of this right, the court had to firstly inform the accused of their power to do so and grounds for such removal. Secondly, the power to remove such accused from trial had to be exercised with caution and circumspection. A warning was required to be given if possible, that the trial court would be obliged to remove him from the proceedings. This was seen as being likely to influence the accused to change his attitude. In this case, conviction was quashed because the accused was not warned that if he disrupted trial it was competent for the magistrate to conduct trial in his absence, because of this, the accused did not receive a fair trial

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<sup>11</sup>Section (35) of the 1996 Constitution of South Africa the interim constitution does not guarantee the right to be present but this is inferred from the right to confront the prosecution witness.

<sup>12</sup>Section 158(1) (C) of the Criminal Procedure Act

<sup>13</sup> 1991(1) SA CR 144

<sup>14</sup> Criminal Procedure Act of South Africa, Act NO. 56 of 1996. Section 322

<sup>15</sup>*S v Moko* 350 (O)



or a trial at all. It was further advised that the accused was to be given further warning after he had been removed from trial and to have him brought before the court after the examination in chief and asked if he wished to give evidence.

Further in the case of *S v Cotty*,<sup>16</sup> It was held that the prison authority could compel an accused in its custody to appear before the court where it would be decided whether trial should occur in his absence. It is therefore evident that apart from a situation where the accused misconducts himself and is removed from trial, the accused cannot decline to attend court proceedings as the courts have the power to order that he be brought before it where he can waive his rights if he so resolves.

### **3.4 ENGLAND.**

England is also another country that has guaranteed the right to a fair trial and is a party to various International and Regional instruments on the protection of Human Rights and has incorporated the European Convention on Human Rights in its Human Rights Act. It must be mentioned that even before the enactment of the Act, England already had common law principles which provided for principles of a fair trial as was seen in Chapter One<sup>17</sup>.

The right of the accused to a fair trial in criminal proceedings has been interpreted in a broad manner by implying certain rights deemed as fundamental to the right to a fair trial such as the right to equality of arms. The court in the case of *Amber v Stacey*<sup>18</sup> held that the right to a fair trial as enshrined in the convention is absolute and so are the institutional elements against bias by the courts. The courts have made a landmark decision in relation to trials in the absence of the

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<sup>16</sup> 1979(1) SA 912 (N)

<sup>17</sup> James, *The Right to Assistance of Counsel: A Reference guide to the USA Constitution*, 1-4.

<sup>18</sup> [2001] 2 ALL ER 88

accused which in the case under research was deemed to have been the core of the failure by the accused to assert the other rights guaranteed under the right to a fair trial. This case determines whether the right to a fair trial permits trial in absence of the accused, in other words, whether the right to a fair trial permits waivers of certain rights guaranteed thereunder or even waiver of the whole trial and under what circumstances such trial would be held.<sup>19</sup>

The brief facts of this case were that the accused and his co accused were charged with attempted robbery. He was initially present during the proceedings but later absconded. The judge was reluctant to proceed with trial in their absence and thus adjourned the case for four months. At the expiry of the adjournment, the accused were still at large, thus the trial judge ordered that trial proceed as the defendants had deliberately frustrated the attempt of the prosecuting authorities to have the case finally concluded.

When the accused was eventually apprehended, he appealed against conviction on grounds that the trial violated his right to a fair trial under the European Convention on Human Rights as it was held in his absence. Counsel for the appellants argued that the court did not have the discretion to hear the case in the absence of the accused because when the accused absconded, counsel's services were terminated by his conduct thus the accused was unrepresented. As a result of this, there was no cross examination of prosecution witness and no evidence and speech was presented to the jury for the defendant. Further, it was argued that the judge and the prosecution counsel could not know all points open to the defendant which could most likely lead to conviction. Thus an injustice had been done.

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<sup>19</sup> *R v Jones* [ 2002] ALL ER Volume 2, 20

The court of appeal held that trial was not unfair and that by his conduct the accused had clearly and expressly waived his right to be present and legally represented and to exercise the other fair trial rights. The issue of trial in the absence of the accused was seen as being vital to maintaining confidence of the public in the courts. On appeal to the House of Lords, it was held that where a criminal defendant of full age and sound mind with full knowledge of the forth coming trial voluntarily absented himself, there was no reason in principle why his decision to violate his obligation to appear and not to exercise his right to appear should have the automatic effect of suspending the criminal proceedings against him until such a time if ever he chose to surrender himself or was apprehended. If the defendant voluntarily chose not to exercise his right, he could not later impugn the fairness of the trial on ground that it followed a course different from that which it would have had had he been present and represented. It was held that the crown had the discretion to conduct trial in the absence of the defendant. However, even if the defendant absconds, it was observed that it was desirable that the defendant was represented because this would serve as a safeguard against the possibility of error, and oversight. It was also stated that in cases such as this, the trial courts routinely asked counsel to represent an absent defendant if counsel acceded.

However, in this case it was observed that the accused behaved indifferently to what might happen in his absence and on the overall analysis of the case it was held that he had in fact enjoyed his right to a fair trial. Reference was made to the case of *R v Abrahams*<sup>20</sup> where it was observed that though the courts have this discretion to hold trial in absentia, the discretion must be exercised with great care, circumspection and reluctance and with a view to do justice rather than to the convenience of the court or anyone. Due to this, the court in exercising this discretion

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<sup>20</sup> [1895] 21 VRL 345.

was called upon to have regard to the following guiding principles: That the defendant in general had a right to be present and to be legally represented at trial; that his rights could be waived separately or together if he deliberately, voluntarily and knowingly absented himself or behaves in a way as to disrupt proper course of proceedings or withdraws instructions from his counsel. Furthermore, the trial judge had the discretion to continue with the trial. However, only in rare and exceptional cases particularly if the defendant is unrepresented should he exercise his discretion in favour of trial in their absence.

The courts also advised that the judge had to take into account all the circumstances of the case before he decided to exercise his discretion particularly: The nature and circumstances of the defendant's behaviour in disrupting or absenting himself from trial, such as whether it was voluntary and such as plainly waived his rights to appear; whether an adjournment might have resulted in him being caught or voluntarily attending court or not disrupting court proceedings; the likely length of adjournment; whether though absent, he wished to be represented; whether counsel was able to obtain instructions and present his defence.

The court also had to have regard to the extent of disadvantage to the defendant in not being able to give an account of events having regard to the nature of evidence against him. However, the court must also consider the effect of delays on the memories of prosecution witnesses. Ultimately, if the judge decided to proceed with trial, he had to ensure that the defendant received a fair trial.

### **3.4 CONCLUSION**

As observed from the legislation and case law in America, South Africa and England, the right to a fair trial has been interpreted as absolute while the rights guaranteed there under are not

absolute. However, the courts have viewed some of these rights such as the right to legal representation which can only be asserted where the accused is present as being the basis of a fair trial and without which one cannot be guaranteed of having a fair trial. In light of the case law in these jurisdictions, the rights under the right to a fair trial may be waived, where the accused voluntarily absents himself from trial, or misconducts himself during trial or where he expressly waives his rights before the courts. The author on the basis of the above submits that while the accused is in court custody, he cannot waive his right to be present during trial as the court has the authority to compel that he be brought before the courts where they may ensure that his waiver is valid. Moreover, it has also been observed that only in rare cases and with leniency have they invoked the discretion to hold trial in the absence of the accused and when they do, regard has been had to certain safeguards and failure to which trial in certain instances was held to be unfair. Even if the accused voluntarily absented himself, the courts had to consider whether an adjournment would have resulted in the accused changing his attitude and other factors as shown.

The next Chapter considers how the courts in Zambia have interpreted the right to a fair trial and how they have dealt with waivers and the repercussions of the same on a fair trial. One will then consider whether the accuseds' based on the observation in the jurisdictions discussed in this chapter had a fair trial.

## 4.0 CHAPTER FOUR

### **THE RIGHT OF AN ACCUSED TO A FAIR TRIAL IN ZAMBIA: CASE STUDY.**

#### 4.1 INTRODUCTION

Zambia like the other jurisdictions discussed in the preceding chapter has also guaranteed the right of an accused to a fair trial as set out in the ICCPR and is a party to the African regional human rights instrument which also enshrines the right to a fair trial. This chapter will firstly consider the legal framework that guarantees the right to a fair trial in Zambia. Secondly, one will consider its legal status by virtue of its constitutional guarantee. Further, one will look at the judicial interpretation of this right, and how the failure by the court to afford the accused the rights guaranteed there under gives rise to claims that the trial had not been fair. One will then discuss whether the accused in the case of *Chibuye and others v the people*<sup>1</sup> herein referred to as the case study were afforded a fair trial based on the court's determination that they had lost their opportunity to assert their rights when they refused to come to court. This will be considered in tandem with how the courts in other jurisdictions have exercised their discretion to proceed with trial in the absence of the accused and how failure to observe certain safeguards has warranted higher courts to set aside the conviction based on the same proceedings as being unfair.

#### 4.2 **CONSTITUTIONAL GUARANTEE OF THE RIGHT TO A FAIR TRIAL**

The concept of a written Constitution can be traced to early naturalist scholars such as Aristotle and John Locke who postulated the theory of the social contract in which individuals resolved to give away some of their power to govern their own affairs to the state while retaining their

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<sup>1</sup> (2010) S.C.J No 33(Unreported)

natural rights, in exchange of protection. This agreement was then reduced in writing in a document called the Constitution.<sup>2</sup> Zambia has a written Constitution which guarantees to each person certain civil and political rights under its Bill of Rights in Part Three. The right to a fair trial is one of the rights that have been guaranteed under the Bill of Rights. This right is provided for under Article 18 of the Constitution in both criminal and civil proceedings. Article 18(1) in relation to criminal proceedings provides,

“If a person is charged with a criminal case, unless the charge is withdrawn, he shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law”

The Constitution in Article 18(2) further lists some specific rights the accused will be entitled to in criminal proceedings and they include the following rights in respect of the case study:

(d) Unless legal aid is granted to him in accordance with the law enacted by parliament for such purpose he shall be permitted to defend himself before the court in person or at his own expense by a legal representative of his choice. (e) Shall be afforded facilities to examine in person or through legal representatives the witnesses called by the prosecution before the courts....

The Constitution in the proviso to this sub article imposes a mandatory order on the courts to ensure that the accused is tried in his presence except if he conducts himself in a manner that makes trial in his presence impracticable and an order is made by the court to have him removed from the court. Further, in Article 18(12), the court is at liberty to proceed with trial in the absence of the accused provided the accused has pleaded to the charge and with full knowledge of the trial date he does not turn up for trial. However, in deciding to invoke their discretion to proceed in the absence of the accused, the court must be satisfied that to do so would be just and

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<sup>2</sup> Johari , J.C, *Principles of modern political Science*( Delhi: Sterling Publishers Private Ltd,2007 ), 104-112

reasonable. This notwithstanding, the judgment arrived at in such circumstances can be set aside if the accused shows that his absence was just and reasonable under the circumstances.

In light of the above constitutional provisions, the law in Zambia does guarantee the right to a fair trial and sets out specific rights which the accused is entitled to. However, as has been shown, the court is left in some instances with the authority to determine whether to dispense with some of the rights that have been guaranteed if it is reasonable or just to do so such as the right for the accused to be tried in his presence. However, in exercise of this power, the court ought to observe the provisions of the constitution and any other law. It is thus pertinent that an examination of how the courts have interpreted a fair trial is considered and how they have exercised their discretion to proceed with trial in the absence of the accused as was the case in the case study.

#### **4.2.1 STATUS OF THE RIGHT TO A FAIR TRIAL UNDER THE LAWS OF ZAMBIA**

The right to a fair trial which is guaranteed in Part Three of the constitution enjoys a high status due to the hierarchy of laws. The Constitution of Zambia in Article 1(3) states that “The constitution of Zambia is the supreme law of the land and if any other law is inconsistent with this constitution, that other law shall to the extent of the inconsistency, be void.” Further, in Article 1(4), the Constitution asserts its binding effect on all persons in Zambia including the legislature, executive and judicial organs of the state at all levels.<sup>3</sup> This status of the constitution was given judicial pronouncement in the case of *Re Thomas Mumba*,<sup>4</sup> where the court held that an Act of parliament which compelled an accused to give sworn evidence was unconstitutional

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<sup>3</sup>Constitution of Zambia, Cap 1.

<sup>4</sup> (1994) Z.R. 38 H.C



as it was inconsistent with the constitution. The implication of the provisions above is that any right enshrined in the constitution enjoys superior status to those which are in subordinate legislation. Further, it entails that no one is above the law. Thus in relation to the judiciary they are obliged to ensure that the accused receives a fair trial, in deciding disputes before them. Even when exercising their discretion to proceed with trial in the absence of the accused, they are subject to constitution and the law<sup>5</sup>.

The fundamentality of the rights guaranteed under the Constitution has been supplemented by the entrenchment of Part Three of the constitution as is provided in article 79 which stipulates that for any alteration to the Bill of Rights, a referendum must be undertaken in contradistinction to an amendment to any other part of the constitution where a resolution by two thirds majority in parliament will suffice. As the right to a fair trial is guaranteed under the constitution in Zambia, it enjoys superior protection unlike any other right that is not enshrined in the constitution.

#### **4.3 JUDICIAL INTERPRETATION OF THE RIGHT TO A FAIR TRIAL IN CRIMINAL PROCEEDINGS**

In considering the legal status of the rights guaranteed under the constitution among which is the right to a fair trial, it was observed that the Constitution under which they have been guaranteed binds all the organs of the government including the judiciary. In this regard, though the courts have been endowed with the jurisdiction to determine disputes, they have to ensure that in their determination of the rights of the parties, they observe that the accused receives a fair trial. In

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<sup>5</sup> *Zambia National Holdings and UNIP v The Attorney General* (1994) S.J (S.C.) The court stated that even though the High Court has unlimited jurisdiction, it is not limitless as it is subject to the constitution and the law.

fact, the right to a fair trial is there to ensure and protect the defendant against abuse of power by the state which includes the court acting as its agent<sup>6</sup>. It is thus pertinent that the research examines how the courts have interpreted a fair trial and whether there has been consistency in their interpretation. One will also consider how they have exercised their discretion to proceed with trial in the absence of the accused as was the case in *Chibuye and others v The people*<sup>7</sup>.

The courts in Zambia have interpreted what the right to a fair trial is as guaranteed by the Constitution in several cases. It has been observed that in certain instances, there is usually a misperception on what constitutes a fair trial. The Supreme Court in the case of *General William Funjika v The Attorney general*<sup>8</sup> had the occasion to interpret what a fair trial entails. In that case the appellant was charged with a criminal offence and based on the Act under which he was charged, evidence could be adduced by an affidavit and the deponent thereof could not be cross examined. It was argued that this violated his right to cross examine witnesses against him and thus violated his Right to a fair trial under the Constitution. The court held that this was a misperception on the interpretation of the Right to a fair trial. A fair trial was held to be a trial within Article 18(1) which stipulates what the elements of a fair trial are: a trial, conducted within a reasonable time, by an independent and impartial court established by law. It was held that Article 18(2) does not define a fair trial and that such an interpretation was not tenable in law. Thus, for the appellant to succeed on the claim that his Right to a fair trial had been violated, his argument had to be brought within the ambit of Article 18(1). The guarantees in article 18(2) were held to be merely directive in the sense that they give guidance on how a

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<sup>6</sup> Nichols Juliana, Roelof Haveman. *National Criminal Law: a system Jus Generis*(Oxford: Oxford University Press,2003), 20

<sup>7</sup> (2010) S.C.J No 33(Unreported)

<sup>8</sup> Z.R. 97 S.C 103

person charged with a criminal offence should be treated by the police and the courts. The mere fact that one has not been afforded the constitutional guarantees under 18(2) does not necessarily entail his right to a fair trial has been violated unless his claim can be brought within article 18(1) by showing that the courts were biased towards him in denying him the rights there under or did not act independently or trial was not held within a reasonable period of time.

Another Case which raised an issue on the Right to a fair trial is the case of *Patel v The Attorney General*.<sup>9</sup> In this case, the accused was charged with a criminal offence and he elected to be represented by a lawyer in Europe who had however been denied a work permit by the immigration department. He thus claimed that as a result of this, he had been denied the right to legal representation of his own choice as guaranteed under Article 18 of the Constitution. The court held that provisions in section 18 including those that guarantee the right to be represented by a lawyer of one's choice are there to ensure that an accused has a fair trial. From the interpretation in this case it is evident that though the rights guaranteed under Article 18(2) are not what entail a fair trial, they ensure that one has a fair trial.

In light of the precedent set in the case of *Funjika* which gave an authoritative and detailed definition of what the right to a fair trial is, the same approach was adopted in the case of *Shamwana and others v the People*.<sup>10</sup> In this case, some of the defendants who were being tried for treason alleged that the right to be present at all stages during their trial was violated when the courts granted an adjournment in chambers in their absence. On this basis, they claimed that

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<sup>9</sup> (1969) Z.R. 97 H.C

<sup>10</sup> (1985) Z.R. 41 S.C

the court had shown bias or partiality in contravention of the requirement that the court must be impartial. Citing Phipson, counsel submitted the following,

The accused has the right to be present during his whole trial upon indictment. Whether he is to be present or not is subject to one qualification that he does not abuse his right. If he abuses it by purposely obstructing the proceedings of the court by using indecent or outrageous behaviour, the judge may have him removed and proceed with trial in his absence.

The court in their judgment acknowledged that article 20 of the then Constitution dealt with the Right to a fair trial in criminal proceedings and that the Constitution did reflect that the courts could at times try cases in the absence of the accused. However, it was held that as no material prejudice had been done as the bias did not relate to a material part of trial, thus the action of the court did not amount to denial of a fair trial. However, it was observed that the said provision for requiring trial to proceed in the presence of the accused were there to safeguard the interest of the accused person.

The author had an interview with Miss Mandhu, a lawyer and lecturer on how she interpreted a fair trial. She defined it by identifying some factors that must be present in order for one to have a fair trial. Among these were: that the accused must have access to the formal courts, a simplified procedure, must be more aware of the procedure and everything that goes on in court. She was of the view that most of those serving their prison sentence do not know the court procedure and this is a disadvantage when they are not represented by a lawyer. In summation, she submitted that a fair trial depends on all the circumstances.<sup>11</sup>

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<sup>11</sup> Mandhu Fatima, interview with the author, Lusaka, April, 13, 2012.

In light of the foregoing, the author submits that the court in the case of *Funjika* interpreted a fair trial as a trial within article 18(1). However, after assessing the subsequent cases, courts viewed the rights under article 18(2) as not merely directing how the accused should be treated as was stated in *Funjika* but as necessary facets of the right to fair trial. The author views article 18(1) as enumerating what attributes the trial courts must possess and observe to ensure that the accused has a fair trial which article 18 (2) also aim at ensuring. As shown by subsequent cases, a fair trial is not restricted to those elements nor the rights in 18(2) because the courts may well be impartial, independent, established by law and trial held within a reasonable time and yet the trial may still be held to be unfair as was the case in *Silungwe v The People*,<sup>12</sup> where the courts reiterated that the failure by the prosecution to make available evidence which would assist the accused resulted in an unfair trial. The right to a fair trial can thus in my view not be restricted to article 18(1). Moreover whether an accused has had a fair trial should be looked at holistically and according to the circumstances because at times even adherence to the procedural rights in article 18 may not entail that one has had a fair trial as the rights are merely minimum standards.

#### **4.3.1 ANALYSIS OF THE JUDICIAL INTERPRETATION OF THE CASE STUDY AND ITS CONSISTENCY WITH PREVIOUS CASE LAW AND INTERNATIONAL STANDARDS**

The most recent case of *Chibuye and Other v the People*,<sup>13</sup> herein referred to as the case study, also addressed the issue of what a fair trial entails. The facts that led to this research are that the appellants were charged with aggravated robbery contrary to section 94 of the penal code. After

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<sup>12</sup> (1974) Z.R. 130 H.C.

<sup>13</sup> (2010) S.C.J NO 33

trial had commenced, the courts had to adjourn the proceedings in order to consider the state of mind of one of the accused as a result of his conduct during trial. After inquiry, the court found that he was fit to put up his defence and that his conduct had merely been aimed at delaying and obstructing trial. After this incidence, the defence lawyer recused himself and appointed a lawyer from legal aid to represent them which two of them refused contending that they wanted to be represented by a lawyer of their choice. The court then warned the accused that trial would proceed without legal representation. After agreeing to converse with the legal aid counsel, they still insisted on private representation and as a result the legal aid counsel recused himself as two had not given him instructions. Later on, the court requested that the accused be brought to court of which they refused and indulged in disruptive conduct. The court then proceeded with trial and heard the prosecution and based on the same proceedings, the accused were convicted. On appeal one argued that he had been denied the right to be represented by a lawyer of his own choice and that as plea was not taken, it rendered the trial a nullity while his co accused alleged that they had been convicted of aggravated robbery which imposed a mandatory sentence of death when the charge was based on mere armed robbery with no use of a gun and which had a maximum sentence of life imprisonment.

On appeal to the Supreme Court, the following was stated which was of relevance to this research:

The right to prepare a defence and to be represented by a lawyer of one's choice is one of the facets that ensure a fair trial. One can claim this right and is entitled to legal representation immediately upon being taken into custody, regardless of whether they have been charged. It is incumbent upon a court trying a suspect to ensure that the minimum guarantees of a fair trial are observed. Among these rights is the presumption of innocence; the right to a lawyer and equality of arms: both the prosecution and the accused

must be heard; both must be allowed to call witnesses and to cross examine them.

Based on the above statement, the court held that the accused could only have asserted their right to legal representation and other rights if they had come to court. As a result of their refusal to appear before the court, they were deemed to have waived their rights. It was further held that by their conduct, the accused did not in fact claim their constitutional rights as it was the duty of the accused to assert their human rights. Thus, it was held that the accused could not rely on the irregularities of the absence of plea as he had caused the default through his conduct by staying away from court before plea could be taken. On the claim against their conviction, it was held that no prejudice was done as trial proceeded on the premise that there was use of a gun and further, the particulars of claim did reveal use of a gun. The court reiterated that it was for an accused to avail himself before the court when he is called upon and allow the due process of the law to take course. It was not up to the accused to dictate whether or not he wanted to be tried and unreasonably hold the court to ransom.

In view of this case, the questions that the decision raised are firstly, whether the accused as shown in chapter three had waived the right to be tried in their presence and thus had lost their right to assert the other rights such as the right to legal representation. Secondly, whether based on the same they had received a fair trial.

The courts though not defining the right to a fair trial recognized the fundamentality of the specific minimum guarantees of a fair trial under article 18(2) to the realization of a fair trial. In light of the decision in the afore cited case, the author submits that though the courts rightly justified the other two procedural irregularities as no prejudice was done, the allegation of the

second appellant that he was denied an opportunity to be represented by a lawyer of his own choice can be affirmed because as observed in the preceding chapter an accused could not be compelled to take on counsel when he had elected to employ the services of counsel of his own choice. This is based on the tenor of both the High Court and Supreme Court decisions, where it was evident that after the accused' lawyer had recused himself, his request to employ a private lawyer was viewed as a mere delay tactic. It is also evident that the court proceeded on the premise that the accused were obliged to accept representation from the legal aid counsel as their lawyer had recused himself. In this regard the court adjourned the case for fifteen minutes for them to instruct the lawyer. Can it be said that they were given adequate facilities to employ a lawyer of their choice? The author contends that the accused were not given such an opportunity and they could not be compelled to take on a legal aid counsel merely because their lawyer had recused himself as was observed in the *Damuskovsky* case<sup>14</sup>. Further, the facts reveal that the legal aid counsel told the court that two of the accused had refused to give him instructions. This implies that one had given instructions thus, could not that one be represented even in his absence? In America and England, where an accused absents himself from trial but had already given instructions, the court could request counsel to represent him even if absent by his own resolve as a safeguard against irregularities.

The author also had an opportunity to interview a lecturer and practicing lawyer Mr. John Sangwa on the judgment in question. He was of the view that the courts cannot impose legal aid counsel on the accused based on the fact that their counsel had recused himself as this would be in violation of article 18 of the Constitution which guarantees the defendant in criminal

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<sup>14</sup>Communication No 632; 624,626,627/1995, *V.P. Damukovsky etal v Georgia*. UN doc GAOR,A/53/40(Vol.11), Para 18.9, Chapter three, 23



proceedings, the right to choose a lawyer to represent him when he has the means. He however agreed with the court's discretion to continue with trial in the absence of the accused as they had elected to absent themselves from trial thus the judge's decision could not be faulted.<sup>15</sup>

The author further conducted another interview with the Honorable Justice S.S. Silomba, Supreme Court Judge (retired) pertaining to the case study. His justice was of the view that in the instant case, the High Court Judge should have been more liberal or tolerant. He observed that, as he had ordered for the trio to be brought to court which they refused to adhere to, he would have held them in contempt of court and made them compellable to appear before the court. It was submitted that this was important so that each of the accused could individually have accounted for and asserted their rights or individually waived them. He also submitted that the need to compel the accused to appear before the court was a vital safeguard when the accused had as in this case refused to come to court while in the prison cells and away from the court. He thus saw the conduct of trial by the High Court Judge in leaving the accused in the cells without doing anything more after being informed of their refusal to come to court where they would have waived or asserted their Rights as unfair. Reference was made to the case of the Chilala the serial killer where the accused had refused to come to court for trial and had been violent and had tried to delay trial by exhibiting traits of insanity, smearing filth on himself just as in the case study. The accused had at certain instances even vowed not to attend trial in the lower courts. The accused was still brought to court and was only removed by an order when trial proved impracticable in his presence. His Honourable Justice observed that the courts in that case had

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<sup>15</sup> John, Sangwa, an interview by the author, Lusaka, April, 12, 2012

been liberal even in light of the defendants conduct. The Honourable Justice reiterated the need for justice to be seen to be done which in this case in his view, was not seen to be done.<sup>16</sup>

In light of the foregoing, the author submits that as shown in Shamwana case, denial of the rights guaranteed under the right to a fair trial would impugn on the impartiality of the courts as it would afford the prosecution an advantage. Thus, the strict and lack of concern by the court as to whether the accused were present or not in this case vitiated the impartiality of the court as it can be perceived that the court had already determined that the accused were guilty and merely trying to delay their conviction. Further there was no waiver proven beyond a reasonable doubt. The court should have compelled the accused to appear before it and determined whether there had been a valid waiver. The accused were thus denied their rights under the right to a fair trial and in fact had received no fair trial as there was no equality between the prosecution and the defendants.

It has previously been held that to show impartiality, it suffices to show that reasonable people think that the judge was biased whether he was in fact biased or not does not matter because justice is rooted in confidence which confidence is destroyed if right thinking members of society go thinking that the judge was biased.<sup>17</sup> Further, in the present case, one of the accused had shown that he was willing to be represented by the legal aid lawyer and none of this was considered. The fate of the individual defendants was left to be determined as a group when in fact the rights guaranteed under the Constitution and other international instruments are

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<sup>16</sup> Honourable Justice S.S Silomba, An interview with the author, Lusaka, May, 1<sup>st</sup>, 2012

<sup>17</sup> *Mwenya (Moses) v The people* (1973) Z.R.261 (H.C.) The court reiterated that the essence of a fair decision is that it was made by an impartial judge and impartiality is wrapped up in the maxim that *justice should not just be done but be seen to be done*.

individual guarantees which each individual is entitled to as an individual. This decision does not accord with international standards in deriving an analogy to the decisions of the courts in the jurisdictions discussed in chapter three. As was observed, the courts' failure to secure the accused presence where they had the ability to do so would be viewed as a denial of a fair trial. Though one would argue that the refusal of the accuseds' to come to court was an exercise of their autonomy, that autonomy had to be safeguarded and the court had the power to make the final determination on the validity of the exercise of such autonomy.

Anyangwe has also observed that the courts are usually passive in protecting human rights based on principles of judicial restraint and that whenever they choose to exercise their discretion, it is usually informed by tradition, methodology, disciplined by system and subordinate to the preservation of social order.<sup>18</sup> Though the punishment of an accused for an offence against the public is important to society in maintaining social order and while the court must maintain their authority by not allowing an accused to dictate whether or not to be tried, there is also a public interest in ensuring that an accused has had a fair trial.<sup>19</sup>

#### 4.4 CONCLUSION

In light of the foregoing, the right to a fair trial in Zambia is guaranteed under the Constitution which is the supreme law of the land. In instances when there is a dispute, the courts have the jurisdiction to determine the disputes. However while they do so, the courts are bound by the Constitution which guarantees every accused the right to a fair hearing. This notwithstanding, though our constitutional allows the courts to hold trial in the absence of the accused, there has

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<sup>18</sup> Carlson , *Introduction to Human Rights and International Humanitarian Law*, 213

<sup>19</sup> *R v Jones* ALL ER 2002 Volume 2

been a difference in the way the courts have exercised their discretion. The courts in the case study unlike other jurisdictions were more inclined to exercise their discretion in favour of a waiver without any safeguards which in practice has the effect of nullifying the benefits of a fair trial. From the case study, it is evident that the court recognized their role in ensuring the guarantees of a fair trial to the accused as well as the role of the accused has in asserting his rights. However, suffice to state that even in the face of such conduct by the accused, the courts must still ensure that the accused receives a fair trial by being liberal, exercising the necessary leniency and invoking their power to proceed with trial in the absence of the accused sparingly. Thus on the overall analysis of this case, the proceedings of the case by the High Court cannot be said to have been fair based on the conduct of the judge towards the defendants which conduct had no leniency and was a relegation of their role to compel the accused to appear before it. On considering the whole trial, the court could be perceived to have had a bias against the accuseds' as any right thinking member of society would be left with doubt on the court's decision to proceed with trial in the absence of the accused. Even though accuseds' refused to come to court, they could have compelled them to be brought in court where the validity of their perceived waiver would have been determined. Though man is autonomous and self determining, his autonomy must be safeguarded even against himself.

The next chapter will give a general conclusion on what has been discussed in the preceding chapters and tender in recommendations.

## **5.0 CHAPTER FIVE**

### **RECOMMENDATIONS AND CONCLUSION**

#### **5.1 INTRODUCTION**

This chapter gives a conclusion on what the research sought to resolve and what was realized therein. The researcher will then tender in recommendations based on the information collected from the research.

#### **5.2 CONCLUSION**

The right of an accused to a fair trial is one of the most fundamental rights an individual is entitled to in criminal proceedings. Among the issues that the research sought to consider were how the courts have interpreted the right to a fair trial at international as well as national level. In particular, one sought to determine the judicial practice of judicial officers in other jurisdictions when exercising their discretion to proceed with trial in the absence of the accused due to the conduct of the accused deemed as a waiver. Having considered this, one also sought to determine if this practice has been consistent with Zambia's judicial practice in relation to the case study. Lastly, based on the same to determine whether the accused had a fair trial and on an overview to draw lessons on how the attitude of the court and the accused as observed in the case can affect the attainment of a fair trial.

In this regard, from the desk research, it was found that the right to a fair trial has been recognized at international, regional and at national level through Constitutions and other enactments. Though the extent to which human rights which includes the right to a fair trial are realised in each State is not the same as a result of differences in the attitudes of the courts, the

accused and other stakeholders towards the realisation of these rights. Though the rights guaranteed in the human rights instruments to a fair trial are minimum guarantees to which each country must adhere.<sup>1</sup> The courts in most jurisdictions have gone beyond this and have even implied the requirement that there should be equality of arms between the prosecution and the defendant and more.<sup>2</sup> Though the right to a fair trial has been interpreted as being absolute, the courts have interpreted the rights there under as being capable of being waived in proper cases. The courts thus have the discretion to dispense with the rights if the waiver is deemed as valid. It was observed in South Africa, England and America, that in exercising their discretion to proceed with trial in the absence of the accused, certain safeguards had to be adhered to, the case of *R v Jones*<sup>3</sup> set out some of them. Further, the courts in these jurisdictions espoused that where the accused was in the custody of the courts, he was incapable of waiving his rights by staying away from trial as this was not within his power. The courts would thus compel him to appear before them to determine whether he had resolved that trial be conducted in absence and whether he intended to waive his other rights as well. The courts in these jurisdictions actually cautioned that this discretion of the court to proceed with trial in the accused's absence was to be used sparingly.

In light of Zambia, it was observed from the interviews and case law that there have been inconsistencies and misconceptions on what a fair trial is. As a result, the right has at times been interpreted to exclude the fundamentality of the rights guaranteed there under from the basic elements of a fair trial within article 18(1). Though these elements cannot be waived, the rights under a fair trial can be waived. However, there is need to recognize the fundamentality of the

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<sup>1</sup> Anyangwe, Carlson. *Human Rights Law and International Humanitarian Law*. (Lusaka: UNZA Press, 2004 at 22)

<sup>2</sup> *Chibuye and others v The People* (2010) S.C.J No 33

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basic rights in ensuring a fair trial which according to the author is a trial which adheres to procedural fairness and is dependent on all the facts of the case. It has been observed that, the interpretation apart from these few misconceptions has been consistent with that of other jurisdictions. The difference has been in the judicial practice and attitude in exercising their discretion in implying waivers of the rights under the right to a fair trial.

This notwithstanding, it was evident that the courts in Zambia just like in other jurisdictions have the discretion to dispense with the rights of the accused to be tried in his presence if he conducts himself in a manner that makes trial in his presence impracticable . Further, the constitution has given the courts discretion to proceed in the absence of the accused where the accused has absented himself from trial with full knowledge of trial date. However in this particular instance the accused were in the custody of the court and while the courts could have compelled the accused to be brought into court where the validity of their waiver would have been asserted, the courts chose not to do so and instead proceeded with trial. The whole effect of the decision was the loss of the rights to legal representation, cross examination and to put up a defence among others as they were not in court to assert these rights. The author thus submits that, the validity of the apparent waiver of the accused was not determined by the courts. The whole trial from the tenor of the court's decision even before the accused were reported to have refused to come to court was that as their lawyer had recused himself, they were obliged to take on the legal aid counsel. From the interviews conducted, the courts' resolve to proceed with trial in their absence without any safeguard impugned on the impartiality of the courts and justice was not seen to be done. It was therefore submitted that the accused did not have a fair trial yet alone a trial.

Thus, based on the foregoing, it was observed that the courts have taken a less active role in ensuring the rights under a fair trial to the accused in the face of uncooperative conduct from the accused.<sup>4</sup> The case study has also shown how the accused's conducts may affect the realisation of a fair trial rights and ultimately a fair trial. As has been shown, the accused has a duty to avail himself to the court process and assert his rights as human rights are claims upon the state.

### **5.3 RECOMENDANTIONS**

#### **COURTS**

**Consistency in interpretation:** There are misconceptions on the interpretation of the right to a fair trial as guaranteed under the Constitution. The inconsistencies were also evident in the interpretation of this right in the case law discussed and interviews conducted. The problem hinges on whether a fair trial is one within article 18(1) or even encompasses 18(2). The implication of this is that for some, just because one has been denied the rights under the latter, if he cannot prove the elements of the former, he cannot claim denial of a fair trial while for some, as long as there has been denial of these rights, one can sustain a claim that he has not had a fair trial. A clarification on this is important as it may negate the protection afforded to the accused by the Constitution.

**DISCRETION:** The courts have been given the discretion to try cases in the absence of the accused where the accused has voluntarily absented himself from trial, or where he disrupts the proper conduct of proceedings. However, the problem that has been observed is that, in exercising their discretion, the courts have been more willing to assert waivers of these fundamental rights

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<sup>4</sup> Agathar, Ntutuma, "An analysis of the effectiveness of the Zambian Judiciary in the protection of Human Rights," Bachelors of law Degree thesis, 2005, University of Zambia), 34, also observed that the judiciary does not play a major role in protecting Human Rights due to certain Administrative constraints.



based on the finding in the case study. In England, the courts have come up with safeguards which were laid down in the case of *R v Jones*<sup>5</sup>. The author advocates for a more sparing and liberal approach to waivers and for the court to adopt the safeguards as set out in this case. Further, I recommend that where the accused is in the custody of the court, he must be made compellable so that the validity of his waiver may be determined. This would enhance the administration of Justice as irregularities and error that were evident in the case study would be likely to be pointed out by legal counsel on behalf of the client where there is an oversight as the courts are not infallible.

Further, the author recommends that the courts must compel the accused to come to court in circumstances such as were observed in the case study so that they may assess whether there has been a valid waiver. This will make the decisions arrived at in such circumstances more transparent and less susceptible to suspicion of bias. The author also submits that where the accused are charged as a group, the rights of each must be determined on an individual basis unlike in the case study where no regard was had to one of the accused who by implication had given instructions to the legal aid lawyer.

### **ACCUSED**

**CONDUCT:** The second problem is the uncooperative conduct of the accused. It has been observed that the accused can frustrate the court process by his conduct. This was evident in the case study by denial of the accused to avail themselves to the court process. This can have an adverse effect on their chances of receiving a fair trial as some of the procedural rights under the

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<sup>5</sup> ALL ER 2002 Volume 2,25-36

constitution such as the right to legal representation may help lessen and cure irregularities as they were properly intended.

**EDUCATION:** From the interview conducted with Miss Mandhu, she lamented the lack of knowledge of the accused of the court procedure due to its complexity especially if he is unrepresented. From this, it can be submitted that if the accused does not know the procedure and the importance thereof, there is likelihood that he may conduct himself in the manner the accused in the case study did as he does not know what he stands to lose. Thus, I advocate for more Civic Education of the accused on the need to assert these rights for their benefit.

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## INTERVIEWS

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